



LAMSON, DUGAN AND MURRAY, LLP
ATTORNEYS AT LAW

BUSINESS COUNSELING

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MATTHEW J. BOCK, EDITOR

LDM NEWSLETTER AVAILABLE VIA E-MAIL

Our newsletter is now available via e-mail. We currently mail our newsletter in written form and make it available on our website at www.ldmlaw.com and we will continue to do so. However, we now have the ability to send our newsletter via e-mail in .PDF format (an Adobe file format readable by downloading Adobe Reader free from www.adobe.com). If you would like to receive our newsletter via e-mail, please visit our website at www.ldmlaw.com. Go to our "Contact Us" page, fill out our short contact form and check the box indicating that you would like to receive our newsletter via e-mail. If you no longer wish to receive a paper version of our newsletter, please write "discontinue written newsletter" in the "Questions & Comments" box on the "Contact Us" page. You may also use the "Contact Us" page to update your personal or business information or to suggest other people in your organization who would be interested in receiving our newsletter. If you have any questions, you can e-mail us at newsletter@ldmlaw.com.

Matthew J. Bock

ARE YOUR E-MAILS VIOLATING THE LAW?

Spam, which is commonly defined as unsolicited, usually commercial e-mails sent to a large number of addresses, is currently regulated by the Federal Trade Commission. The Controlling Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM") took effect January 1, 2004 and regulates business e-mail. CAN-SPAM prohibits targeted commercial e-mail practices and imposes certain requirements for protecting commercial e-mail users. Commercial e-mail refers to messages the primary purpose of which is advertising or promotion or are not transactional or relationship based in nature. In other words, e-mail messages that relate to previous transactions or communications between the parties will not be considered commercial e-mail for purposes of CAN-SPAM.

If your e-mails are unsolicited spam there are a number of rules imposed by CAN-SPAM, the violation of which could subject you to civil and criminal penalties for such "predatory and abusive commercial e-mail practices." CAN-SPAM rules include message requirements such as sending e-mails with an appropriate originating

address and company domain name, identifying the message as an advertisement or a solicitation and providing recipients of e-mail the ability to opt-out of future e-mails. The foregoing is only a sample of the comprehensive rules relating to spam. You should first determine whether your e-mails meet the definition of spam under CAN-SPAM. If so, it is important to follow all of the CAN-SPAM rules as to avoid civil and criminal penalties.

Matthew J. Bock

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**SEXUAL HARASSMENT
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DISCHARGE**

As discussed in an earlier newsletter, one of the principal goals of a Chapter 7 bankruptcy case is a “fresh start” for the debtor. This is accomplished in large part by the debtor obtaining a “discharge” of his debts at the conclusion of the case. Section 523 of the Bankruptcy Code establishes various exceptions to discharge, thus debts which may not be discharged, including debts to governmental authorities for certain taxes, certain alimony and child support obligations to a spouse or former spouse, government guaranteed educational loans, debts arising from fraudulent conduct, and others. Section 523(a)(6) creates an exception from discharge of debts for “willful and malicious injury by the debtor to another entity or to the property of another entity.”

Recently, a federal bankruptcy court in New York was faced with resolving a collision between the “fresh start” philosophy of Chapter 7 of the Bankruptcy Code and the rights of a creditor who had obtained a judgment against the debtor for sexual harassment under Title VII of the Civil Rights Act of 1964 and the parallel provisions of the New York State Human Rights law. *In re Busch*, 311 B.R. 657 (N.D. N.Y. 2004).

The plaintiff, a former employee, had obtained a judgment in federal district court against Busch and his substantially owned company, having alleged that the debtor committed several acts of sexual harassment, including repeated attempts to kiss her, putting his hand around her waist, trying to kiss and touch her, and a number of additional more egregious

actions. The plaintiff had testified at trial that the debtor’s conduct caused her to suffer considerable harm: she required counseling on four to six occasions, unemployment benefits were unavailable because she voluntarily resigned, her medical insurance lapsed, she lost retirement benefits, she experienced difficulty finding other employment because she feared placement in a similar work environment, and she was afraid to go outside her house at night because she feared that the debtor was “going to try and kill her.” She also testified that she was sexually harassed by her male co-workers whose conduct was known to the debtor, but the debtor took no disciplinary action to remedy the hostile work environment.

In objecting to the debtor’s discharge of the \$400,000 judgment she had obtained against the debtor, plaintiff argued that the debtor’s conduct amounted to “willful and malicious injury by the debtor to another entity or to the property of another entity,” and should be determined to be a nondischargeable debt.

While the bankruptcy court agreed that there was “no question about the deplorable nature of the conduct for which the debtor was held liable in the district court,” it declined to find the former employee’s judgment against the debtor nondischargeable. While the debtor’s acts had necessarily been categorized as “intentional” under the Title VII analysis, the court reasoned that this was not the same as causing a “willful and malicious injury.” In *Karwaauhau v. Geiger*, 523 U.S. 57, 61-62 (1998), the U.S. Supreme Court had held as follows:

“The word ‘willful’ in (a)(6) modifies the word ‘injury,’ indicating that nondischargeability takes a deliberate or

intentional *injury*, not merely a deliberate or intentional act that leads to injury. Had Congress meant to exempt debts resulting from unintentionally inflicted injuries, it might have described instead ‘willful acts that caused injury.’”

Observing that the Supreme Court has also held (in *Grogan v. Garner*, 498 U.S. 279 (1991)) that in determining whether a particular debt falls within one of the exceptions of section 523, the statute should be strictly construed against the objecting creditor and liberally in favor of the debtor, the Bankruptcy Court concluded that the first part of the test for nondischargeability under this exception is not the gravity of misconduct, but the intent to cause injury. The court concluded that there was no evidence that the debtor ever intended to cause any of these specific injuries recounted by the plaintiff in the district court action, and that in fact, it would have been unlikely that the debtor would have intended to have caused the termination of plaintiff’s employment in view of plaintiff’s ability to notify debtor’s wife of the debtor’s conduct and the reasons for her resignation. Finally, the court found that the debtor’s motivation was solely a “specific intent to advance his own prurient interests” at the expense of the employee’s right to be free from sexual attack and harassment, and found that the plaintiff’s judgment was dischargeable.

While certainly a harsh result for the victim of this workplace sexual harassment, it appears mandated by the current state of the law.

Frank M. Schepers

**IRS AMENDS REVERSE
LIKE-KIND EXCHANGE
SAFE HARBOR**

A recent revenue procedure issued by the IRS amends the reverse like-kind exchange safe harbor found in Rev. Proc. 2000-37 in order to address perceived abuses by certain taxpayers. Rev. Proc. 2000-37 states that if a taxpayer enters into a Qualified Exchange Accommodation Agreement (“QEAA”) with an Exchange Accommodation Titleholder (“EAT”), the EAT is treated as the owner of the property for federal income tax purposes. Consequently, taxpayers were utilizing the safe harbor provisions of Rev. Proc. 2000-37 to construct and exchange improvements on parcels of land that they already owned and then treating this property as replacement property in order to obtain tax deferral under Section 1031.

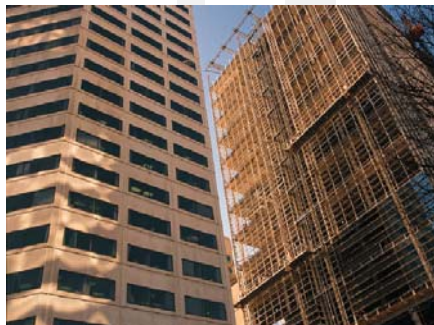
All unimproved real property that a taxpayer may want to improve in the future should be acquired or held by the taxpayer in separate legal entities.

The IRS issued Rev. Proc. 2004-51 as a result of its stated concern that “some taxpayers have interpreted [Rev. Proc. 2000-37] to permit a taxpayer to treat as like-kind exchange a transaction in which the taxpayer transfers property to an exchange accommodation titleholder and receives that same property as replacement property in a purported exchange for other property of the taxpayer.” In Rev. Proc. 2004-51, the IRS concluded that an exchange of real

estate owned by a taxpayer for improvements on land owned by the same taxpayer does not meet the requirements of Section 1031. To implement its decision, the IRS amended Rev. Proc. 2000-37 by adding a new section which provides that Rev. Proc. 2000-37 does not apply to replacement property held in a QEAA if the property is owned by the taxpayer within the 180 day period ending on the transfer of ownership of the property to an EAT. In other words, a taxpayer is directly prohibited from using Rev. Proc. 2000-37 to engage in a transaction in which the taxpayer purports to lease or sell property to an EAT and then reacquire the property as replacement property in a reverse like-kind exchange.

The provisions of Rev. Proc. 2004-51 apply to transfers after July 19th, 2004. However, the provisions of Rev. Proc. 2004-51 do not apply to real property owned by a person related to the taxpayer. Consequently, all unimproved real property that a taxpayer may want to improve in the future should be acquired or held by the taxpayer in separate legal entities that are related to and controlled by the taxpayer (but which are not disregarded entities for tax purposes) if the taxpayer wishes to maximize potential §1031 planning opportunities.

Ryan N. Boe



**NEW LAW: THE NEBRASKA
UNIFORM TRUST CODE**

The Nebraska Uniform Trust Code (NUTC) became effective on January 1, 2005. The NUTC is a default Code, meaning that the terms of a trust instrument will generally prevail over the NUTC. A number of the provisions of the NUTC cover areas where there has been no Nebraska law. Some provisions have reversed Nebraska law. However, the intention of the settlor remains crucial in the interpretation of any trust.

Some of the mandatory provisions of the NUTC that cannot be drafted around include the power of creditors or assignees to reach trust assets in certain circumstances and a trustee’s duty to notify qualified beneficiaries. The reporting duties of trustees of irrevocable trusts that were established before January 1, 2005 will have different reporting duties than under previous Nebraska law. If you serve as trustee of an irrevocable trust, you should contact us so we can inform you of your new duties. Further, any trustee of a trust that becomes irrevocable after January 1, 2005 will need to closely examine the NUTC and the trust document to determine the trustee’s reporting duties. Due to the changes made by the NUTC, any individual who has established a trust for estate planning purposes and wants to restrict beneficiaries’ access to trust information in the event of the settlor’s death or incapacity should consider an amendment to their trust to limit the trustee’s reporting duties.

In theory, the NUTC applies to all trusts in existence as of January 1, 2005. However, there are various exceptions to this rule included in the NUTC. Additionally, there are

constitutional issues that will arise in the application of the NUTC to preexisting irrevocable trusts that Nebraska courts will have to address.

Angela M. Pelan

IRS APPROVES "POORER SPOUSE FUNDING TECHNIQUE"

In 2005, each taxpayer is entitled to exclude or shelter up to \$1,500,000 of asset value from federal estate tax upon the taxpayer's death. This is referred to as the Federal Estate Tax Applicable Exclusion ("Applicable Exclusion").

The Applicable Exclusion is scheduled to increase to \$2,000,000 in 2006 and \$3,500,000 in 2009. In 2010, the federal estate tax will be repealed, meaning any amount can pass free of federal estate taxes. In 2011, the federal estate tax will return, and the applicable exclusion will drop to \$1,000,000.

Married couples are often advised to spread ownership of their assets in order to make sure that each spouse separately owns enough assets to take full advantage of their separate Applicable Exclusions, regardless of which spouse dies first. However, in some instances, such a division of the assets is found to be unfavorable for taxation or personal reasons. Consequently, if the "poorer" spouse dies first, that spouse's Applicable

Exclusion is wasted to the extent the exclusion amount exceeds the value of assets separately owned by the deceased spouse.

In a recent private letter ruling (PLR 200403094), the Internal Revenue Service approved a technique which allows the poorer spouse ("PS") to fund a credit shelter trust, and thus utilize the Applicable Exclusion, with assets owned by the surviving wealthier spouse ("WS").

*The Poorer Spouse
Funding Technique
allows the poorer spouse to
fund a credit shelter trust,
and fully utilize the full
Federal Estate Tax
Applicable Exclusion.*

Under the technique, sometimes referred to as the "Poorer Spouse Funding Technique," WS creates a personal revocable trust and transfers to it assets equal to the applicable exclusion amount less the value of the PS's owned assets. WS then grants PS a general power of appointment, effective only if the PS dies first, giving PS the power to appoint enough assets out of the trust to cause the value of PS's taxable estate to be equal to PS's applicable exclusion amount.

Consequently, if PS is the first to die, and the power of appointment is properly exercised, the trust assets subject to PS's power of appointment would be included in PS's estate for estate tax purposes and sheltered under PS's applicable exclusion.

In essence, the Poorer Spouse Funding Technique allows the poorer spouse to fund a credit shelter trust, and fully utilize the Federal Estate Tax Applicable Exclusion, with assets owned by the wealthier spouse.

Andrew T. Chapeau

BUSINESS DEPARTMENT

Frank J. Barrett
Matthew J. Bock
Ryan N. Boe
Thomas R. Burke
Andrew T. Chapeau
Donald L. Erftmier, Jr.
Lawrence F. Harr
C.E. Heaney, Jr.
Brian J. McGrath
Robert J. Murray
Angie M. Pelan
Jon S. Reid
Frank M. Schepers
R.A. Skochdopole

Julie J. Feldhacker, LA
Anna C. Palmer, LA
Carol J. White, CLA



LAMSON, DUGAN AND MURRAY, LLP
ATTORNEYS AT LAW

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