

BUSINESS BRIEFS

Legal Developments Affecting Business



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WHAT SHOULD YOU DO WITH A MILLION DOLLARS (OF LIFE INSURANCE)?

By Jeff Moore

Here is the short answer – get it out of your estate.

Although life insurance plays a critical role in personal, financial, estate and business succession planning, it can cause estate planning issues if it is not properly owned. Let me explain.

Just the other week I met with a client to update his estate planning documents. We reviewed his assets and his estate planning goals. He was confident that his estate was under the \$5 million federal estate exemption (this exemption drops to \$1 million in 2013). I then asked him about his \$1 million dollar life insurance policy. He insisted that the insurance benefits were not taxable and therefore not includible in his taxable estate. Unfortunately he was only partially right. Although life insurance proceeds are not generally subject to *income* tax, they are subject to the *estate* tax. In other words, this client's \$1 million dollar would have been included in his taxable estate assets.

So how can you make sure that your life insurance benefits your family after your death and avoids the federal estate tax (particularly if your other assets are close to the federal exemption threshold)?

Under current estate tax rules, insurance on your life will be included in your taxable estate if you either (1) name your estate as the beneficiary on the policy, or (2) possess certain economic rights in the policy at the time of your death (the IRS refers to these rights as "incidents of ownership").

Avoiding the first situation is easy. You should simply make sure that your estate is not designated as the beneficiary on the policy. Avoiding the second situation is not as simple because, even if you don't name your estate as

the beneficiary on the policy, proceeds are still includible in your taxable estate if you are the owner of the policy. This is true regardless of who is named as the beneficiary.

So, to avoid any incidents to ownership, just don't own the policy, right? Well, it's a little more complex than that. Simply having someone else own the policy will not alone prevent inclusion in your estate if you retain certain incidents of ownership in the policy. These incidents of ownership include the following:

- the right to change beneficiaries;
- the right to assign the policy (or to revoke an assignment);
- the right to pledge the policy as security for a loan;
- the right to borrow against the policy's cash surrender value; and,
- the right to surrender or cancel the policy.

Keep in mind that merely possessing any of the above-named powers will cause the proceeds to

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be included in your taxable estate, regardless of whether you ever exercised the power.

Buy-Sell Agreements. Notwithstanding the above, life insurance obtained to fund a buy-sell agreement for a business interest under a “cross-purchase” arrangement will not be taxed in your estate (unless your estate is named as the beneficiary). For example, suppose Bob and Jeff are partners who agree that the partnership interest of the first of them to die will be bought by the surviving partner. To fund these obligations, Bob buys a life insurance policy on Jeff's life. Bob pays all the premiums, retains all rights incidents of ownership, and names himself beneficiary. Jeff does the same regarding Bob. When the first partner dies, the insurance proceeds are not taxed in his estate.

Life Insurance Trusts. An irrevocable life insurance trust (often called an “ILIT”) is an effective way to keep life insurance proceeds from being taxed in the insured's estate. The policy is typically transferred to the trust along with sufficient cash to pay future premiums or cash that is specially gifted to the trust beneficiaries to cover the premiums. Alternatively, the trust buys the insurance policy directly with funds contributed by the insured. As long as the trust agreement gives the insured none of the incidents of ownership described above, the proceeds will not be included in the insured's estate. In a few cases, it may be appropriate for the insured to transfer the policy to mature children (and those who care for their well being) and gift the premiums to the children. Because the children own the policy, it is not included in the insured's taxed estate. However, the problem with children or anyone else owning the policy is that the insured must give up control over the management and use of the policy.

The Three-Year Rule. You should be cautious if you are considering setting up a ILIT with a policy you own currently or simply assigning away your ownership rights in such a policy. In these circumstances, you must live for at least three years after the transfer of the policy or the proceeds will be taxed in your estate. For policies

in which you never held incidents of ownership, the three-year rule does not apply.

If you're still wondering what to do with a million dollars (of life insurance) or would like more information about this important topic, please contact a member of our Estate Planning group.

THE PRICE OF JUSTICE

By Hunter Emerick

My learning curve as a new member of the Board of Governors for the Oregon State Bar has been quite steep. The Board oversees many functions of the Bar, including attorney discipline, legal malpractice insurance and operations. One of the highest priorities of the Bar is to ensure that Oregon's courts are open and accessible to the public. Now that the Oregon Legislature is in session a number of bills are being closely followed by the Bar. One such set of measures, House Bills 2710A and 2712, will directly impact the accessibility of Oregon courts. These measures set the court fees and fines collected by our court system to fund its operations.

Although the court system is critical for public safety, accessible courts are an equally important part of a vibrant economy. If businesses are not able to efficiently and effectively resolve disputes, risks and uncertainty increase. Capital is risk adverse. If companies cannot recover funds justly owed to them for products and services, or if ownership of property cannot be resolved, investment in business would stagnate. The rule of law not only keeps us safe, but it also helps us prosper.

The court fees imposed by HB 2710A and 2712 directly affect businesses seeking a judicial resolution of their disputes. In order to utilize our judicial system, each business or business owner must pay a number of “user fees.” Not surprisingly, most governmental agencies are exempt from paying court fees. Fee waivers or deferrals are frequently granted to individuals who are below certain household income levels. As in many other areas of our society, business and

individuals of average or above-average means carry more than their "share" of the expense.

In the 2009 legislative session, Oregon's court filing fees and criminal fines were dramatically increased. These increases were in response to the loss of governmental revenues resulting from the recession. Fees to commence a civil lawsuit were determined by a complex matrix which considered the amount in dispute and the number of parties. For the types of commercial litigation handled by our firm, filing fees sharply increased. There were several civil cases filed by our firm under this schedule in which the court fees exceeded \$5,000. I also heard anecdotal reports in which filing fees reached into the tens of thousands of dollars. And these fees were just for the commencement of the lawsuit! As cases progressed through court additional fees were imposed for filing motions, scheduling hearings, submitting orders, and trying the case before a judge or jury.

Unfortunately, the sharp increase in court fees did not increase service. However, the increases probably staved off any significant reductions in service. Although court staffs were furloughed and a few layoffs occurred, Oregon courts were (for the most part) able to stay open despite the significant downturn in the economy and governmental revenues.

In the 2011 session, the Legislature has proposed a fee schedule that ameliorates some of the excesses of last session's court fee schedule. These proposed schedules slightly increase the base filing fee, but eliminate the multiplier for additional parties. This adjustment should reduce the outrageously large filing fees in complex civil litigation. The legislation also minimizes the number of add-on fees for additional steps in the litigation process such as fees for filing motions or submitting orders. Finally, significant changes are being proposed to the distribution of revenues raised from criminal fines, including traffic violations. Consideration is being given to reducing some of the higher penalties for more routine traffic violations because of concerns that the fines have become so expensive that police are reluctant to write citations.

Although some of the more pernicious aspects of the previous fee schedule may be eliminated, the

proposed fee schedule is designed to raise about the same amount of revenue for the biennium operations of the Oregon court system. As presently configured, HB 2710A and 2712 are expected to generate \$54 million for court operations over the next two years. The amount of revenue expended on our court operations is significant, especially when one understands that the system is largely funded by "user fees." Generally speaking, court operations do not receive property or income tax revenues. Counties do provide support for courthouses, facilities and security, but court operations such as clerks and judges are funded from fees largely paid by the parties involved in lawsuits or fined for violations or crimes.

Court filing fees are also used to pay for other court-related services. In 2010, nearly 20,000 low income and elderly Oregonians received legal aid services. Most of these services were for resolution of domestic disputes and violence. Legal issues surrounding housing and income support, such as social security, are the next largest service segments. This work is funded by a combination of state, federal and private partnerships. However, the largest single component of legal aid funding has been state court filing fees. Filing fees under HB 2710A are anticipated to raise an additional \$11.9 million for legal aid services. Other special programs receive a portion of court filing fees and fines. These programs include indigent criminal defense, courthouse libraries, and domestic dispute mediation services.

Although the process is far from perfect, Oregon's courts are well run and recent system changes have increased efficiencies. Conversion to an electronic filing system will continue to improve efficiencies. Nonetheless, the cost of providing justice to our society is substantial. It is critical that access to the courthouse be maintained for all members of society and it is remarkable that the most significant revenue source for judicial operations comes from "user fees" and not from the general fund.

If you are interested in learning more about pending legislation that may affect accessibility to Oregon's courts, please contact a member of the firm's Litigation Group.

PERSONNEL MANUALS – SO MUCH MORE THAN A PAPERWEIGHT

By David Briggs

Remember when only ear lobes were pierced? Remember when “military leave” meant a weekend each month with the local National Guard unit? Remember when cell phones needed to be carried in shoulder bags and couldn’t be hidden under a piece of paper or next to an office phone on a desk? Your personnel policies need to keep pace with the constant changes in the workplace and the law.

Open your bottom desk drawer. Under the old envelopes, travel receipts and interoffice memos . . . there it is . . . your company’s personnel manual. Blow the dust and crumbs off the cover. If it hasn’t been updated in the last couple years, it ought to be.

Now, you’re probably thinking, *Why should I spend time and money on reviewing and updating my personnel manual?* That is a good question. Especially since working on an updated manual sounds about as appealing as a flu shot does to my three-year-old son. But, just like there’s a good reason for the flu shot, there’s a good reason to update your manual.

A good manual, combined with proper employee training and frequent use by management, can protect your company from liability. Among other things, it can help provide protection from sexual harassment lawsuits or help defend against unemployment insurance claims. Not only does it set the rules for your employees, it also tells them the consequences of failing to meet your expectations. In short, a well-written and often-used manual can be one of your best defenses in a lawsuit and one of the biggest sources of frustration for an employee’s attorney.

Unfortunately, a bad manual can be even worse than having no manual at all. Ask yourself the following about your personnel manual: Did you get it from a friend or colleague? Did you piece it together from a few manuals you found searching the web? Did you get a one-size-fits-all manual from a national distributor? If the answer to any of

these questions is yes, you should receive no comfort in knowing that your manual is now in the hands of each of your employees (and their attorneys).

Using a second-hand or one-size-fits-all manual reminds me a little of George Costanza eating the chocolate éclair that he found sitting on top of a trash can. It looked ok. It didn’t have any apparent problems. Why not go for it? But, we all know how that turned out. Picking up an out-of-date manual can also lead to unwanted consequences far beyond violating social etiquette. So, let’s look at a few things that may go wrong when your personnel manual is hopelessly out of date:

1. **Failing to account for all of Oregon’s new laws.** Nearly every year, the Oregon Legislature passes new employment laws. Recent examples include laws on domestic violence leave, new religious accommodation obligations, nursing mother rest breaks, and others. You know you’re in for a rough stretch if your employee – or worse, your employee’s attorney – is educating you on your obligations under the law.
2. **Obligating yourself to provide more to your employees than the law requires.** You should carefully consider whether you want to obligate your company to more than the law requires. For example, did you know that the law doesn’t require you to pay out accrued but unused vacation at termination? Or, if you have fewer than 25 employees, the law doesn’t obligate you to provide family leave?
3. **Forbidding discussions on wages.** Many employees have argued that a prohibition on discussing benefits and wages is a violation of the National Labor Relations Act. These policies are best to be avoided.
4. **Accommodating employees with disabilities.** The definition of “disability” is much broader than you may realize. Do you have a policy? Does your policy clearly state that employees need to ask for an accommodation? Does it take into account

the new regulations issued this year by the EEOC?

5. **Including social networking policies.** Do you have a policy protecting the company? Did you know that the NLRB has filed charges against some employers for prohibiting too much criticism of the employer over social media sites? There is a happy medium between protecting your company's interests while honoring your employees' rights under federal law.

Getting your personnel manual up-to-date is a lot like getting a flu shot. It is not pain free, but it is a whole lot more pleasant than curing the problem after it arises. Saalfeld Griggs can help you update your current personnel manual or provide you a new manual on a flat-fee basis. Please contact a member of the firm's Employment Group if you are interested.

PROTECT YOUR WINE BRAND THROUGH TRADEMARK REGISTRATION

By Caleb Williams

Designing a label for your wine is an important step in promoting your product to the wine-drinking public. Before a consumer at a local grocery store can sip the wine behind the label, he or she must choose your bottle from among hundreds of others on the store's shelves. The name, colors and designs displayed on the label all create an impression of the wine in the mind of the consumer. Sophisticated wine buyers likely already have an expectation about your wine through the other statements on your label, such as the grape variety, appellation and alcohol content. Branding gives the winery the opportunity to create its own impression in the consumer of the winery and the wine.

Every time a wine drinker enjoys your wine, the value of your brand increases. The consumer will seek out your wine on future occasions, look for new releases and vintages from your winery, and perhaps even visit the winery or join your wine club. In order to protect the value you have created in your brand, the name, logo and the

design need to be carefully selected and then registered as a trademark.

Every winery must obtain a Certificate of Label Approval (COLA) from the Alcohol and Tobacco Tax and Trade Bureau (TTB) before wine can be sold under that label. The name of the wine, designs and artwork are included in the label that receives the COLA. Once the COLA is obtained, your wine can be sold in commerce under the brand set forth on the approved label. However, too many wineries fail to take the step of protecting their brand through trademark registration. The TTB does not regulate trademarks and therefore your brand is not protected by a COLA.

Some businesses mistakenly believe that registering a business name with the Secretary of State protects any trademark rights that the winery may have in its name. The registration of a business name with the state is primarily for the purpose of establishing a public record of who is operating a business in the state. It is true that others may not register the same name with the state, but this is only to keep businesses within the state distinguishable from one another. Registration of a winery name does not prevent another winery from selling wine under a similar name.

So, how do you protect the value of your brand? There are three important steps in protecting your brand, as follows: (1) select a unique brand; (2) search for competing uses of your brand; and (3) register your brand.

First, you must select a brand name, logo or design that is sufficiently unique to differentiate your wine from that of your competitors. Fanciful, arbitrary or suggestive names, as well as unique designs, are afforded the greatest trademark protection. Names that use the geographic location of the winery or a vineyard or a surname are not given the same level of protection until those names have acquired distinctiveness with consumers over time.

Second, before using the brand on a wine a winery should search various resources in order to confirm that the name or design is not already in use on

wine or a similar product such as cider, beer, or spirits. Certainly an internet search for a name is critical, but searches also should be made of the online TTB records and U.S. Patent and Trademark Office (PTO) records to see if a similar name is in use on a similar product. For a more comprehensive search, search companies will, for a fee, conduct searches of state trademark records, industry publications, yellow page advertisements and other resources. Failing to conduct a thorough search may result in your winery adopting a name or design that is already in use by another winery. This may create confusion among consumers. Even worse, it could result in a claim of trademark infringement, forcing you to discontinue the use of the brand. This could be costly if the vintages sold under that brand are popular, as the value in the brand would be lost.

After you have selected a brand and searched to make sure there are no similar brands in use, the final step is to apply for federal registration of the brand as a trademark with the PTO. Once registration is complete, your winery will be presumed to have the right to use the registered trademark on your wine throughout the U.S. and a presumption of the ownership of that trademark.

Vineyard owners whose vineyard produces grapes for a winery that then identifies the vineyard in its labeling should also be concerned about trademark protection. Certainly a vineyard can become recognized for the quality of fruit that it produces, creating value in the vineyard's name. Even though the vineyard owner sells its grapes to a winery, it needs to protect the goodwill it has created by registering its vineyard name as a trademark, and then licensing the name to wineries for use on the winery's label.

If you would like assistance in protecting your winery or vineyard's trademark, please contact a member of the firm's Winery, Vineyard & Brewery Industry Group.

2011 LEGISLATIVE UPDATE – ACCESSORY USES AT WINERIES

By Alan Sorem

The legal landscape governing wineries in Oregon continues to evolve. The Oregon State Senate and House of Representatives recently passed Senate Bill 829 and House Bill 3280 in their respective legislative chambers. If either of these bills becomes law, they will expressly authorize certain wineries in exclusive farm use zones to use the winery's facility for accessory uses, including full service restaurants, incidental retail sales, weddings, charitable or political fundraisers, and other private events. The new bills grant express authority for these accessory uses only to wineries that produce 150,000 gallons of wine annually, are located on vineyard properties greater than 80 acres in size with at least 50 acres of grapes, and also own a second vineyard with more than 80 acres of grapes.

The vast majority of wineries in exclusive farm use zones will not qualify under the new legislation, and the legislation raises questions about the continuing validity of accessory uses such as weddings, banquets and events for existing smaller wineries. Many such uses were previously authorized by local jurisdictions, but nonetheless fall outside of the scope of the current legislation. Every winery that offers accessory uses, or plans to offer accessory uses, should review its current business plan and any land use entitlements to determine whether or not the winery's operations are in compliance with existing local and state laws and how the new legislation will impact its business. Even if the new legislation is targeted toward uses at large wineries, owners of existing small wineries may be able to continue their existing accessory uses as nonconforming uses or perhaps receive compensation pursuant to Measure 49.

Interestingly, bills concerning smaller wineries and smaller event venues were initially proposed in the legislature but they have not passed either the House or Senate at this time. We will continue to monitor the progress of these bills and others up until the close of the legislative session, which is scheduled for June 30.

FIRM SEMINARS AND ANNOUNCEMENTS



Thank you to everyone who voted for us in the Statesman Journal's "Best of the Mid-Valley" competition. We are excited to announce that Saalfeld Griggs received the Gold Medal for best mid-valley law firm. This is a great honor and we appreciate the community's support.

Jennifer Paul was recently elected as Member at Large for the Mary Leonard Society. The Mary Leonard Law Society is the Marion County chapter of the Oregon Women Lawyers which is dedicated to transforming the practice of law and ensuring justice and equality by advancing women and minorities in the legal profession.

On June 1st, *Jeff Moore*, a partner in our Estate Planning Group, will make a presentation to the employees of Salem Electric. His presentation will cover basic estate planning tools and techniques. If you would like to arrange a similar presentation for your employees, please contact a member of our firm.

Saalfeld Griggs is proud to be a sponsor the upcoming annual convention of the Oregon Bankers Association. The convention will be held June 23-26. In addition, the firm recently helped sponsor Uncorked, a charity wine auction held to benefit Family Building Blocks. The funds raised at this event will enable children and parents to benefit from Family Building Blocks' therapeutic classrooms and home visits.

At this time we do not have any seminars scheduled. Please continue to check our website for new announcements and upcoming seminars.