BUSINESS BRIEFS

Legal Developments Affecting Business

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ESTATE PLANNING MYTH BUSTERS

By Bob Saalfeld

Clients sometimes make assumptions about their estate plan that can cause problems at a later date. If you can avoid making such assumptions, you will save yourself and your family time, money and hassles. Let's see if you can guess if the estate planning assumptions listed below are true or false . . .

- ❖ If two of your children don't get along now, they will get along better after you die if you name them Co-Trustees in your estate plan.
- ❖ Your loved ones will be able to easily locate where you keep your estate planning documents, asset titles, financial records, passwords, etc.
- ❖ Your spouse won't change his or her Will and give your property to a new spouse after you die.
- ❖ Your children will always pay back the loans that you make to them.
- ❖ Your children will enjoy being co-owners of the same business or piece of real estate after you die.
- ❖ If you give money to your child because his or her business needs cash you will save the business.
- ❖ None of your children will mind if you gift to their siblings.
- ❖ Wills avoid probate.
- ❖ Living Trusts are not subject to your creditors.
- ❖ If your spouse is a not a citizen of the United States you can transfer any amount to them without gift tax or estate tax.
- ❖ It is acceptable to name minors as outright beneficiaries on your life insurance and retirement accounts.
- ❖ You can bequeath an unlimited amount to grandchildren without generation-skipping tax.
- ❖ If you put your house in joint names with a child it will be safe from your child's creditors, qualify for the full capital gain exclusion on sale, and won't be a gift for gift tax purposes.
- ❖ You can bequeath assets to a disabled child who is on Supplemental Security Income ("SSI") without loss of these government benefits.

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- Your children don't need to name Guardians or Trustees for their minor children.

- If you get divorced you don't need to update your estate plan. Your ex-spouse will act reasonably if they remain a beneficiary on your life insurance.

- You don't need to name contingent beneficiaries on your life insurance or retirement plans.

- You have a long time to sell assets to pay death taxes.

- If you want to amend your Will you can just cross out provisions and make handwritten insertions.

- Your Will or Trust covers all your property so you don't need to coordinate your pension, IRA, and life insurance with your Will or Trust.

- The life insurance you own passes death tax free to your beneficiaries.

- If you would like to protect the inheritance of a child who is getting a divorce, you can just leave the child's inheritance to them outright, instead of in trust.

- You will lose control if you place your assets in a Revocable Living Trust.

- You don't need a Living Trust if you have under $1 million in assets because probate is only for large estates.

- If you name your estate as beneficiary on your life insurance that means that it will not go through probate.

- If you are a co-owner of a business you don't need a Buy-Sell Agreement to address issues like how each co-owner can transfer their interest during life or at death and how the surviving co-owners can purchase a deceased owner's interest.

- You don't need to put much thought into who should be your Personal Representative and Trustee.

- If you are married and have a combined estate over the death tax exclusion ($1 million in Oregon) you can save death tax for your children by leaving everything to your spouse outright, instead of to a Bypass Trust.

- By giving a lot of money after your death to your children who are not yet mature, your children will mature faster.

- If you have a family business the best succession plan is to simply die in the saddle.

- It is better to keep your children in the dark about your estate plan and let them be surprised.

- Your children will easily come to an agreement regarding the use of a vacation home, including when it can be used and by whom, whether or not a child can will their share in the home to a spouse, whose kids can use it without the parents being there, how to handle purchases and expenses, etc.

- An irrevocable trust means a trust you can readily revoke.

- You can wait to update your estate plan until after you are admitted to the hospital. You will be more relaxed and clear thinking lying down.

If you have ever assumed any of the above about your estate plan, you should revisit your plan now to avoid the problems that will arise down the road. Please call a member of our Estate Planning Group if you would like more information.

HEALTHCARE REFORM: CHANGES FOR THE NEW YEAR

By Steve Hitchcock

The Patient Protection and Affordable Care Act (known as the "PPACA" or the "Health Care Reform Act") brought with it a wholesale change in the way health care will be delivered in our country. While the majority of news coverage has focused on other, perhaps more controversial, provisions of the PPACA, employers should be aware of two provisions of the PPACA that may affect the health-related benefits that are currently offered to employees.

Simple Cafeteria Plans

One feature of the PPACA that may benefit employers is the ability to adopt a new "Simple Cafeteria Plan." These plans offer employers the opportunity to provide tax-free benefits to its highly compensated employees ("HCEs") and key employees. Under pre-PPACA law, many employers either didn't have cafeteria plans or significantly restricted the benefits offered to owners and other key personnel through the cafeteria plan because of non-discrimination requirements. The new Simple Cafeteria Plan offers an alternative that will allow owners and higher paid employees to participate fully in cafeteria plans.

Cafeteria plans are plans that offer employees the ability to obtain certain benefits on a pre-tax basis rather than receiving cash. The most common benefits offered in a cafeteria plan are the ability to purchase health insurance on a pre-tax basis and the ability to participate in flexible spending accounts through the plan. Most cafeteria plans offer health flexible spending accounts ("Health FSAs") which allow employees to contribute a portion of their salary into an account on a pre-tax basis and then be reimbursed for eligible medical expenses. This can result in significant tax savings on behalf of the employee. Also, because the employee defers salary on a pre-tax basis, the plan offers tax advantages to the employer since those deferrals are not subject to FICA or Medicare taxes.

Federal law requires that cafeteria plans not discriminate in favor HCEs or key employees. Generally, a cafeteria plan discriminates in favor of HCEs if the plan favors HCEs as to eligibility to participate, contributions, or benefits received under the plan. A cafeteria plan discriminates in favor of key employees if more than 25% of the total of the nontaxable benefits provided to all employees under the plan is allocated to key employees of the company.

Smaller employers generally have a higher concentration of HCEs or key employees, and therefore it can be difficult to satisfy the non-discrimination requirements of cafeteria plans. This can make it difficult to justify the cost of maintaining a cafeteria plan since the plan is unable to offer benefits to HCEs or key employees.

Now, employers with fewer than 100 employees are able to offer a Simple Cafeteria Plan, in which the non-discrimination requirements of a cafeteria plan are treated as satisfied so long as the plan complies with new rules relating to eligibility and employer contributions. The employer contribution rules require an employer to make either (1) a uniform "non-elective" contribution for all eligible employees in the plan, or (2) a "matching" contribution for all eligible employees who make a contribution to the plan themselves. A non-elective contribution is a contribution made by a employer regardless of whether an employee elects to make a salary reduction contribution themselves. If the employer elects to provide non-elective contributions, the employer must offer a uniform percentage contribution on behalf of all employees of no less than two percent of the employee's compensation.

The alternative to the non-elective contribution is for the employer to make a "matching" contribution, in which the employer offers to match the employees' contributions to the cafeteria plan. The amount that the employer must contribute is limited to the lesser of (a) six percent of the employee's compensation, or (b) twice the amount of the salary reduction elected by the employee. To illustrate the matching component of the plan, if an employee makes $20,000 per year and elects to contribute 5% of his salary to a Simple Cafeteria Plan, the employer is required to contribute an amount equal to 6% (or $1,200) of the employee's salary to the plan. However, if the employee elects to contribute 2% (or $400) of his salary to the cafeteria plan, the employer would only be required to contribute an amount equal to 4% of the employee's salary (or $800, two times the amount the employee contributed himself).

The Simple Cafeteria Plan must also comply with certain eligibility requirements. Generally, if an employer wishes to adopt a Simply Cafeteria Plan, it will need to allow employees to participate if they have worked for the employer for at least one year, are at least age 21, and have worked at least 1,000 hours during the prior year. There are some exceptions to the eligibility rules that may allow employers to exclude certain classes of employees from the plan (e.g., employees that are part of a collective bargaining agreement if there is evidence that benefits conferred as part of the cafeteria plan were part of the good faith bargaining between the employees and the employer).

If your company has not adopted a cafeteria plan because of non-discrimination restrictions or if your company has a cafeteria plan and has had trouble meeting the non-discrimination requirements, the new Simple Cafeteria Plan may be a cost effective way to provide additional benefits to your employees while providing tax advantages to both your company and your employees.

Over-the-Counter (OTC) Drug Reimbursements and Debit Cards

Beginning on January 1, 2011, participants in Health FSA's and health reimbursement arrangements ("HRAs") are no longer able to receive tax-free reimbursements for OTC drugs unless they are prescribed by a physician. Reimbursements for medicine and drugs will be restricted to prescribed drugs, insulin and OTC drugs that are prescribed by a physician. Depending on how your cafeteria plan (if it offers a Health FSA) or HRA treats reimbursements for OTC drugs, it may need to be amended to comply with the new rule. Plans must be amended by June 30, 2011 and employers must start complying with new rules on January 1, 2011. This effective date applies whether the plan year is a fiscal or a calendar year.

Some Health FSAs allow participants to use debit cards to pay for eligible medical expenses. Effective January 15, 2011, such debit cards may be used to purchase OTC medicines only if certain requirements are met, such as the OTC medicine must be dispensed by a pharmacist and a prescription number must be assigned to the OTC medicine.

Please contact a member of our Employee Benefits Group if you need to amend your plan to address the new requirements relating to OTC drugs or if you would like to find out more about Simple Cafeteria Plans.

DECODING MERS: WHAT IT POTENTIALLY MEANS FOR RESIDENTIAL REAL PROPERTY

By Andrew Naylor

What is MERS?

There are many problems created by the current financial crisis, ranging from increasing foreclosure rates to chronic unemployment. A problem that has, so far, avoided significant attention concerns a growing majority of court opinions challenging title to real estate held by MERS, or the Mortgage Electronic Registration System. MERS is an entity created to avoid local recording fees. Before MERS, whenever a creditor recorded a mortgage in local real property records, the county charged a recording fee. This was also true whenever a mortgage was assigned from one party to another.

Following the creation of MERS, it is now common practice for the lender who originated a residential real property loan to immediately assign that loan, and mortgage, following origination. Ultimately, financial institutions began bundling these assigned mortgages together and placing them into a trust. The trust produced income from the bundled mortgages which, in turn, were sold to investors. MERS was created to avoid the local recording fees created in this process. By creating an entity that, on paper, appeared to "own" all of the mortgages, assignments could occur without the need to record those assignments with the county. Instead, MERS is designed to track the assignments internally and charge a transactional fee for its efforts. Lenders would retain the original promissory notes and other rights, but could then sell their rights to other parties who were members of the MERS system without recording the assignment and, therefore, without having to pay a recording fee.

So, What's the Problem?

MERS is not typically listed as the beneficiary under a mortgage. Rather, MERS is designated as a "nominee." Thus, the issue becomes whether the designation of MERS as a nominee has any legal significance. Recent decisions within Oregon have held that a "nominee" does not have any legal meaning. Rather, it is an internal designation used to track ownership of a mortgage. A recent opinion by one Oregon court stated that "[t]he relationship of MERS to [the creditor] is more akin to that of a straw man than to a party possessing all the rights given a buyer." The Court, when addressing legal notice issues, concluded that because the listing of MERS as a nominee lacked any legal meaning, notice to MERS was unnecessary.

In a subsequent opinion, a different Oregon court granted a debtor's motion for a temporary restraining order to prevent the foreclosure of her home. The debtor argued that MERS did not have any right to assign the trust deed because it lacked any authority to assign the underlying promissory note. Thus, the creditor who received the deed of trust by assignment from MERS had no authority to foreclose because the assignment was invalid. The court, in granting the restraining order, noted the growing line of cases holding that MERS lacks any legal authority to act on behalf of the original creditor. Thus, the court believed that the debtor had shown she could likely succeed on the merits of her claim that MERS was not permitted to assign the debt and thus the party seeking to foreclose had no right to do so.

What Do These Decisions Mean?

The impact from the ever-growing number of court decisions holding MERS lacks any real legal authority is difficult to assess. However, one potentially devastating result is a cloud on title that MERS-related residential real property titles may now carry. For example, in cases where MERS is the party foreclosing the mortgage, the foreclosure itself may be invalid. If MERS lacks any legal authority, then it cannot foreclose upon a mortgage. It is unclear what the full impact of MERS foreclosures will be and there remain countless unanswered questions.

For example, if the sale is void, but an innocent buyer purchased the property, is that purchase still valid, or is the entire transaction undone? If a foreclosure is invalid, or if the underlying assignments were invalid, parties could be establishing legal title for years to come. Acquiring clean title to purchased properties that have been somehow tainted by MERS may become a costly and time consuming endeavor. While most title companies have continued to issue title insurance to purchasers of MERS foreclosed properties, they are doing so on a case-by-case basis. Depending upon who is foreclosing and what has been represented, title insurance to purchase the property may not be available.

In sum, the full impact of the growing MERS court decisions has yet to be seen. For parties who have purchased properties sold through a foreclosure, it is critical that the potential impact of a MERS-affiliated assignment be addressed. Likewise, creditors holding mortgages or deeds of trust either purchased or assigned through MERS, or upon which MERS is designated as a nominee, need to carefully evaluate whether such instruments are currently enforceable. In addition, creditors seeking to provide "notice" to a title holder with MERS as a "nominee" need to carefully consider whether notice to MERS is sufficient.

The attorneys in our Litigation Group can help you evaluate whether MERS may impact your real property rights. If you believe you may be impacted by the MERS issues discussed in this article, and the growing number of courts reviewing this issue, please contact our office to discuss the matter in greater detail.

Protect Your Property From Exactions: Act on the Local Level

By Alan Sorem

The Oregon Supreme Court has recently reduced protections from unlawful state and local exactions previously granted to Oregonians by the United States Supreme Court decision in *Dolan v. City of Tigard*. An exaction is a land use or building permit condition of approval (like requiring the applicant to construct a new signalized intersection) that requires a property owner to forfeit real property, personal property, money, or a combination of the three in order to receive permission to use his or her property in an otherwise lawful manner. Property owners are exposed to unlawful government demands when they apply for building or land use permits because the local or state government can force them to either accept a denial of their application or give the government the demanded money or real property. Former Oregon Supreme Court Justice Edwin Peterson explained the problem of exactions in this manner:

> *I am convinced that [the City of] Tigard decided that it needed a pedestrian/bicycle pathway and a flood control greenway easement along Fanno Creek. One way of getting these, free of cost, is by requiring all owners who propose to change the use of their property to convey the easements to the city. That is what happened in this case.* Dolan, 317 Or. 110, 129-30 (1993).

On September 23, 2010, the Oregon Supreme Court ruled that the protections in *Dolan* no longer apply to Oregonians outside the scope of real property dedications. While our courts refuse to protect property owners from unfair exactions, local governments still have an opportunity to foster development in our communities and affirm that our cities and counties remain "open for business."

Along with the Marion & Polk Home Builder's Association, Salem Chamber of Commerce, and Strategic Economic Development Corporation (SEDCOR), we have requested the City of Salem and Marion County consider adopting the following text amendment as a part of their current development code updates:

> Conditions of approval may only be imposed on land use decisions when deemed necessary to ensure compliance with the applicable standards and criteria. Any conditions attached to approvals shall be directly related to the impacts of the proposed use or development and shall be roughly proportional in both the extent and amount to the anticipated impacts of the proposed use or development. Findings in the land use approval shall indicate how the required dedications, improvements, or other conditions of approval are roughly proportional to the impact.

The adoption of the above text would maintain the current planning practices in our local communities that have been in place for over 15 years.

The City of Bend, Coos County, and Clatsop County have already adopted similar language in their respective development ordinances. If our local governments join these jurisdictions, they will ensure our community remains competitive with other communities inside and outside of Oregon that provide property owners and developers the needed cost predictability for their projects. Developers and property owners recognize they must pay their "fair share" for their impacts on public services, but they must not be forced to pay for disproportionate and unrelated exactions.

If you would like to find out more about supporting the efforts to add the text amendment that will protect your real property, please contact a member of our Real Estate and Land Use Group.

FIRM SEMINARS AND ANNOUNCEMENTS

Hunter Emerick was recently elected to the Board of Governors for the Oregon State Bar. He will serve a four year term as a director for the state bar association. The Board of Governors consists of fourteen lawyers elected from seven regions and four public members appointed by the Board. The Board governs the bar, determines the general policies of the bar and approves its budget each year. The Board is charged with the executive functions of the state bar, including attorney licensing and admission.

Freeman Green and ***Jennifer Paul*** have joined Saalfeld Griggs PC as associate attorneys. Freeman is a member of the firm's Estate Planning Group. His practice focuses on estate planning, protective proceedings, and probate and trust administration. Freeman joins our firm with over two years of experience in estate planning. He graduated from Brigham Young University and received his law degree from the University of Iowa College of Law. He is licensed to practice in both Oregon and California.

Jennifer is the newest member of the firm's Litigation Group. She grew up in Salem and has strong ties to our community. She graduated *magna cum laude* from the University of Oregon, Robert D. Clark Honors College, with a B.A. in Public Relations. Jennifer received her law degree from Willamette University College of law in 2010.

Nate Boderman recently received the Leadership in Energy & Environmental Design (LEED) Green Associate credential from the Green Building Certification Institute. The LEED credential demonstrates an expertise in the area of green building, with an emphasis on green design, construction, and operations. Nate is the first and only attorney in Salem and the Willamette Valley to have received any LEED-based credentials, and one of only 17 attorneys in Oregon.

David Briggs was recently elected to serve on the Marion County Bar Association's Board of Directors. The MCBA's purpose is to promote a spirit of cordiality and mutual respect among its members and to increase the usefulness and efficiency of the Bar and the quality of legal services to the public.

We are proud to announce that Saalfeld Griggs PC recently brought in over 500 pounds of food for Marion-Polk Food Share. Marion-Polk Food Share is a non-profit charity providing food for people at risk of hunger in Oregon's mid-Willamette Valley.

Please continue to check our website for new announcements and upcoming seminars.