HOW NOT TO SELL A HAUNTED HOUSE

In keeping with the ghostly time of year, I submit the following legal advice for home sellers. The old rule of “buyer beware” has been eroded over the years by court cases involving less than candid sellers and disappointed buyers. These days, the basic rule in home sales is disclosure. A seller is expected and, in some instances, required to disclose to a potential buyer defects in the home, such as physical problems, environmental contamination and the like.

The duty of disclosure was elevated in a 1991 appellate case in New York State in which a buyer rescinded the purchase contract and sued the seller for a return of his earnest money deposit on the basis that the seller had not disclosed the fact that the home was haunted. The buyer contended that the seller should have disclosed the ghosts, and the seller defended under the legal doctrine of “buyer beware” and the theory that no duty of disclosure existed.

The Judge in the case summarized the tension between the two legal theories as follows:

From the perspective of a person in the position of plaintiff herein (the buyer), a very practical problem arises with respect to the discovery of a paranormal phenomenon: “Who you gonna’ call?” as the title song to the movie “Ghostbusters” asks. Applying the strict rule of caveat emptor to a contract involving a house possessed by poltergeists conjures up visions of a psychic or medium routinely accompanying the structural engineer and Terminix man on an inspection of every home subject to a contract of sale. It portends that the prudent attorney will establish an escrow account lest the subject of the transaction come back to haunt him and his client—or pray that his malpractice insurance coverage extends to supernatural disasters. In the interest of avoiding such untenable consequences, the notion that a haunting is a condition which can and should be ascertained upon reasonable inspection of the premises is a hobgoblin which should be exorcised from the body of legal precedent and laid quietly to rest.

Ultimately, the Judge reversed the ruling of the lower court and ruled that rescission was available to the buyer and that the money should be returned.

So, if you lie in bed and hear things going “bump” in the night or you have a “face to face” relationship with ghostly house guests, you should not remain silent as a tomb when you are trying to sell your house. Rather, you should consider making a disclosure to the buyer. You should let them decide for themselves if they want to share the home with the spirits; hopefully all of whom are like Casper, the friendly ghost.
HAPPY HALLOWEEN!!

PRENUPTIAL AGREEMENTS: WHO SHOULD HAVE ONE?

Prenuptial Agreements are paradoxical. On one hand, you have a couple who is about to marry and commit to spend the rest of their lives with each other. On the other hand, the couple signs an agreement that spells out what legally happens when a divorce occurs. This paradox can produce tension and anxiety.

Prenuptial Agreements (or “Prenups” as they are sometimes called) are not for everyone. However, there are certain situations when it is recommended that they be strongly considered. Here is a list of some of those situations:

- There are children from a previous marriage. A prenup can protect the inheritance of those children as the agreements can clarify what happens in the event of a death.
- One or both parties have significant assets. A prenup can provide protection so that assets brought into the marriage, by either party, are subject to limited risk.
- One of the parties is a business owner. This is especially important if the party has a business partner because the business partner wants to know that a divorce will not negatively affect the business.
- One of the parties has significant creditor trouble. A prenup can help insulate the non-debtor spouse from the debts and creditors of the other.
- There is a large disparity in wealth of the parties. The greater the disparity of wealth the more that is at risk.
- There is a significant difference in age of the parties. Typically, the older spouse will have more in retirement savings which should be protected.
- There is an expectation of large financial gifts or inheritance. It is typically expected that an inheritance or gift should remain the property of the spouse who has inherited it. A prenup can help provide protection over those assets so they are not put at risk.

Prenups do not just address what happens in the event of divorce, but they can govern the property rights of the parties during the marriage, and may determine what happens to the assets of a party who dies. It is important to note that prenups are most likely to be enforced by a court if both parties have their own lawyer. And finally, it is best if the Prenuptial Agreement is signed well before the wedding day, usually a month or more, to take the tension and anxiety of executing the Prenuptial Agreement out of what should be a joyous occasion.

CONGRESS PASSES LEGISLATION TO PROVIDE TAX BREAKS TO BUSINESSES

On September 23rd the House of Representatives passed H.R. 5297 Bill that provides tax breaks and other incentives to businesses. It is anticipated that the bill previously passed by the Senate, will be signed into law shortly. Some of the key provisions of the legislation are as follows:

- **Capital gains exclusion.** The bill temporarily increases the capital gains exclusion percentage to 100 percent for stock issued by some small businesses, through the end of the year. The gain is limited to 10 times the original investment or $10 million, whichever is greater. It is not subject to the alternative minimum tax.
- **Built-in gains tax.** Normally, when a company converts from a C corporation to an S corporation, it must retain its assets for at least 10 years, or pay a 35 percent tax on the built-in gains that occurred before the company made the conversion. Prior legislation reduced the holding period to 7 years for assets sold in 2009 and 2010; this bill reduces the period to 5 years for an asset sold in the 2011 tax year.
- **Section 179 expensing.** The bill temporarily increases the first-year write-off for business equipment under Section 179 from $250,000 to $500,000, and raises the cap on eligible expenditures that triggers a phase-out of the incentive from $800,000 to $2 million. These provisions expire after 2011.
- **Accelerated depreciation of real estate.** Certain investments up to $250,000 in "qualified real property" can now be expensed. "Qualified real property" includes certain leasehold improvements, certain restaurant property, and certain retail property.
- **Bonus depreciation.** The bill restores the generous 50 percent first-year depreciation for some kinds of property, through 2010. Bonus Depreciation was originally enacted in the first stimulus bill and in place for 2008 and 2009. The bill also makes a technical change that decouples bonus depreciation from the allocation of certain contract costs.
- **Start-up deduction.** The bill increases the deduction for start-up expenditures to $10,000, from $5,000 through 2010, and raises the cap on expenditures that triggers a phase-out of the deduction to $60,000, from $50,000.
- **Deduction for health insurance costs.** The bill allows self-employed business owners to deduct their family's health insurance expenses from their self-employment tax income in 2010.
- **Deducting cell phones.** The bill makes it easier to deduct or depreciate cell phones by removing them from the category of "listed property." Listed property, when it is not used by the business more than half the time, is subject to stringent limits on deductions and depreciation.
- **SBA Loans.** The bill extends the 90 percent guarantee level and waives borrower fees first enacted in the 2009 stimulus, through 2010. Note that these provisions largely expired in May. It also permanently raises the maximum loan size to $5 million, from $2 million. In addition, the bill temporarily—for one year from the date it is enacted—raises the maximum loan size to $1 million from $350,000. Moreover, it extends current

legislation provisions that eliminated borrower fees, through 2010. This bill permanently raises the maximum loan sizes from a range of $1.5 million to $4 million, to a range of $5 million to $5.5 million. It temporarily—for two years after the date of enactment—allows 504 loans to be used to refinance some existing commercial mortgages.

More information about the legislation can be found here.

ATTORNEY JASON SCOBY APPOINTED CHAIR OF MBA'S CORPORATE, BANKING AND BUSINESS SECTION

Attorney Jason Scoby of O'Neil Cannon was recently appointed to serve as Chair of the Corporate, Banking and Business Section of the Milwaukee Bar Association ("MBA"). In this role, Attorney Scoby will focus on providing continuing legal education presentations and resources, as well as networking opportunities for attorneys and other professionals in the corporate, banking, and business field.

Some of the topics to be addressed in upcoming presentations may include:

- Choice of Business Entity and the Associated Business and Tax Implications
- Various Subjects in Mergers and Acquisitions

vLending Issues:

- Ethical Issues Involved in Business Transactions
- Contract Drafting

If you would like further information regarding an upcoming MBA event, of if you are interested in making a presentation for the MBA's Corporate, Banking and Business Section, please contact Jason.

Attorney Scoby is an associate at O'Neil Cannon, where he assists clients on a wide variety of corporate and business-related issues, including commercial transactions, mergers and acquisitions, franchising, business entity selection, and regulatory compliance.

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.

CONGRESS DEBATES LIMITING ESTATE PLANNING TECHNIQUE: NOW IS A GOOD TIME TO CONSIDER A GRAT

The grantor retained annuity trust (GRAT) has been a staple vehicle for estate planning since it was first introduced twenty years ago by the Revenue Reconciliation Act of 1990. A GRAT can effectively transfer property from a grantor to a beneficiary, while greatly reducing the amount of tax the grantor would otherwise owe on the gift, if the gift was transferred without a GRAT.

A GRAT is created by transferring property to a trust for a fixed number of years. During the life of the trust, the grantor is paid an annual annuity from that trust. Upon the expiration of the trust, any remaining property in that trust passes to the beneficiary. Tax savings are realized by placing property expected to greatly increase in value into the trust. Tax is then assessed by adding the value of the initial property plus a statutorily fixed interest rate based on the month the trust was created as found in Code Sec. 7520. The current fixed interest rate for August 2010 is 2.6%, according to Rev. Rul. 2010-19. Therefore, as long as the annuity payments over the fixed period of the trust equal the initial property value plus the fixed interest rate, there would be no gift tax assessed on any remaining property left in the trust upon expiration, which would be automatically transferred to the beneficiary.

In other words, if a GRAT is created this month with any type of property expected to appreciate more than 2.6% over the life of the trust, any profits greater than 2.6% would be considered a tax free gift by the IRS to the beneficiary without requiring the donor to utilize a portion of the standard $1,000,000 lifetime gift tax exemption. Currently, the minimum term of a GRAT is two years and there are no restrictions on the structure of annuity payments, effectively allowing a donor to have little to no tax burden if properly created.

Recently Congress has been considering limiting the effectiveness of GRATs. President Obama’s 2010 budget proposal and 2011 revenue suggestions sought to change the minimum term of a GRAT from two to ten years. Additionally, the House attempted to attach a similar curtailment of GRAT to a small business jobs bill and a supplemental spending bill. The Senate’s version of the small business jobs bill did not contain the GRATs provision, and ultimately the House was unsuccessful is attaching the provision to the supplemental

spending bill. However, the Senate currently has a GRAT curtailment provision in a proposed COBRA extension act, S. 3548, to provide funding for the bill, an increasingly common trend for proposed anti-GRAT legislation.

The current Senate bill proposes to (1) raise the minimum GRAT term to ten years, (2) require the remaining interest, as calculated at the time of GRAT creation, to be greater than zero, and (3) prohibit the annuity payments from decreasing in value from the first year until after the initial ten years of the trust. These proposed changes have the potential to significantly alter GRATs as we know it. By raising the minimum term to ten years, a grantor increases the chances that he or she may pass away prior to the GRAT expiring. A GRAT that is ongoing at the time of the grantors death reverts back to the estate of the grantor, along with any appreciation, and does not transfer to the beneficiary. In this scenario, not only does the beneficiary get nothing, but the property is now taxable to the grantor's estate. Furthermore, by disallowing decreased payments, the proposed bill shuts the door on scheduling high initial payments to reduce the amount of the trust that reverts back to the estate. Lastly, the bill creates great uncertainty about exactly how much "greater than zero" the gift must be, meaning that there will likely be disagreements between the IRS and GRAT creators until initial revenue rulings are proposed.

Currently, GRATs are functioning without any of the proposed limitations. However, as the above government actions indicate, that is likely to soon change. Therefore, if you have property that is likely to appreciate more than 2.6% over at least the next two years, and you wish to avoid using part or all of your lifetime $1,000,000 gift tax exemption to transfer that property, now is the time to create and fund a GRAT. Any GRAT created and funded prior to the enactment of any legislation, similar to what is described above, will be grandfathered in to the old GRAT tax laws and you will still receive the significant tax benefits that GRATs currently provide. However, if you wait too long, it is likely that you will miss out on fully capitalizing on one of the best intergenerational wealth preservation techniques currently available.

THE BEST LAWYERS IN AMERICA®

The following O'Neil Cannon attorneys were selected for inclusion in the 17th edition of *The Best Lawyers in America* 2011 in the following practice areas:

- James G. DeJong—Corporate Law
- Seth E. Dizard—Bankruptcy and Creditor-Debtor Rights Law
- John G. Gehringer—Construction Law, and Real Estate Law
- Dennis W. Hollman—Real Estate Law

- Dean P. Laing—Personal Injury Litigation, and Product Liability Litigation
- Thomas A. Merkle—Family Law

The Best Lawyers in America "is the oldest and most respected peer-review publication in the legal profession," and is based on more than 3.1 million detailed evaluations of lawyers by other lawyers." Lawyers "are not required or allowed to pay a fee to be included in *The Best Lawyers in America,"* and "have no say in deciding which practice areas they are included in;" they are selected for inclusion in the publication, and assigned practice areas, based entirely on the votes they receive from their peers.

Given that less than 3% of all attorneys in the U.S. are included in *The Best Lawyers in America*, it is a true honor for O'Neil Cannon to have approximately 25% of its attorneys selected for inclusion in this highly-respected publication.

SEVENTH CIRCUIT: TITLE VII TRUMPS PATIENT AND CUSTOMER RACIAL PREFERENCES

A recent Seventh Circuit Court of Appeals ruling makes clear that an employer's obligation under Title VII of the Civil Rights Act of 1964 to provide employees with a discrimination-free workplace takes precedence over patient or customer preferences regarding the race of employees from whom they receive services. The court held, in Chaney v. Plainfield Health Center, that by accommodating a patient's demand for white-only health-care providers, a nursing home maintained a racially hostile work environment in violation of Title VII. (The court also determined that issues of fact existed as to whether the defendant nursing home's discharge of the plaintiff, a black nursing assistant, was motivated by race).

In Chaney, the defendant nursing home had a policy of honoring the racial preferences of its residents when assigning them health-care providers in order to avoid violating federal and state laws the nursing home viewed as requiring it to grant residents certain related rights to privacy, bodily autonomy and choice of providers. The court noted that, while allowing patients to choose the gender of their health care providers is permissible under Title VII, the patient-privacy grounds justifying employee assignment based on gender-based preferences are inapplicable to race-based preferences. The court further dismissed arguments that state or federal health laws otherwise permitted a policy of permitting patients to choose providers on racial bases, reasoning that laws requiring access to chosen providers did not necessitate race-based work practices and any state law otherwise conflicting with Title VII would be preempted.

The court also rejected the defendant's contention that, as a practical matter, its race-based policy protected black employees from racial harassment from the residents, referencing several alternative means to accomplish such objectives. Calling the defendant's willingness to accede to a patient's racial preferences "the principal source of the racial hostility in the workplace" where the plaintiff allegedly experienced three specific incidents of racial harassment from co-workers, the court reasoned that barring such a policy was consistent with judicial precedence, which "now widely accept[s] that a company's desire to cater to the perceived racial preferences of its customers is not a defense under Title VII for treating employees differently based on race." The court concluded that the defendant nursing home's status as a medical provider and permanent home to its residents did not exempt it from Title VII's prohibitions of such race-based employment policies.

A full copy of the decision can be found here.

TEXAS BILLIONAIRE'S DEATH TRIGGERS RENEWED ESTATE TAX DEBATE

For the first time in nearly 100 years, extremely wealthy individuals who pass away this year will leave enormous estates to friends and family tax-free. Since 1916, the estates of America's wealthiest individuals have been subject to a federal estate tax. Over the years the minimum value has fluctuated, but the tax has remained in effect. In 2009, for example, the tax applied to the portion of individual estates valued over $3.5 million, or the portion of a couple's estate valued over $7 million. However, because of a law passed by Congress in 2001, the estate tax has been entirely repealed for the year 2010.

In March of this year the first American since 1916 was able to pass a multi-billion dollar estate to his children and grandchildren without paying an estate tax. Dan L. Duncan, a Texas pipeline tycoon ranked 74th wealthiest individual in the world, passed away from a brain hemorrhage in late March, leaving billions of dollars in assets behind. Had Duncan passed away in 2009, his $9 billion estate would have been subject to at least a 45% federal estate tax.

Supporters of the estate tax argue that it is unconscionable to allow the wealthiest Americans a tax break at a time when income gaps between the wealthy and poor are so large and deficits so high. Opponents of the estate tax, however, argue that taxing an individual when income is earned and then again at death is unfair and it forces the liquidation of family owned businesses and farms. Read the full New York Times article for a more detailed look at the Duncan estate and the implications of the estate tax repeal.

This window of opportunity for tax savings may be short lived as the current law has the estate tax returning in 2011 with an exemption of only $1 million for individuals and a top marginal rate of 55%.

ATTORNEYS RANDY NASH AND JASON SCOBY PUBLISH ARTICLE IN ABA'S HEALTH LAW LITIGATION NEWSLETTER

Randy Nash and Jason Scoby recently published an article in the Spring/Summer 2010 edition of the American Bar Association's *Health Law Litigation newsletter* entitled "New Rules Dramatically Affect Health Care Expert Witness Disclosures."

The article discusses the existing Federal Rules of Civil Procedure and a proposed change to Rule 26 involving the disclosure of expert witness draft reports and communications between the attorney and an expert witness in a case. This proposed rule change has the potential to impact expert witness disclosures before the federal courts. It is expected to go into effect on December 1, 2010.

Under the current rule, an expert witness's entire file with regard to the matter in litigation, including any drafts of the expert's report and any communications with the attorney, is discoverable by the opponent in the lawsuit.

The Committee on Rules of Practice and Procedure has recommended that the current rule be amended, stating that the rule has caused "significant practical problems." The Committee described the problem as follows:

> Lawyers and experts take elaborate steps to avoid creating any discoverable record and at the same time take elaborate steps to attempt to discover the other side's drafts and communications. The artificial and wasteful discovery-avoidance practices include lawyers hiring two sets of experts—one for consultation, to do the work and develop the opinions, and one to provide the testimony—to avoid creating a discoverable record of the collaborative interaction with the experts. The practices also include tortuous steps to avoid having an expert take any notes, make any record of preliminary analyses or opinions, or produce any draft report. Instead, the only record is a single, final report.

Recognizing these issues, many have sought to change the discovery rules. The proposed amendment to Rule 26 attempts to avoid disclosure of experts' draft reports and attorney/expert communications. The goal is to permit the attorney to communicate freely with the expert about the attorney's thoughts and opinions relating to the case without fear of those communications being discovered by opposing counsel. The Rule also aims to avoid the unnecessary costs caused by hiring multiple experts and to prevent attorneys from taking other intricate maneuvers to evade the discovery of communications or drafts of expert opinions.

The Supreme Court recently approved these amendments to Rule 26 of the Federal Rules of Civil Procedure. It is expected that Congress will approve the amended Rule, and if it does, the amended Rule 26 will go into effect on December 1, 2010. A full copy of "New Rules Dramatically Affect Health Care Expert Witness Disclosures" can be found here.

O'NEIL, CANNON, HOLLMAN, DEJONG AND LAING ELECT JOSEPH GUMINA AS SHAREHOLDER

O'Neil Cannon is pleased to announce that Attorney Joseph E. Gumina has recently been elected as a shareholder of the firm. Joe will continue his labor and employment practice representing management in the states of Illinois and Wisconsin, and will represent clients in litigation matters in both state and federal courts, including the federal district courts in Illinois, Indiana, and Wisconsin.

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.