



LAMSON, DUGAN AND MURRAY, LLP
ATTORNEYS AT LAW

BUSINESS COUNSELING

UPDATE

S P R I N G 2 0 1 0

A N D R E W T . C H A P E A U , E D I T O R

CONTINUING UNCERTAINTIES REGARDING FEDERAL ESTATE TAX EXEMPTION

As many of you are probably aware, under existing law, the Federal Estate Tax Exemption of \$3,500,000 per person expired on December 31, 2009. Under current law, there is no Federal Estate Tax for individuals who pass away during the calendar year 2010, but the exemption is scheduled to drop back to \$1,000,000 per person as of January 1, 2011.

Throughout most of the calendar year 2009, it had been anticipated that Congress would take appropriate action to simply extend the \$3,500,000 exemption indefinitely. However, that did not occur and the consensus of most of the better informed "experts" seems to be that Congress will take appropriate action sometime later this year to extend the \$3,500,000 exemption for a period of two years and make it retroactive to January 1, 2010. That continues to be our best guess, although the events in Washington, D.C. during the past six months make any guesstimate truly fraught with risk.

The only legitimate prediction that anyone can make is that with each passing day, it becomes less and less certain what Congress will do on a going forward basis.

In view of all of the uncertainties regarding a future estate tax exemption and, of course, a generation-skipping transfer tax exemption, many couples are asking what, if anything, they should be doing to change their existing estate planning documents. It is this writer's view that for most people, they will probably not wish to do anything until Congress takes some legitimate action to eliminate most of the uncertainties with respect to future tax law.

At the present time, there appear to be three options for couples to consider and each couple needs to make their own decision. The first option is to do nothing and hope that Congress takes some coherent action to reinstate the federal estate tax exemption which was in effect as of December 31, 2009. For couples with existing estate plans, much of their current planning has been done premised upon that underlying assumption.

The second option is to revise existing estate planning documents today in the hope that the federal estate tax and generation-skipping exemptions will be eliminated entirely, not only for 2010, but for future years as well. We believe that such a scenario is unlikely, but is clearly what our current law suggests at least for the calendar year 2010. The third option is to make a modest amendment to existing wills and/or trusts to directly address the current uncertainties. For example, most trusts could be amended to provide that if a decedent passes

INSIDE THIS ISSUE

CONSUMER CREDIT

Credit Card Act
Protects Consumers

ESTATE PLANNING

Continuing Uncertainties Regarding
Federal Estate Tax Exemption

IDENTITY THEFT

\$200,000 For Identity
Theft Victim

LENDING

Bank Violates Truth
In Lending Act

away at a time when there is a federal estate tax exemption in effect comparable to the exemption level that was operative for the calendar year 2009, their existing documents remain fully effective. However, a contingency provision could be provided to specify that if, at the time of a decedent's death there is no federal estate tax (or federal generation-skipping transfer tax) in effect, and such taxes are not reinstated on a retroactive basis to the time of the decedent's death, then the probate or trust property shall be disposed of in accordance with alternate provisions which presumably are not premised primarily upon estate tax considerations which were in effect at the time the original documents were prepared.

Individual couples will need to make their own decisions based upon a myriad of personal tax and sometimes business considerations which obviously vary from couple to couple. No two situations are exactly alike. Consequently, it is difficult to generalize about what action may be appropriate for one married couple versus another. The most common problem that is likely to occur during this period of uncertainty is that existing estate planning documents that rely on formulas tied to the federal estate

tax exemption will many times result in unintended consequences potentially causing intended gifts to fail. For example, in most of the documents which this writer has reviewed, if a decedent passes away during the current calendar year, the marital deduction portion of a trust will often be over-funded, many times to the detriment of beneficiaries of the credit shelter carve out trusts.

There is a legislative bill pending in the Nebraska legislature which has been introduced by State Senator Brad Ashford (LB 1047) which is intended to provide a default rule of construction for any decedent who does not or could not change his/her estate plan to account for a year when there would be no federal estate tax or generation-skipping transfer tax. The language of LB 1047 provides, in substance, that a will or trust that contains a formula referring to an estate tax exemption or other similar exemption, or that measures a share of an estate or trust based on the amount that can pass free of federal estate tax, or federal generation-skipping tax or a similar provision of tax law, shall be deemed to refer to the federal estate and generation-skipping transfer tax laws as they applied with respect to estates of decedents dying prior to December 31, 2009. The default rule is intended to protect the intent of those decedents who used such formulas which were in effect prior to December 31, 2009 and thereby avoid some of the unintended

consequences referred to in the preceding paragraph. (LB 1047 is now on final reading and it appears as though it will be enacted.)

We would welcome the opportunity to talk with you about your current estate planning documents to ensure that they properly carry out your intentions in view of the prevailing uncertainties.

Robert J. Murray

CREDIT CARD ACT PROTECTS CONSUMERS

Recently, the Credit Card Accountability, Responsibility, and Disclosure Act of 2009 (the Act) went into effect. Congress saw a pressing need to protect consumers from abusive fees, penalties, interest rate increases and other unjustified changes in the terms of credit card accounts. A new hike in the penalties for violators of the Act will provide extra incentive for compliance.

A few of the highlights of the Act are:

- The Act prohibits rate increases on existing balances due to "any time, any reason" or "universal default," and severely restricts retroactive rate increases due to late payments.
- Contract terms must be clearly spelled out and must remain in place for all of the first year. Companies may continue to offer promotional rates with new accounts or during the life of an account, but these rates must be clearly disclosed and must last at least six months.
- Institutions are required to give



credit card holders a reasonable time to pay the monthly bill—at least 21 calendar days (up from 14) from the time of mailing.

- Credit card companies are required to apply excess payments first to the highest interest balance (usually for new purchases), as most consumers would expect them to do but which some companies have not done because it is not as profitable.
- The Act ends the confusing practice by which issuers use the balance in a previous month, even if all or a part of it was paid off, to calculate interest charges on the current month. Many consumers likely were not even aware of this particular practice, called “double-cycle” billing.

Credit card holders will find it easier to avoid over-limit fees because institutions now have to obtain a consumer’s permission to process transactions that would place the account over the limit. So that consumers can better avoid unnecessary costs and manage their finances, creditors must give consumers clear disclosures of account terms before consumers open an account and clear statements of the activity on consumers’ accounts afterwards.

The Act contains new protections for college students and young adults, formerly a favorite target for blanket marketing of credit cards. Among other things, there is a new requirement that no card be issued to anyone under 21 unless

he or she submits a written application, with either the signature of a co-signor over 21 or information showing independent means for repaying the credit card debt.

BANK VIOLATES TRUTH IN LENDING ACT

A husband and wife who operated a day-care business out of their home decided to take out a new mortgage on the home. Over the 10 years that they had owned the business they had taken corresponding deductions and depreciation on their tax returns to account for the business run from the home. As calculated for tax purposes, approximately 17% of the home was devoted to the day-care business, even though during the hours when the day-care business was open about 52% of the home’s square footage was devoted to that use.

The homeowners came to realize that their lender had dramatically increased their monthly payments and had sent the loan documents to them when it was too late by law for them to change their minds (more than three days after they signed the papers). They sued the bank under the federal Truth in Lending Act (TILA), asking that the loan transaction be rescinded. Among other things, TILA requires lenders to provide particular disclosures to borrowers of “high-rate” loans when points and fees exceed 8% of the amount borrowed. The bank had not made these disclosures to the borrowers at least three days ahead of the

transaction, as required by TILA.

The bank’s response was two-pronged. First, it argued that TILA did not even apply to the case because of an exemption in the law for extensions of credit primarily for business or commercial purposes. Second, the bank took the position that the points and fees that the homeowners were required to pay could not count toward the 8% threshold because the homeowners had folded those costs into the loan instead of paying them up front in cash. A federal trial court sided with the homeowners on both points, allowing their case to go to trial.

Regarding the bank’s claim that the “business purposes” exception in TILA should apply, the key fact was that, properly calculated, only a small percentage of the home was devoted to the business, thus defeating any attempt to argue that the loan was primarily for business or commercial purposes. As for the fact that the points and fees were financed, not paid in cash, this method of payment was of no consequence for purposes of meeting the 8% threshold. The applicable statutory language says only that the points and fees must be “payable” by the consumer at or before closing. The borrowers did bear the costs of the points and fees at the time of closing, no matter whether they were being paid then, deducted from loan proceeds, or, as happened here, added to the amount to be financed over time.

Working in favor of the borrowers on both points was the fact that TILA is a remedial statute to be construed and applied so as to achieve its goals of assuring the meaningful disclosure of credit terms and avoiding the uninformed use of credit.

**\$200,000 FOR IDENTITY
THEFT VICTIM**

Nicole discovered that someone with a name very similar to hers had stolen her identity and opened fraudulent accounts in her name and under her Social Security number. This was only the beginning of a long and arduous saga in which she took all of the recommended steps to rectify the problem, but nonetheless was beset by financial and emotional stresses over several years before the matter was finally resolved. Ultimately, she secured some relief in the form of a substantial jury verdict against a credit reporting firm. The firm bore no responsibility for the identity theft itself, but it had repeatedly compounded the impact of the theft by mishandling information about Nicole. Nicole sued the firm under the federal Fair Credit Reporting Act (FCRA).

Although it did not do so intentionally, the credit reporting firm had caused Nicole's ordeal to be more protracted, and to

have more consequences for her finances and general well-being, by mistakenly putting her address and Social Security number on credit files set up by the identity thief. What is worse, the firm did this a few times over several years, even after having been informed of the problem. Because of the erroneously adverse credit files, Nicole was sometimes denied credit, such as for a home mortgage. On other occasions, she was offered credit only on very disadvantageous terms because she was perceived as such a high risk. Nicole did have some previous credit problems of her own making, but the "infection" of her credit information by the files created by the identity thief made her look even worse to lenders.

A key issue in the firm's unsuccessful appeal from the jury verdict was whether Nicole had shown enough to recover a large sum not just for out-of-pocket losses, but also for emotional distress. The federal appellate court left the verdict undisturbed. The jury had not indicated what portion of its total award was attributable to emotional injuries, but, in any case, the court was satisfied that the award was not excessive in light of the evidence offered at trial.

Nicole had been made to spend literally hundreds of hours, often while having to miss work, trying to rectify the tangled mess created by the firm. The record showed that as she dealt with the credit reporting service and tried to cope with the rippling effects of its errors, Nicole often was uncharacteristically upset with friends, family members, and co-workers. She was beset by frequent headaches, sleeplessness, and even such symptoms as bad skin and hair loss. In short, Nicole became a wreck emotionally and even physically. For its role in causing it all, the credit reporting firm had to pay.

BUSINESS DEPARTMENT

Frank J. Barrett
Matthew J. Bock
Andrew T. Chapeau
Lawrence F. Harr
C.E. Heaney, Jr.
Craig F. Martin
Robert J. Murray
Jon S. Reid
Frank M. Schepers
Daniel J. Waters

Anna C. Palmer, Certified
Paralegal



LAMSON, DUGAN AND MURRAY, LLP
ATTORNEYS AT LAW

LAMSON, DUGAN AND MURRAY BUILDING
10306 REGENCY PARKWAY DRIVE
OMAHA, NEBRASKA, USA 68114-3743