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**PROPER ASSET TITLING  
AND BENEFICIARY  
DESIGNATIONS ARE KEYS  
TO SUCCESSFUL  
ESTATE PLAN**

A common misconception is that one's estate planning is completed upon the signing of his or her estate planning documents. However, for an estate plan to function optimally, assets need to be titled properly and the correct beneficiaries must be designated on all insurance policies and retirement plans.

The proper titling of assets is one key to an effective estate plan. Occasionally, assets are jointly titled between spouses or between a parent and a child. This causes the assets to pass to the surviving joint owner upon the first joint owner's death. Although such titling may simplify and expedite the estate administration process, it may cause serious defects to the overall estate plan. For example, if assets are jointly titled between spouses, the assets will automatically pass to the surviving

spouse upon the first spouse's death. Depending on the respective values of the jointly titled property and the estate as a whole, such joint titling may cause a "bunching-up" of the assets. This, in turn, may cause the federal estate tax exemption to be underutilized or wasted, greatly increasing potential estate tax liability.

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Another potential problem with jointly titled assets may occur when the assets are titled jointly between a parent and a child. Because both joint owners are seen as owning the whole, creditors of the child may be able to seize all of the assets so titled. This may cause a serious detriment to the estate of the parent while the parent is still living.

Proper beneficiary designations for insurance policies and retirement plans will help ensure that potential estate tax liability is minimized. A will or trust can only control the disposition of life insurance proceeds or retirement assets if the proper beneficiary designation is made. Many times this means designating a spouse as the primary beneficiary and a revocable trust that will become operative upon death as

**INSIDE THIS ISSUE**

**BANKRUPTCY**

Bankruptcy Terminology And Practice  
(and A Sneak Preview Of The New  
Bankruptcy Law)

**EMPLOYMENT**

Lessons From The Bench

New FTC Regulations On Proper  
Destruction Of "Consumer Information"  
Will Impact Employers

**ESTATE PLANNING**

Proper Asset Titling And Beneficiary  
Designations Are Keys To  
Successful Estate Plan

Federal & State Transfer Tax Exemptions  
Require Estate Plan Reviews

the contingent beneficiary. Depending on the value of the insurance proceeds and retirement assets, the surviving spouse may elect to disclaim some or all of the proceeds so the state and federal estate tax exemptions are properly utilized. This added flexibility will help minimize potential estate tax liability.

Further, the beneficiary designated in a retirement plan will determine the period for payout of distributions from the plan. Accordingly, naming the proper beneficiary can decrease potential tax liability.

To get the most out of your estate plan, assets must be titled properly and the correct beneficiaries must be designated. If you have not recently reviewed the titling of your assets or your beneficiary designations, it is worth the time to review them and make sure they reflect your wishes and comply with your overall estate plan.

*Andrew T. Chapeau*



## **NEW FTC REGULATIONS ON PROPER DESTRUCTION OF “CONSUMER INFORMATION” WILL IMPACT EMPLOYERS**

As part of its comprehensive efforts to combat identify theft, the Federal Trade Commission (FTC) has promulgated regulations effective June 1, 2005 for the proper destruction of “consumer information.” The FTC regulations, in part, require proper disposal of credit and “consumer” information, which includes information obtained through background checks of employees conducted by third parties and notes prepared by a supervisor or human resources manager based upon information contained in the report. The rules are intended to decrease the risk of consumer fraud created by the improper disposal of consumer information.

While the regulations do not require any specific disposal methods, the regulations provide examples of the types of disposal processes that would be reasonable. For example, paper documentation containing consumer information could be placed in locked trashed bins until the documents are shredded or burned. The new regulations do not create document retention periods. Accordingly, employers must look elsewhere when

deciding how long to retain records containing consumer information. We generally tell employers to maintain records relating to the hiring process for two years or more.

Employers who do not comply with these regulations, and whose employees or job applicants ultimately are victimized by identify theft as a result, could face a lawsuit seeking to enforce remedies. In the case of negligent violations, the remedies are limited to actual damages and an award of attorneys fees and costs. Willful violators may be subject to statutory damages of up to \$1,000 per violation or to an award of actual damages, whichever is greater, and attorney’s fees and costs.

All employers who possess or maintain consumer information must begin to develop reasonable measures to dispose of such information in order to protect against the unauthorized access or use of the information. The firm’s labor and employment attorneys are ready to assist you with this effort.

### **“Summary of Rights” Under FCRA Has Been Updated**

The Federal Trade Commission (“FTC”) has updated certain documents often required when conducting background checks of employees and job applicants. Most notably for employers using a third party consumer reporting agency to

conduct background checks, the summary of rights of consumers under the Fair Credit Reporting Act has been updated.

This summary is required to accompany a pre-adverse action notice. It must be given to an individual, along with the consumer report the employer is relying upon, when there is the possibility the employer will make a decision adverse to the individual applicant or employee. A copy of the FTC's updated summary of rights can be downloaded from the Federal Trade Commission website. [Http://www.ftc.gov](http://www.ftc.gov)

#### **IRS Permits Extension of FSA "Use-It-Or-Lose-It" Deadline**

The Internal Revenue Service ("IRS") issued new guidance that allows health care and dependent care flexible spending accounts under cafeteria plans or "FSAs" to permit participants to be reimbursed for expenses incurred as late as 2-1/2 months following a particular plan year. Prior IRS guidance required unused FSA balances to be forfeited at the end of the plan year. This was referred to as the "use-it-or-lose-it" rule. Plan sponsors that wish to offer the grace period must amend their plan documents by the end of the plan year. Please contact one of the firm's labor and employment attorneys if you need assistance in amending your cafeteria plan.

*Brian J. McGrath*

## **BANKRUPTCY TERMINOLOGY AND PRACTICE (and A SNEAK PREVIEW OF THE NEW BANKRUPTCY LAW)**

With the recent passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, to be effective on October 17, 2005, this is a good time to remind our readers of the basics of the bankruptcy process, the nature of our practice and the services provided to our clients.

**Chapter 7** is the "straight bankruptcy" or liquidation option for individuals and other entities. Chapter 7 results in the discharge, or elimination, of certain debts. However this chapter, especially as it affects consumer debt, has undergone significant revision by the new law. (We will be doing an article on the new law for the next issue of the newsletter.) We do very little consumer/individual debtor work but often represent clients who are creditors of Chapter 7 debtors.

**Chapter 11** is the reorganization chapter, most often for businesses, but theoretically available to individuals. A successful Chapter 11 case results in a confirmed (approved by the court) plan of reorganization. We have handled the occasional Chapter 11 case for a debtor client, but more frequently represent a bank or

other creditor in connection with a case.

**Chapter 12** is the "family farmer" chapter and is available only to farmers. We typically do not do any debtor Chapter 12 work but often represent creditors in connection with Chapter 12 cases.

**Chapter 13** is the "individual debt adjustment" chapter and is available only to individuals with regular income whose debts do not exceed certain levels, and generally requires a three- to five-year plan for repayment of some percentage of the debtor's unsecured debts. Chapter 13 will become more significant and more utilized as a result of the new bankruptcy law. Based on income and other objective standards, many more debtors will be required to file Chapter 13 rather than Chapter 7. We generally do not handle Chapter 13 cases for individual debtors but regularly represent creditors in connection with such cases.

Chapter 13 provides a good illustration of the changes the new law will bring. Under current law, certain obligations cannot be discharged or eliminated under Chapters 7, 11 or 12 but can be eliminated under Chapter 13. These are the so-called "fraud-based obligations" which include debts for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained

by fraud, as well as debts arising as a result of fraud in a fiduciary capacity, embezzlement, or larceny. Under current law, provided a Chapter 13 debtor completes his or her payments under an approved Chapter 13 plan, fraud-based debts such as those described above are eliminated, unlike the result under Chapter 7, 11 or 12. Under the new law, such obligations will not be discharged or eliminated, notwithstanding the debtor's completion of payments under the Chapter 13 plan.

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A **Proof of Claim** may be required to be filed in any of the chapters, although in a Chapter 7 the initial notice from the court will often advise creditors not to file a proof of claim unless ordered to do so, because the case appears to be a **no asset** case. There are specific requirements for claims

pursuant to statute and court rule, and proofs of claim should be prepared, or at least reviewed, by a bankruptcy attorney before being filed.

An **adversary proceeding** is a separate lawsuit filed within a bankruptcy case, with its own case number. It is governed by the Federal Rules and is much like any suit in federal court procedurally. Suits to recover "**preference**" payments made to creditors and "**fraudulent transfers**" are examples of adversary proceedings. There are many others.

The term "**trustee**" is the subject of some confusion. There is always a trustee in a Chapter 7 case. The trustee essentially succeeds to the debtor's rights in property when the case is filed, and is a significant player in any Chapter 7 case. There is almost never a trustee in a Chapter 11 case. Instead, the **debtor-in-possession** (the debtor) is the trustee of its assets for the benefit of its creditors. Chapters 12 and 13 have permanent trustees who monitor and administer the cases. The **U.S. Trustee** has general administrative responsibility for all bankruptcy cases and appoints other trustees.

We also often work with entities in an effort to resolve issues between a borrower and lender, or account debtor and creditor, outside of bankruptcy,

since bankruptcy can be a very expensive and protracted process. This is sometimes called a "**workout**."

The firm's library can assist with obtaining online information and copies of bankruptcy documents filed not only in this district but also in most districts around the country.

*Frank M. Schepers*

#### **FEDERAL & STATE TRANSFER TAX EXEMPTIONS REQUIRE ESTATE PLAN REVIEWS**

Much has been written about the increases in the federal estate and gift exemption equivalent. As a result of the Economic Growth and Tax Relief Reconciliation Act passed in 2001, the current \$1,500,000 exemption will be increased to \$2,000,000 for 2006 through 2008. The exemption is scheduled to rise to \$3,500,000 in 2010. As a result of these increases, many incorrectly believe that estate and gift tax planning is no longer an important concern.

However, many state estate tax exemptions are not keeping pace with the federal increases. The estate tax exemption in Nebraska, for example, remains fixed at \$1,000,000. The Nebraska estate tax cost on this \$500,000 difference is over \$31,000. Focusing solely on federal estate

taxes could cost a Nebraska couple over \$62,000 in local taxes that can be deferred or avoided altogether with continued planning.

Year	Federal Exemption	Nebraska Exemption
2005	\$1,500,000	\$1,000,000
2006	\$2,000,000	\$1,000,000
2007	\$2,000,000	\$1,000,000
2008	\$2,000,000	\$1,000,000
2009	\$3,500,000	\$1,000,000

The increases in the federal estate tax exemption also require review of more sophisticated estate plans that utilize generation-skipping trusts. A federal generation-skipping tax is imposed on gifts or estate transfers that skip a generation. This tax is in addition to the federal estate and gift tax. A generation-skipping transfer tax ("GST") exemption exists, however, and is currently set at



\$1,500,000. Like the federal estate tax exemption, the GST exemption is scheduled to increase and match the federal estate tax exemption over the next few years.

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Because many generation-skipping trusts are funded by a formula referring to the applicable federal GST exemption, the upcoming increases may result in over-funded bequests to grandchildren, with little or no assets passing to children. Accordingly, clients with estate plans that utilize generation-skipping trusts should review them carefully to make sure that their true objectives will be achieved.

Year	GST Exemption
2005	\$1,500,000
2006	\$2,000,000
2007	\$2,000,000
2008	\$2,000,000
2009	\$3,500,000

*Donald L. Erfmier, Jr.*

## LESSONS FROM THE BENCH

Lamson, Dugan and Murray's employment lawyers have had a number of recent successes in defending employers against discrimination claims arising out of involuntary terminations. Our attorneys were successful in persuading the court to dismiss the ex-employees' claims prior to trial because of documentation contained in an employee personnel file or documentation created by the employer to support its action.

In one of these cases, an employee filed a discrimination lawsuit after he was terminated for poor performance. The employee claimed that he was treated more harshly than non-minority employees only because of his minority status. In defending against this claim, we relied on documentation contained in the employee's personnel file which showed poor performance and documentation contained in other employees' personnel files to show the court that non-minority employees were treated in the same way.

Ultimately, the court found that the ex-employee provided no evidence that he was treated more harshly than non-minority employees and the employer's documentation showed that both minority and

non-minority employees received similar treatment for similar conduct, up to and including termination. As a result, the court refused to allow the matter to be heard by a jury.

In another case, LDM attorneys were successful in defending against a claim of discrimination after an employee was let go in a reduction in force (RIF). The employee claimed that she was terminated because she was a woman and that the company's financial circumstances did not merit a RIF. In defending against this claim, we were able to show the court that the company's financial circumstances necessitated the RIF and that other employees were similarly treated. The court found the employer's documentation of its RIF persuasive and dismissed the claim.



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***For that reason,  
we recommend  
that employers document the  
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In both of these cases, the successful defense of the ex-employees' discrimination claims relied heavily on the employers' documentation explaining the reasons for the action. In our experience, the court will find documentation that was created around the time of the employment action much more persuasive than documentation created after a lawsuit has been filed. For that reason, we recommend that employers document the reasons for termination or disciplinary action taken against the employee at the time action is taken. This documentation can be as simple as a memo to the file or something more formal such

as a business plan involving a reduction in force. You should be careful not to over-document a file, because a jury may see the over-documentation as an attempt to hide discrimination. Craig Martin and Brian McGrath can answer any questions that you have about documenting terminations or disciplinary actions.

*Craig F. Martin*

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