IRS CREATES SAFE-HARBOR FOR THE DEDUCTION OF M&A SUCCESS BASED FEES

The Internal Revenue Service has created a safe-harbor election under Revenue Procedure 2011-29 to allow taxpayers to allocate seventy percent (70%) of the success-based fees paid in business acquisitions or reorganization as a deduction against current ordinary income. If the election is made, the remaining thirty percent (30%) must be capitalized. This election can be made for success-based fees incurred in years ending on or after April 8, 2011. This Revenue Procedure clears up the uncertainty that has existed in how to allocate these fees.

COURT RULES THAT DEBTOR'S INHERITED IRA QUALIFIED FOR BANKRUPTCY EXEMPTION

In *Chilton v. Moser*, a Texas Federal District Court overturned a Bankruptcy Court and ruled that an inherited IRA owned by a debtor is an exempt asset and protected under the Bankruptcy Code. This is an important decision. As more and more wealth is accumulated in 401(k)'s and rolled over into IRA's, these IRA's are often the most significant assets heirs inherit from decedents. To have these inherited IRA assets protected from the Bankruptcy process, is an enormous benefit for heirs who may be in financial trouble. One cautionary note, although this court decision is persuasive for Bankruptcy Courts in Wisconsin, it is not binding. Nevertheless, the decision should provide some comfort to heirs owning inherited IRA's who may be subject to creditor concerns.

ATTORNEY JASON SCOBY QUOTED IN WISCONSIN LAW JOURNAL

Jason Scoby was recently quoted in the *Wisconsin Law Journal* in an article about the proposed Bucyrus-Caterpillar merger. The article, titled "Bucyrus Clears Hurdle in Merger Lawsuits," describes the Jan. 19 decision by Judge Charles Clevert Jr. of the Eastern District Court of Wisconsin in which he denied plaintiff shareholders' motion for a preliminary injunction seeking to prevent the shareholder vote to approve the merger. The excerpt containing Jason's quote reads:

- Attorney Jason Scoby, chairman of the Business, Banking and Corporate Law Section of the Milwaukee Bar Association, pointed out that under relevant case law, the plaintiffs needed to satisfy three requirements: irreparable harm, inadequate traditional legal remedies and a likelihood of success on the merits.
- Scoby, of O'Neil, Cannon, Hollman, DeJong and Laing SC, Milwaukee, said the court clearly explained why the plaintiffs failed to satisfy any of the three requirements.
- "The court could've denied the plaintiffs' motion based on the fact that they couldn't satisfy the first requirement, that they faced irreparable harm if the injunction was not granted," he said. "However, the court took care to also hold that the plaintiffs failed to satisfy the other two requirements."
- In arriving at its decision, the court alluded to the Business Judgment Rule, Scoby said. That rule provides that a court will rarely substitute its own judgment for that of the corporation's board when the board engaged in sufficient due diligence prior to arriving at its decision.

Read the full article here. The case is *City of Sterling Heights Police* and *Fire Retirement System v. Bucyrus International, Inc., et. al.*, Case No. 10-CV-1106.

Jason advises individuals and closely held businesses on a variety of corporate and business-related issues, including mergers and acquisitions, commercial transactions, corporate issues, franchising, contract negotiation and preparation, and business entity selection and formation.

O'Neil Cannon, founded in Milwaukee in 1973, is a full-service legal practice that primarily focuses on providing business law and civil litigation services to closely-held businesses and their owners. The firm represents corporations, institutions and partnerships at all stages of the business life cycle, helping them start, grow and transition from one generation to the next. We also assist business owners with their personal legal needs including tax and estate planning, family law and litigation—including personal injury litigation.

O'NEIL CANNON WELCOMES ATTORNEY NEWBOLD TO EXPAND LITIGATION GROUP

Attorney Joseph D. Newbold has joined the litigation practice at the downtown Milwaukee law firm of O'Neil Cannon He will bring with him extensive experience in complex commercial and intellectual property litigation and has significant experience in trial and appellate matters in both the state and federal courts.

Prior to joining the firm, Mr. Newbold was an associate in the Chicago law firm of Freeborn and Peters LLP. While at Freeborn and Peters, Mr. Newbold worked extensively on a wide

variety of matters, including representing industry leading patent holders before the Court of Appeals for the U.S. Federal Circuit and individuals standing up against large real estate developers before the Illinois Supreme Court. Mr. Newbold is a former clerk to United States District Judge Joe Billy McDade, United States Magistrate Judge Donald Wilkerson, and former United States Magistrate Judge Gerald Cohn.

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BAN ON TEXTING AND E-MAILING WHILE DRIVING

Wis. Stat. § 346.89(1) states "[n]o person while driving a motor vehicle shall be so engaged or occupied as to interfere with the safe driving of such vehicle."

Until December 1, 2010 that was the major focus of the "inattentive driving" statute. On December 1, pursuant to 2009 Wisconsin Act 220, subsections (3)a-b were added to the statute stating that "[n]o person may drive, as defined in s. 343.305(1)(b), any motor vehicle while composing or sending an electronic text message or an electronic mail message." Exceptions to the statute include (1) operators of emergency vehicles, (2) certain in-vehicle systems (On-Star) that transmit and receive emergency alert messages and messages related to the operation of the vehicle, including global positioning devices, (3) amateur radio operators who hold a valid license issued by the federal communication commission when using dedicated amateur radio 2-way equipment and observing proper operating procedures, and (4) users of voice-operated or hands-free devices if the driver of the motor vehicle does not use his or her hands to operate the device, except to activate or deactivate a feature or function of the device. The penalty for violating Wis. Stat. § 346.89(3) is a fine of not less than $20 nor more than $400, and, because it is a moving violation, 4 points on your drivers license.

What does that mean? It means that a person, while driving, cannot compose (write) or send text messages or e-mails while their car, van, truck, motorcycle, bus or any other motor vehicle is in motion. The focus of this new law has been on the texting aspect of it, but it does include a prohibition against composing and sending e-mails. However, it excludes times

when the vehicle is stopped at a traffic light, a stop sign or in traffic due to congestion. It does not prohibit reading messages, or using or surfing the internet. Further, it does not prohibit dialing a phone number, making or receiving phone calls, scrolling through contacts, checking one's electronic calendar, etc.

Of course, this does not permit inattentive driving. Captain Tim Carnahan of the Wisconsin State Patrol believes that driving distractions, such as texting, are simply dangerous and irresponsible. While state troopers usually give drivers 30 days before enforcing a new law, it will not be the case with the texting or e-mailing while driving ban. Carnahan stated "[t]he law becomes effective on [December 1] and it is entirely possible that someone who is violating that law and is witnessed by our law enforcement would be stopped for that violation." However, State Patrol Superintendent David Collins noted that the state also has a law against inattentive driving, and that drivers could be ticketed under that law if they are distracted by reading text messages or talking on their cell phones. Collins stated "[t]o be very simple, it's not illegal to read. But we're not recommending that. We're not saying that's a flaw in the law. We're just saying use common sense."

As part of 2009 Wisconsin Act 220, the Legislature added requirements to the driving curriculum for Technical College Systems, Wisconsin public schools, and Driving Schools that they "[a]cquaint[] each student with the hazards posed by composing or sending electronic text messages or electronic mail messages while driving and with the provisions of s. 346.89(3)."

O'NEIL CANNON NAMES SCHREIBER AND MAIER SHAREHOLDERS

Milwaukee, Wisconsin (January 31, 2011) – O'Neil Cannon is pleased to announce that Attorney John R. Schreiber and Attorney Joseph M. Maier have been elected as shareholders of the firm.

Attorney Schreiber will continue his practice in the Banking and Creditors' Rights practice group assisting creditors, commercial landlords and other entities, in the enforcement, collection and workout of loans, leases and other obligations.

Schreiber received his undergraduate Bachelor's degree from the University of Wisconsin and his law degree from the Marquette University Law School, *cum laude*. He was selected as a

2008, 2009 and 2010 Wisconsin Super Lawyers Rising Star, *Law and Politics and Milwaukee Magazine*, and is a member of the Board of Directors for Groundwork Milwaukee.

Attorney Maier will continue to assist businesses in employee benefit design and ERISA issues, executive compensation planning, income tax planning, state and succession planning, operation and liquidation of business entities and the creation, formation, merger and acquisition of businesses.

Maier received his B.B.A. in accounting, *summa cum laude*, from the University of Wisconsin-Milwaukee and earned his J.D., *summa cum laude*, graduating #1 in his class from the University of Wisconsin-Madison. He was a member of the UW Law Review and is a member of the Society of Financial Services Professionals.

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NEW WISCONSIN RULES OF CIVIL PROCEDURE GOVERNING E-DISCOVERY AND ELECTRONICALLY STORED INFORMATION

It is estimated that more than 90% of all information created today is stored electronically.

The Federal Rules of Civil Procedure were amended in 2006 to address such electronically stored information, or "ESI". Effective January 1, 2011, the Wisconsin Rules of Civil Procedures also are being amended to address ESI and confirm that discovery of ESI stands on equal footing with discovery of paper documents.

The Wisconsin rules have been changed to parallel the federal e-discovery rules and make it easier to utilize existing federal authority in discovery disputes in the Wisconsin courts. But Wisconsin did not adopt the 2006 federal amendments in their entirety. The new Wisconsin rules take a slightly different approach than the federal amendments in two ways: First, some federal rules do not have Wisconsin counterparts. For example, unlike FRCP Rule 26(a), Wisconsin's new rules make no provision for mandatory disclosure. Second, the drafters of the new Wisconsin rules thought some portions of the federal amendments should be

addressed by substantive Wisconsin law, rather than by a procedural rules change.

The new Wisconsin ESI rules are:

- Wis. Stat. § 802.10(3)(jm) (the Wisconsin counterpart to FRCP 16)

This rule is being enacted to encourage courts to be more active in managing electronic discovery. It adds the need for discovery of electronically stored information to the issues that a trial court may address in issuing a scheduling order.

- Wis. Stat. § 804.01(2)(e) (the Wisconsin counterpart to FRCP 26)

This rule is being enacted to help manage the costs of discovery of ESI. It creates a "meet and confer" obligation, and states that no requests for production or inspection of ESI under Wis. Stat. § 804.09 (or responses to interrogatories by production of ESI under Wis. Stat. § 804.08(3)) can be issued until after the parties confer on a number of discovery issues. However, it does not require parties to confer before commencing other types of discovery.

- Wis. Stat. § 804.08(3) (the Wisconsin counterpart to FRCP 33(d))

This rule gives parties the option to produce electronic business records in lieu of an answer to an interrogatory. It specifies that ESI is among the types of business records that a business may provide in response to an interrogatory. But, this is an option; it is not mandatory.

- Wis. Stat. §§ 804.09(1) and (2) (the Wisconsin counterpart to FRCP 34)

These rules are the heart of the new electronic discovery rules. They govern the formulation of electronic discovery requests and responses and establish the scope and procedures regarding the discovery of ESI. They treat ESI the same as paper documents.

- Wis. Stat. § 804.12(4m) (the Wisconsin counterpart to FRCP 37)

This rule provides a "safe harbor" for the good faith, routine deletion of ESI and gives limited "immunity" from certain spoliation sanctions.

- Wis. Stat. § 805.06 (the Wisconsin counterpart to FRCP 53)

This is not a new rule, but rather its use in ESI matters is suggested by the comments to the new Wisconsin rules. It allows for the use of discovery referees or "special masters" to handle complex and/or expensive discovery issues, including those involving ESI.

- Wis. Stat. § 805.07 (the Wisconsin counterpart to FRCP 45)

This rule adds ESI to the types of materials which may be discovered by subpoena.

For more information about these new amendments to the Wisconsin Rules of Civil Procedure, contact Grant Killoran at O'Neil Cannon at 414.291.4733 or grant.killoran@www.wilaw.com.

NEW TAX LEGISLATION ALLOWS FOR ENHANCED ESTATE PLANNING

The President has signed into law the new tax legislation which recently passed through Congress. Generally, the new tax law extends the existing tax rates for two more years, provides a two percent reduction in the payroll tax, and increases the estate tax exemption to $5 million. An additional provision in the legislation, which has been given very little attention in the public media, increases the gift tax exemption to $5 million beginning in 2011. Prior to this, the gift tax exemption was $1 million. This change will give individuals significantly greater flexibility in their estate planning. The $1 million gift ceiling was a hindrance to many individuals who wished to do comprehensive estate planning. With this exemption raised to $5 million, $10 million per couple, the estate planning options become much more diverse and will allow significantly more freedom to individuals to do planning.

WHY ARE BUY-SELL AGREEMENTS IMPORTANT?

The term "buy-sell agreement" means any legally enforceable arrangement by and among a business entity or its owners prescribing limitations on the ability to own and to transfer equity interests. It is the linchpin between a business succession plan and the estate plans of the owners in determining the future ownership and control of a business. The terms of a buy-sell agreement can be included in an operating agreement of a limited liability company, a partnership agreement for general and limited partnerships, or in a close corporation agreement for corporate entities.

Most often the terms of a buy-sell agreement are set forth in a separate written document by and among the shareholders of a corporation and the corporation itself. This article focuses on separate written buy-sell agreements involving corporations, even though many of the concepts apply to other types of business entities.

When entrepreneurs are forming a business entity, or a new investor becomes a shareholder, the parties are optimistic that they will all benefit from the financial success of the enterprise.

Introducing the topics of death, disability, termination of employment, and other negative possibilities is comparable to negotiating a prenuptial agreement for a couple about to be wed. Unfortunate but foreseeable events need to be addressed as soon as possible before irreversible commitments are made.

A buy-sell agreement is an integral part of a shareholder's personal estate plan. The creation of a market to liquidate an otherwise nonmarketable asset is crucial to many estate plans. The shareholder's will and trust must contain directions to the fiduciary to comply with and to implement the terms of the agreement. These documents may also direct the fiduciary to accept the provisions of the agreement (such as the valuation methods) without the necessity or duty to inquire as to the validity of the data on which the sale is based or the process by which it is made.

Control and ownership

In discussing business succession planning, it is advisable to focus on three separate elements:

(1) Income
(2) Control
(3) Equity ownership

While a buy-sell agreement may indirectly affect the income from a business entity, the arrangement more directly affects control and equity ownership.

The company's capital structure and organizational documents determine the control of the enterprise through the election of the board of directors. The managers of the business and perhaps the other shareholders, however, do not want family members who happen to inherit stock to be involved in the management of the business. The separation of control from the equity ownership of the business and the extraction of the value of the equity ownership of the business should be agreed on in writing by the shareholders.

Who is the purchaser?