TAX AND WEALTH ADVISOR ALERT: TAX COURT AFFIRMS DISCOUNT FOR FAMILY PARTNERSHIP

The United States Tax Court is reminding some taxpayers to run their family like a business. In the *Estate of Barbara M. Purdue* decision, the court affirmed the use of discounts in an estate tax dispute involving a family partnership, which was critical to minimizing the estate's tax liability. Most importantly, the court affirmed the use of discounts because the family actually treated the partnership like a business.

While taxpayers and tax practitioners wonder what will come of the IRS's threat to disallow discounts under this method of estate planning, this case is a good reminder to taxpayers that they should follow through with all the steps of their family partnership based estate plan if they want it to be effective. A plan on paper alone will not cut it.

The court in the *Estate of Barbara M. Purdue* cited to several actions taken by the family that proved the family partnership was formed for a nontax reason—to consolidate and manage the family's investments. To start, the partnership formalities were respected: The decedent maintained assets outside of the partnership to pay for living expenses, the partnership had its own bank accounts, and she did not comingle her assets with the partnership's assets. Further, the five children ran the business like a business. The Purdue children held an initial partnership meeting and agreed to hire a professional management advisory firm and to hold annual meetings. At the meetings, the children discussed the family's accounts and assets, approved distributions, heard presentations from the investment manager, and received estate tax planning updates and advice.

All families already managing or considering managing their assets under this type of estate plan should take note; the court barely mentioned the formal planning documents in this case. Although such documents are important, planning does not stop after the documents have been signed.

NEW LAW CHANGES WISCONSIN SALES AND USE TAX RULES FOR CONSTRUCTION CONTRACTORS

A new Wisconsin law allows contractors to purchase materials tax-free for construction projects undertaken by certain tax-exempt government and non-profit entities. Under former

law, such entities generally had to purchase the construction materials directly themselves in order to receive the Wisconsin sales and use tax exemption. Now, construction contractors may make tax-exempt purchases of construction materials for projects owned by exempt entities. These entities generally include the State of Wisconsin and its agencies, counties, municipalities, school districts and other units of local government, sewerage commissions and districts, water authorities, religious, charitable and non-profit entities, and Indian tribes. The new law took effect on January 1, 2016, and applies to construction contracts entered on or after that date.

To qualify for the tax exemption, the contractor must transfer the materials to the exempt entity, and the materials must become "a component of a facility in this state that is owned by the entity." The new law defines "facility" as a "building, shelter, parking lot, parking garage, athletic field, athletic park, storm sewer, water supply system, or sewerage and waste water treatment facility." There is a notable express exception. A "facility" does not include a highway, street, or road. Consequently, the new rules will not apply to road and highway projects.

The purpose of the new law is to avoid inflation of the cost of public construction projects due to difficulties in realizing the sales and use tax exemption under prior law. The new law should help government and non-profit entities take full advantage of their tax-exempt status in connection with construction projects. It will also simplify the material purchasing process both for the tax-exempt owner and for the contractor.

If you have any questions, please contact Attorney Steve J. Slawinski at O'Neil Cannon at 414-276-5000.

WILLIAM RYAN DREW RECOGNIZED BY THE MILWAUKEE COUNTY BOARD OF SUPERVISORS

Attorney William Ryan Drew was honored recently by the members of the County Board for his 30 years of service to the residents of the city of Milwaukee and Milwaukee County. Mr. Drew's commitment to the residents of Milwaukee County began in 1985 when he recommended the creation of the Research Park and served on the Park's Board of Directors as the Personal Representative of former County Executive Tom Ament. In 1998, he was appointed as Executive Director of the Research Park and coordinated the Park's high-technology development on the approximately 150 acres of Milwaukee County-owned land in Wauwatosa. The Research Park is currently the largest Milwaukee-area office complex with 14 buildings and over 5,000 employees. The Technology Incubator, which is located within

the Research Park, serves as a business incubator for start-up technology companies. To date over 1,100 jobs have been created.

Mr. Drew's service to our community also involved several other appointments and elected positions. These include: Director of Administration for Milwaukee County, Commissioner of City Development for the City of Milwaukee, Treasurer of the Southeastern Wisconsin Regional Planning Commission, President of the Milwaukee Common Council, and Fourth District Milwaukee Alderman. In addition, he served as President of the Board of Directors for the City of Milwaukee Retiree's Association, Board of Directors for the National Center for Housing Management, and is on the Board of Visitors for the Les Aspin Center for Government at Marquette University.

Mr. Drew began his Real Estate and Construction practice at the downtown law firm of O'Neil, Cannon, Hollman, DeJong and Laing in 1988. He uses his extensive background in city, county, and state government to help clients resolve municipal and real estate development issues they encounter when dealing with government agencies.

TAX AND WEALTH ADVISOR ALERT: IT'S ALL ABOUT LEADERSHIP… STRUCTURE

Loyal readers of this blog (thank you!) know that my position on succession planning is that success depends primarily on leadership. A business is successful based on the quality of its decisions, which means its success depends on the ability of the decision-makers. In my opinion, too much succession planning time, energy, and client money is wasted on issues of taxation and asset protection, and too little energy is focused on the more important first question—if not you, then who?

In this blog post, I want to share a quick anecdote on this issue from my practice. I met with a potential client last year who was the 100% owner of a business he purchased from his parents. As I got to know this person, it was clear he was smart; incredibly savvy, he knew his industry, and he knew his business. Eventually, we came to the issue of succession. His plan was to leave 50% of the company's stock to each of his two children. I began to question him about how the children worked together, how they collaborated, what their values and beliefs were, and how they meshed. The client, sheepishly, had no answers to any of these questions. While he had prepared his children to do their jobs well, he had not prepared them for the role they were to play—50% owners of the company. These two people could collaborate to drive company success or deadlock to drive it into the ground. And he had no

idea which.

What is interesting is this client was more thoughtful, smart, and well prepared than 95% of the clients that walk through my door. He prepared his children well for their future jobs; prepared clients, vendors, and employees well for transition; and prepared himself well for retirement. But as I ask my clients all of the time—what would Apple do? Would they implement an untested decision-making structure? Absolutely not. So, remember, it is not only the who (makes the decisions) that needs to be thought through, but the how (decisions will be made). And the owner needs to always keep in mind, the business needs to come first; it is the economic engine that drives happiness.

TAX AND WEALTH ADVISOR ALERT: WHY I WOULD RATHER BE A BENEFICIARY… PART TWO: MIMICKING OWNERSHIP

Part one of this blog post focused on why trusts protect people from themselves and others. But, will our client's children be as happy being a beneficiary of a trust as they would be if they owned property? The critical questions that need to be answered are what does it mean to own property and what is different with a trust? If people own property, they have the right to make decisions about that property. For example, if they own a house, they can decide what color to paint it. If they own a car, they can decide who drives it. If they own a race horse, they can decide what races to enter the horse in. In other words, they can control the property. Also, if people own property, they have the right to enjoy it. They can sit on their beach house patio and watch the sunset; they can drive their Ferrari fast down a deserted road; they can eat their chocolate ice cream cone. And finally, if people own property, they can transfer that property to others. They can convert it to cash through a sale; they can give it to a loved one or a charity.

So, the essence of ownership is control, enjoyment, and power to transfer. If Mom and Dad leave their property to a trust for a child who is financially mature, solely to protect that child from others, can we design the trust to mimic outright ownership? The first goal the trust needs to accomplish is to give the child control over the trust property. In the trust context, the trustee has control. Can the child be trustee and still be protected from creditors, predators, and divorcing spouses? The answer is an absolute and unequivocal, yes.

The trust beneficiaries have the ability to enjoy trust property. Who are the trust beneficiaries? The child and the child's children. So yes, the child can enjoy the trust

property.

Finally, can the child transfer the trust property to others? We can design a protective trust that allows the child to transfer trust property to other people. This right is known as a "power of appointment" and allows the child to transfer the trust property to people other than creditors, the exact people we do not want the child to be able to transfer property to.

So, that is why the best estate plans do not leave property outright to the people our clients care about. Instead, these plans leave property in a trust that does everything our clients want: it mimics their ownership while protecting them from others.

If you want to learn more about this perfect estate plan, O'Neil, Cannon, Hollman, DeJong and Laing's Tax and Estate Group would love to hear from you.

TAX AND WEALTH ADVISOR ALERT: WHY I WOULD RATHER BE A BENEFICIARY… PART ONE: TRUSTS PROTECT PEOPLE FROM THEMSELVES AND OTHERS

As a management tool, trusts accomplish two goals. One, they protect people from their own financial immaturity. For example, about a month ago, I met with a wonderful woman with four children. As we discussed her strategy to take care of the people she cared about, she began to violently weep. You see, before meeting with me, she had come to the difficult decision to write one of her children out of her estate plan; a son with terrible spending habits linked primarily to a substance abuse problem. Her quote: "Everything I leave him puts him in greater danger." I then proceeded to explain how a trust could accomplish her goals; she could leave 25% of her wealth to a trust to benefit her son, yet have someone whose financial wisdom she trusted to oversee how those funds are used to benefit him.

But protecting people from themselves is only one reason to leave property to a trust rather than outright to the children. The other is to protect them not from themselves, but from others. If Mom and Dad design their estate plan to leave 1/3 of a child's share outright at 25, 30, and 35 years of age (a classic design in my area of the world), those distributed assets are exposed. If they, the children, get into an automobile accident or sign a poorly thought through personal guarantee, the assets Mom and Dad wanted to take care of the person they cared about will instead be diverted to an undesirable creditor. But the main reason to use a trust is not to protect your assets from some amorphous, unknown creditor but rather a

known one; a creditor that 51% of married people deal with that takes 50% of their worth. That creditor, of course, is a divorcing spouse. If Mom and Dad leave property outright to their child, unless careful accounting is done (which in my world is rarely the case), Mom and Dad's ex-son or daughter-in-law end up with half. If they leave the property in a well-designed trust, that is not the case.

So, a well-constructed estate plan leaves property to the children in trust rather than outright. The trust protects those children from themselves (if they need that protection) and from others. But what about those children's enjoyment? Isn't it better to own property? If the children owned the assets directly, wouldn't they have more freedom and control? Not so—and those points will be addressed in part two of this blog post.

EMPLOYMENT LAWSCENE ALERT: IRS DELAYS AFFORDABLE CARE ACT REPORTING

On December 28, 2015, the IRS extended the deadlines for insurers, self-insuring employers, other coverage providers, and applicable large employers to file reports regarding health care information required by the Affordable Care Act. The information required to be reported relates to whether and what health insurance was offered to full-time employees to determine whether the employer met its shared responsibility requirements under the Affordable Care Act and whether employees are eligible for the premium tax credit. For each month, applicable large employers must report certain information, including, but not limited to, how many employees they had, whether the employees were offered health coverage, and the cost of that coverage. The IRS determined that covered entities needed additional time to "adapt and implement systems and procedures to gather, analyze, and report this information." The applicable forms must now be furnished to individuals by March 31, 2016 and to the IRS by May 31, 2016 (or June 30, 2016, if filing electronically). If these forms have already been prepared, the IRS is ready to receive them in January 2016 and encourages providers to file them now instead of waiting for the new due dates.

EMPLOYMENT LAWSCENE ALERT: SEVENTH CIRCUIT RULES THAT EEOC MUST TRY TO

RESOLVE DISPUTES THROUGH CONCILIATION BEFORE FILING SUIT

On December 17, 2015, the Seventh Circuit held in *EEOC v. CVS Pharmacy Inc.* that the EEOC was required to first attempt to resolve its dispute with CVS through conciliation before bringing suit over whether CVS's language in its severance agreements constituted a "pattern or practice of resistance to the full enjoyment" of rights secured by Title VII. The EEOC alleged that CVS's standard severance agreement was overly broad, misleading, and intended to deter terminated employees from filing charges with the EEOC even though the agreement provided a carve-out recognizing the employee's right to "participate with any appropriate federal, state or local government agency enforcing discrimination laws."

We have previously blogged about this specific case here and other attempts by the EEOC to broaden their enforcement powers by skirting its conciliation duties here, here, and here.

In February 2014, the EEOC filed suit in federal district court in Illinois alleging that CVS's severance agreements constituted a "pattern or practice" in violation of Section 707(a) of Title VII by interfering with an employee's full enjoyment of the rights afforded by Title VII. In granting CVS's motion to dismiss the complaint, the district court determined that the EEOC was first required to conciliate its claim before bringing a civil suit—a prerequisite that the EEOC claimed it did not have to meet because "pattern or practice" claims brought under Section 707(a) authorizes the agency to bring such actions without following the pre-suit procedures in Section 706—including conciliation. The district court granted CVS summary judgment dismissing the EEOC's suit finding that the agency was required to conciliate its claims before filing its civil suit. In dismissing the EEOC's suit, the district court also questioned whether or not an employer's decision to offer a severance agreement could be the basis for a "pattern or practice" discrimination suit without any allegation that the employer had actually engaged in retaliatory or discriminatory employment practices—an allegation that was missing from the EEOC's complaint.

On appeal, the Seventh Circuit rejected the EEOC's position that Section 707(a) relieved it from any obligation to follow the pre-suit procedures found in Section 706. In addition, the Seventh Circuit held that the prohibition against "pattern or practice" discrimination found in Section 707(a) did not create a broad enforcement power for the EEOC to pursue non-discriminatory employment practices that it dislikes but, rather, simply permits the EEOC to pursue multiple violations of Title VII. Because several circuits, including the Seventh Circuit, have found that conditioning benefits on a promise not to file charges with the EEOC is not, in itself, retaliation under Title VII, the court found that simply offering the severance agreement was not discrimination, and therefore, the EEOC failed to state a claim under Title VII. The Seventh Circuit's holding is in line with the recent Supreme Court decision in *Mach*

Mining, LLC v. EEOC, which found that the EEOC can only resort to litigation when informal methods of dispute resolution fail because conciliation is a "key component of the statutory scheme" of Title VII.

Although this case was decided in the employer's favor regarding the waivers contained in its severance agreement, it is still recommended that employers include explicit and express provisions in their severance agreements that make clear: (i) that even though a severance agreement may provide that an employee may waive his or her right to sue in any court or agency, an employee should still be permitted by the express language of the agreement to participate in agency proceedings that enforce discrimination laws; (ii) that the waivers and releases are not to be construed to interfere with the EEOC's rights and responsibilities to enforce federal anti-discrimination statutes under its jurisdiction or those rights of any state administrative agency; and (iii) that the employee has the protected right to file a charge or participate in an investigation or proceeding conducted by the EEOC or any state administrative agency charged with the authority to enforce anti-discrimination laws. Until the U.S. Supreme Court ultimately rules on the issues presented in the CVS case, employers should expect that the EEOC will continue to be aggressive on these issues regarding whether the use of covenants not to sue under Title VII violate an employee's rights to the full enjoyment of protections afforded by Title VII. Including the above recommended carve-out language in severance agreements places an employer on defensible ground against any EEOC attack regarding the lawfulness of covenants not to sue used in severance agreements. For now, the Seventh Circuit's recent decision is an important victory for employers in Illinois, Indiana, and Wisconsin with regard to their ability to effectively use severance agreements to protect themselves from future suits by terminated employees without fear that such agreements may be considered retaliatory by the EEOC.

IS YOUR COMPANY'S WEBSITE COMPLIANT WITH THE AMERICANS WITH DISABILITIES ACT (ADA)?

Recently, class action lawyers around the country have filed lawsuits against businesses and organizations (even the National Basketball Association) alleging that their websites are not compliant with the ADA. Attorneys on behalf of vision or hearing impaired individuals are alleging that websites available for use by the public must conform to certain standards of accessibility. These claims are based on the ADA's general prohibition that "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment… of any place of public accommodation…." Although initially thought to cover only physical

locations, plaintiffs' lawyers have argued that the changing technology landscape has modified the definition of "places of public accommodation" over the last twenty years or so. Courts around the country have disagreed as to whether websites constitute a "place of public accommodation," but litigation under the statute continues.

Part of this recent push may come from the Department of Justice's changed stance on accessibility standards for websites. In 2010, the DOJ stated that covered entities could comply with the ADA's requirements regarding websites by providing an accessible alternative, such as a staffed telephone line. However, in June 2015, the DOJ filed statements of interests in at least two lawsuits in support of claims that the defendants needed to make their websites immediately accessible. The DOJ was expected to issue proposed rules in spring 2016, but now it seems as though the DOJ will not complete rulemaking until 2017 or 2018.

If you own a business, you will want to speak with your website developer about these issues. Moreover, if your company has been the target of a letter or lawsuit threatening legal action based on your website, you should contact an attorney to discuss your options before agreeing to any settlement demands.

If you have any questions, please contact Attorney Erica N. Reib at O'Neil Cannon at 414-276-5000.

RECOGNIZED AS ONE OF THE TOP LAW FIRMS IN WISCONSIN BY SUPER LAWYERS

O'Neil, Cannon, Hollman, DeJong and Laing is pleased to be selected for inclusion in the 2015 *Super Lawyers Business Edition*. The Top firms were chosen based on the number of attorneys within the firm who were selected to the 2014 or 2015 Super Lawyers list in business practice areas, as well as a combination of metrics indicating the quality of those attorneys. Quality factors that were considered included the number of years selected to the list, inclusion on a top list, and their average blue ribbon panel scores.

The following attorneys recognized by Super Lawyers and featured in the *2015 Annual Directory* of the nation's top attorneys in business and transactions practice areas include:

- James G. DeJong – Mergers and Acquisitions
- Seth E. Dizard – Creditor Debtor Rights
- Peter J. Faust – Mergers and Acquisitions
- John G. Gehringer – Real Estate

- Joseph E. Gumina – Employment and Labor
- Gregory W. Lyons – Business Litigation
- Patrick G. McBride – Business Litigation
- Joseph D. Newbold – Business Litigation
- Chad J. Richter – Business/Corporate
- John R. Schreiber – Creditor Debtor Rights
- Jason R. Scoby – Mergers and Acquisitions

