TIME FOR THE INCOME TAX TAIL TO START WAGGING THE ESTATE PLANNING DOG

For a long time, estate planners have been focused primarily on the transfer taxes (estate, gift and generation skipping), while minimizing income tax planning when planning with their clients. An example of this would be lifetime gifting. Many an estate planner has pontificated ad nauseum about the power of the gift; if the annual exemption is used, it removes the value of the gift from the donor's estate, and if the lifetime gift exemption is used, it removes the appreciation in the transferred property. But, there has always been an income tax tradeoff to those transfers. The donee receives the property with the donor's income tax basis. Had that same transfer been made at death, the donee would receive the property with a basis equal to date of death value (generally called a "stepped up" basis under the presumption that property will appreciate in value, but for those beneficiaries unlucky enough to receive bequests in 2008 and 2009, they might use the term "stepped down" basis to reflect their reality).

So why did these planning strategists place transfer tax avoidance as a higher priority than income tax planning? A few simple reasons are obvious:

1. Until recently, the transfer tax rate (up to 55% through 2000, gradually lowering since then to its current 40%) was higher than the capital gains rate (which has generally hovered around 15-20%).
2. The amount that could be excluded from the transfer tax system, also known as the estate (or gift) tax exemption was relatively low compared to the net worth of a successful client ($1,000,000 in 2001 growing to $3,500,000 in 2009).
3. The use by a married couple of each of their estate tax exemptions resulted in the first spouse to die's estate tax exemption being left to a credit shelter trust. That property would grow estate tax free after the death of the first spouse, but would not get an income tax basis step up on the death of the survivor.

So what has changed?

1. The rate differential between the transfer tax and capital gains has been dramatically reduced. The transfer tax is 40%; capital gains, when you figure in the impact of the net investment income tax and state tax can be as high as 25-30%. But there is still a differential, so all things being equal, the income tax is still lower.
2. The 2012 Tax Act (AFTA) has made the concept of portability permanent. Without going too far in-depth on the mechanics of portability, it allows the first spouse to die to transfer not only property to the surviving spouse, but also the right to use the "first" spouse's estate tax exemption. The impact of portability is that all of the property of the two spouses can get a full income tax step up on the death of the surviving spouse while utilizing both spouse's estate tax exemptions. But while that gives us an income tax planning tool, it does not make income tax more important than transfer tax from a

planning perspective.

3. The real paradigm shift comes from the dramatic increase in the estate tax exemption. In 2014, each spouse can leave $5.34 million (10.68 million working in concert) without the imposition of estate taxes. This will remove millions of people from a world of being concerned about transfer taxes. But, those same people, and their heirs, are subject to capital gains taxes at very low income thresholds. For example, assume Mom and Dad are worth $3,000,000 and are in their late 50s. In the past, the game plan would likely have been to give assets that they believed have high appreciation potential to their two children, both of whom are in their 30s, and each of whom make $100,000 per year. The reason, based on the "rule of 72" is that the appreciation in their hands could have been subject to an onerous estate tax; and in the hands of their children would only be subject to a much lower capital gains tax when the children elected to sell the asset. Or, even better, we could sell the asset to an irrevocable grantor trust, have Mom and Dad retain the income tax exposure on future sales and "leverage" the gift to the children. Now, however, the better move likely is to hold onto low basis, highly appreciating assets to get the income tax step up upon the survivor's death, with a closer look at the strategy only coming when Mom and Dad's net worth begins to approach the indexed estate tax exemption. In other words, the planning world is now on its head and waiting is the better strategy than giving for clients whose net worth is under the exemption amount.

At the end of the day, clients will want to seek out advisers who can navigate the world of both income and estate taxes, and can help them build a plan to take care of the people they care about while minimizing the impact of all taxes. No more cookie cutter plans; no more cookie cutter planners.

If you have any questions regarding this article, please contact Joe Maier at O'Neil Cannon at 414-276-5000.

EMPLOYMENT LAWSCENE ALERT: EEOC ISSUES NEW PUBLICATIONS ON RELIGIOUS DRESS AND GROOMING

On March 6, 2014, the Equal Employment Opportunity Commission announced that it released two new publications addressing religious dress and grooming rights and responsibilities in the workplace under Title VII of the Civil Rights Act of 1964 (Title VII), in response to an increased number of religious discrimination charges filed with the agency.

The EEOC has published a question-and-answer guide and a fact sheet in an effort to provide

employers and employees practical guidance for complying with Title VII, which, under certain circumstances, requires employers to provide reasonable accommodations to employees and applicants who wear clothing or follow certain grooming practices for religious reasons, unless doing so poses an undue hardship on the employer's business operations.

The two publications address a number of topics, including examples of common religious dress and grooming practices and when an employer's duty to consider an accommodation request is triggered, potential claims against employers for failing to accommodate religious requests, tips for preventing and addressing workplace harassment and retaliation against employees who request religious accommodations, and examples of when these requests have posed undue hardship on employers.

If you have questions about religious accommodation under Title VII, please contact one of our Employment Law attorneys.

ATTORNEY JIM DEJONG TO BE INDUCTED INTO PHI KAPPA PHI

James G. DeJong, a 1973 Carroll graduate and president of the Milwaukee law firm O'Neil, Cannon, Hollman, DeJong and Laing, will be inducted into the Phi Kappa Phi National Honor Society during a ceremony at Carroll University in April. Founded in 1897, this highly selective honors society was created to recognize and promote academic excellence in all fields of higher education and to engage the community of scholars in service to others.

A Mequon, Wis., resident, DeJong joined Carroll's Board of Trustees in May 2008. He has served on the Board's Executive and Institutional Advancement committees and was elected Board Chair in 2013. He is serving a three-year term.

LANDLORDS TAKE ACTION! SIGNIFICANT CHANGES IN WISCONSIN LANDLORD/TENANT LAWS CAME INTO EFFECT MARCH 1, 2014

Wisconsin Act 76 went into effect on March 1, 2014. This Act makes numerous changes to

Wisconsin's landlord/tenant law, Chapter 704 of the Wisconsin statutes. There are a number of changes that have an immediate impact on the ordinary course of a landlord's business that landlords and their counsel should consider.

First, Wis. Stat. § 704.05 potentially expands a landlord's ability to treat a tenant's personal property as abandoned in an eviction action in the absence of a written agreement to the contrary. The statute's technical revisions have arguably broadened the circumstances which trigger a landlord's rights with respect to abandoned property.

Second, the law now addresses costs associated with "infestation of insects or other pests, due to the acts or inaction of the tenant…" The landlord may elect to allow the tenant to repair such damage at his or her own cost, or alternatively, may take such action as is necessary to repair such damage and seek reimbursement for the reasonable costs associated with such action.

Third, while landlords are still required to provide a check-in sheet to new tenants, landlords no longer need to provide a "standardized information" check-in sheet.

Finally, the Act created Wis. Stat. § 704.14 which requires a "Notice of Domestic Abuse Protection" be included in all residential rental agreements. The required notice sets forth protections for tenants facing eviction in certain instances of domestic abuse as well as tenant termination rights pursuant to Wis. Stat. § 704.16.

Copies of the new legislation can be read here. There are a number of other changes landlords and their attorneys will find particularly of interest. Further information about this bill and its impact on Wisconsin landlords can be obtained by contacting any member of our firm's Real Estate Practice Group, or if a dispute has arisen, by reaching out to our firm's Litigation Practice Group.

CHECKLIST FOR CREATING AN EFFECTIVE SOCIAL MEDIA POLICY

Employers' social media and internet policies are a top enforcement priority for the NLRB. Below is a checklist that employers can use to create an effective social media policy. Please continue to visit the Employment LawScene™ for more policy pointers and practical guidance.

- Evaluate your business' needs and goals.
- Take a stance on social media use—will you encourage, permit, or simply tolerate it?

- Understand and be familiar with the latest federal and state laws and NLRB rulings and guidance.
- Create a Social Media Policy that addresses your business needs and goals.
- Define “Social Media.”
- Include key provisions:
    - Notify employees that they should have no expectation of privacy when using Company-issued equipment, systems, or networks.
    - Notify employees that the Company reserves the right to monitor data transmitted through Company-issued equipment, systems, or networks.
    - Remind employees that the Company’s computer systems, networks, and equipment are Company property.
    - Remind employees to include a disclaimer when writing personal blogs or posts stating that he or she is a Company employee and that any views and opinions expressed are the employee’s and do not represent official statements or views of the Company.
    - Remind employees of prohibitions against disclosing confidential or proprietary Company information.
    - Notify employees of prohibition against using social media to harass co-workers.
    - Encourage employees to report violations to the Company’s social media policy to management.
- Provide specific examples of prohibited conduct.
- Avoid overly broad statements, especially concerning disparagement of the Company, respectful workplace, and confidentiality.
- Include a clause stating that the employer’s policies are not intended to and should not be interpreted to interfere with or infringe upon employees’ rights to engage in protected concerted activity.
- Notify employees of the Company’s stance regarding social media use during working hours and while using Company resources.
- Clearly identify the consequences for violating the policy.
- Review other existing personnel policies to determine whether they apply to employees’ use of social media.
- Implement your Social Media Policy by distributing the policy to all employees and obtaining acknowledgment of receipt.
- Enforce and apply your policy consistently (be aware that monitoring employee use of social media sites and other off-duty conduct may be prohibited under federal or state law, terms and conditions of social media sites themselves, and collective bargaining agreements).
- Train employees on the appropriate uses of social media.
- Review your policy annually and update according to changes in the law.

ATTORNEY DIZARD QUOTED IN MILWAUKEE

JOURNAL SENTINEL

Downtown Milwaukee office building put in receivership

Milwaukee Journal Sentinel – February 24, 2014

A court-appointed receiver has been named to oversee the operations of a financially troubled downtown Milwaukee office building.

The eight-story building, at 211-219 W. Wisconsin Ave., adjacent to the Shops of Grand Avenue, is owned by 30 separate investment groups, all based outside Wisconsin, according to court records.

Those groups are insolvent. Their debtor is a Bank of America commercial mortgage fund, with U.S. Bank serving as its trustee.

Milwaukee Attorney Seth Dizard was appointed as receiver for the 105,000-square-foot building, which is leased mainly to the Internal Revenue Service.

The IRS moved its regional office there in 2006, the same year the property was sold by Wispark LLC to Chicago-based TSG Real Estate LLC for $20 million. Wispark bought the building in 2004 for $3 million, and remodeled it to accommodate the IRS.

Later in 2006, the building was sold to its current owners. It is now valued at $13 million, according to city assessment records.

AN UPDATE ON DEVELOPMENTS REGARDING THE WISCONSIN AND FEDERAL RULES GOVERNING E-DISCOVERY

It has been estimated that more than 90% of all information created today is stored electronically. This electronically stored information, or ESI, is crucial information in most business disputes.

The Federal Rules of Civil Procedure were amended in 2006 to address ESI, and additional amendments to these federal e-discovery rules have been proposed that could go into effect in late 2015. The Wisconsin Rules of Civil Procedures were amended in January, 2011, and

again in January, 2013, to address ESI too. The state and federal e-discovery rules significantly broaden the concept of what constitutes a “document” for purposes of discovery and confirm that discovery of ESI in civil lawsuits stands on equal footing with discovery of paper documents.

The Wisconsin e-discovery rules for the most part parallel the federal e-discovery rules, making it easier for federal authority to be used in discovery disputes in the Wisconsin courts. But the Wisconsin rules differ slightly from the federal rules. For example, unlike Fed. R. Civ. P. 26(a), Wisconsin documents have a rule requiring mandatory initial disclosures. The drafters of the Wisconsin rules decided that certain portions of the federal e-discovery rules would be better addressed by substantive law rather than procedural rules changes.

Highlights of the January 2013 amendments to the Wisconsin e-discovery rules include:

• Wis. Stat. § 804.01(2)(c), which provides that the trial materials privilege is not automatically forfeited because of the inadvertent disclosure of ESI and that claims of forfeiture of this privilege must be considered under Wis. Stat. § 905.03(5) as if they involved privileged attorney-client communications.
• Wis. Stat. § 804.01(7), which creates a Wisconsin “clawback” rule allowing for the recovery of privileged ESI inadvertently produced in discovery and establishes the procedure to be followed in order to recover such information.
• Wis. Stat. § 805.07(2)(d), which adds ESI to the materials which may be discovered by subpoena and permits subpoenas for inspection, copying, testing or sampling of ESI.
Highlights of the proposed amendments to the federal e-discovery rules include:
• A proposed amendment to Fed. R. Civ. P. 1 which would encourage cooperation by the parties as to the efficient determination of a case, including e-discovery issues.
• A proposed amendment to Fed. R. Civ. P. 26 which would add a new “proportionality” test to the scope of allowable discovery.
• A proposed amendment to Fed. R. Civ. P. 30 which would reduce the limit on the number of depositions in a case from 10 to 5 and would reduce the maximum length of a deposition from 7 hours to 6 hours.
• A proposed amendment to Fed. R. Civ. P. 33 which would reduce the limit on the number of written interrogatories from 25 to 15.
• A proposed amendment to Fed. R. Civ. P. 36 which would limit the number of requests to admit to 25.
• A proposed amendment to Fed. R. Civ. P. 37 which would provide a uniform national standard for evaluating discovery preservation efforts and for the imposition of sanctions for failures to preserve discovery.

The public comment period for the proposed federal amendments runs until February 15, 2014. If approved, the federal amendments currently are expected to go into effect on December 1, 2015.

For more information about the state and federal e-discovery rules or ESI issues, please contact Grant Killoran at 414.276.5000, or at grant.killoran@wilaw.com.

EMPLOYMENT LAWSCENE ALERT: U.S. SUPREME COURT AFFIRMS TIME SPENT CHANGING CLOTHES NOT COMPENSABLE WORK TIME

On October 14, 2013, the Employment LawScene™ brought you an article explaining that the Supreme Court would hear oral arguments in *Sandifer v. U.S. Steel Corp.*, a case out of the Seventh Circuit, to resolve disagreement among other circuit courts as to what constitutes "changing clothes" within the meaning of the Fair Labor Standards Act ("FLSA") for purposes of determining whether time spent "changing clothes" at the beginning and end of each workday is compensable work time.

The *Sandifer* case specifically focused on Section 203(o) of the FLSA, which allows employers and unions to collectively bargain over whether employees must be paid for time spent "changing clothes" at the beginning and end of each workday. The Seventh Circuit held that time spent putting on certain articles of protective gear fell within the definition of "changing clothes" under the FLSA and, accordingly, was not work time that employees had to be paid for pursuant to the parties' collective bargaining agreement.

On January 27, 2014, the U.S. Supreme Court unanimously affirmed the Seventh Circuit's holding that the time employees spent "donning" and "doffing" protective gear was not compensable under the FLSA when, "on the whole", the vast majority of the time was spent "changing clothes" and the employer and employees agreed that time was non-compensable under a collective bargaining agreement.

The U.S. Supreme Court noted that employees in *Sandifer v. U.S. Steel Corp.* were required to don and doff twelve (12) items of protective gear, nine of which fell within the definition of "clothes" under the FLSA (flame-retardant jacket, pants, hood, hard hat, "snood," "wristlets," work gloves, leggings, and steel-toed boots) and, therefore, were not compensable. Although the Court did not consider the other three items—safety glasses, earplugs, and a respirator—to fall within its definition of "clothes," it found that, "on the whole", a vast majority of the time was spent donning and doffing the other items that did fall within the definition and, accordingly, the time was not compensable. The Court instructed that in determining whether time spent donning and doffing certain protective gear is compensable

under the Act, other courts should examine the time period at issue "on the whole" and determine whether the vast majority of donning and doffing time involves clothing items or non-clothing items as defined by the Court. If a vast majority of the time is spent on items that are "clothes," then the entire period should qualify as time spent "changing clothes" and should not constitute compensable work time under the FLSA pursuant to an applicable collective bargaining agreement.

The U.S. Supreme Court's decision in *Sandifer* makes clear that unionized employees are not entitled to compensation for time spent donning and doffing protective gear under the FLSA where a vast majority of time is spent "changing clothes" and where a collective bargaining agreement excludes such time from working time.

Click here to read the U.S. Supreme Court's complete decision in *Sandifer v. U.S. Steel Corp*.

EEOC OBTAINS VICTORY IN SEVENTH CIRCUIT IN PREVENTING JUDICIAL REVIEW OF PRE-SUIT CONCILIATION EFFORTS

In July, the Employment LawScene™ advised our readers that a federal district court granted the EEOC's motion to seek an interlocutory appeal before the Seventh Circuit as to whether the EEOC's alleged failure to conciliate prior to commencing suit is subject to judicial review in the form of an implied affirmative defense to the EEOC's suit. Title VII of the Civil Rights Act of 1964 requires the EEOC, prior to commencing suit against an employer, to "endeavor to eliminate the alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b). The federal district court granted the EEOC's motion for an interlocutory appeal because the Seventh Circuit had not yet directly addressed the issue and because there was a split between other federal circuits as to the scope of a court's review of EEOC's pre-suit conciliation efforts.

In a somewhat surprising decision, the Seventh Circuit became the first federal circuit court of appeals in the country to explicitly reject an employer's ability to assert an implied affirmative defense that the EEOC failed to comply with its conciliation efforts prior to commencing suit. The Seventh Circuit's decision also breaks ranks with the Second, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits who have all held that the EEOC's pre-suit conciliation efforts are subject to judicial review, despite the fact that these courts are divided as to the level of scrutiny to apply in reviewing the EEOC's conciliation efforts. The Second, Fifth, and Eleventh Circuits evaluate conciliation under a three-part inquiry whereas

the Fourth, Sixth, and Tenth Circuits require instead that the EEOC's efforts meet a minimal level of good faith. The Seventh Circuit, based upon the plain language of the statute, rejected the notion that the EEOC's pre-suit conciliation efforts are subject to any level of judicial review or scrutiny.

The Seventh Circuit reasoned that the language of Title VII, the lack of a meaningful standard for the courts to apply, and the overall statutory scheme that Congress set forth in Title VII precluded a court from reviewing the EEOC's pre-suit conciliation efforts and likewise precludes an employer from asserting an affirmative defense on that basis. The Seventh Circuit found the language of Title VII made clear that conciliation is an informal process entrusted solely to the EEOC's expert judgment and that the conciliation efforts between the EEOC and an employer must remain confidential. The Seventh Circuit also found persuasive that there is no meaningful standard to apply is determining whether the EEOC's efforts to conciliate were sufficient. The Seventh Circuit even rejected applying a good faith standard because in applying such a standard, the court reasoned, a reviewing court could not help but to engage in a prohibited inquiry into the substantive reasonableness of particular settlement offers – not to mention using confidential and inadmissible materials as evidence. In rejecting the application of a good faith review standard, the Seventh Circuit found compelling that Congress granted the EEOC the unreviewable discretion on the choice to settle or not to settle. Finally, the Seventh Circuit held that the broader statutory scheme of Title VII in protecting individuals from unlawful discrimination trumps an employer's interests in asserting an affirmative defense based on the EEOC's failure to conciliate because, according to the Seventh Circuit, "the conciliation defense tempts employers to turn what was meant to be an informal negotiation into the subject of endless disputes over whether the EEOC did enough before going to court."

At least in the Seventh Circuit, which oversees the federal district courts in Illinois, Indiana, and Wisconsin, the manner in which the EEOC conducts pre-suit conciliation efforts may very well change as its efforts, and whether such efforts were conducted in good faith, are no longer subject to challenge by an employer or review by a court. This lack of oversight gives the EEOC wide-latitude and considerable leverage in negotiations with an employer prior to commencing suit. The question will become whether the EEOC will use that leverage and its relatively large litigation budget to force employers into needless litigation. Employers, on the other hand, as always will have to weigh the cost/benefit of surrendering to the EEOC's attempt to extract a high monetary settlement through the conciliation process versus the high cost of litigating against the EEOC. Given the Seventh Circuit's decision precludes judicial review of the EEOC's conciliation efforts, there will be no watchdog over whether the EEOC's pre-suit settlement demands are made in good faith and commensurate with the merits of a particular case.

The Seventh Circuit's decision and the clear split that now exists between other federal circuits on this issue provides a basis for the Supreme Court of the United States to address

this issue and resolve the dispute among the different circuit court of appeals. We will let our blog readers know if the U.S. Supreme Court decides to hear this case to resolve this important issue.

PENDING LEGISLATION MAY MAKE FORECLOSURES MORE CHALLENGING FOR LENDERS

As reported in the Milwaukee Journal Sentinel, State Rep. Evan Goyke (D-Milwaukee) introduced five bills designed to alleviate what Rep. Goyke considers ongoing problems arising from the housing crisis that began in 2008. Lenders and their counsel would be wise to pay careful attention to a number of the bills in the package, as they could, if passed in to law, significantly affect future foreclosure actions.

Of particular concern to lenders is the proposal to require a plaintiff filing a foreclosure action to post a $15,000 demolition bond with the clerk of courts of the county in which the property is located. If the property in question must be demolished, the $15,000 would be applied to the cost of the demolition. Additionally, the $75 filing fee currently associated with a foreclosure action would be increased by $50. This fee increase would be used to install lighting at existing abandoned homes. Another bill in the package would give municipalities and lenders the right to enter foreclosed properties to address any potential problems. It is uncertain whether the bill is intended to create a requirement to do so.

Copies of the legislation can be read here. Further information about these bills, and the other bills included in the package, as well as the impact they may have on the decision to bring a foreclosure action, can be obtained by contacting any member of our firm's Creditors' Rights Practice Group.