

## Multi-State Sales, Use and Income Tax Considerations

By Michael M. Berzowski

Wisconsin based businesses engaged in multi-state transactions may be subject to both Wisconsin and out-of-state sales and use tax, as well as income tax or franchise tax responsibilities and obligations.

When a Wisconsin retailer sells to a purchaser located in another state and ships by mail or common carrier or with its own vehicles, Wisconsin sales or use taxes are not due. If the purchaser picks up the item in Wisconsin, then Wisconsin sales and use taxes will apply, as well as the purchaser's state use tax. In the case of both Wisconsin retailers dealing out of state and out of state retailers dealing in Wisconsin, whether they are subject to the jurisdiction of the state turns on whether there is a significant enough physical presence within the state which is referred to as "Nexus."

If Nexus is present, then the taxpayer becomes subject to the rules of the state for sales and use taxes as well as income taxes. The starting point for a Nexus analysis is an examination of the state statutes and taxing authority rulings followed by constitutional considerations.

Owning any real property in a state, leasing or renting out any tangible personal property in a state, maintaining, occupying or using,

permanently or temporarily, directly or indirectly, or through a subsidiary, agent or other person, an office or place of distribution, sales or sample room or space, warehouse or storage place or other place of business within a state, having any representatives operating in a state for purposes of selling, delivering or taking orders, servicing, repairing or installing equipment or other tangible personal property, delivering goods into a state in company operated vehicles and performing construction activities in a state can create Nexus.

*"If Nexus is present, then the taxpayer becomes subject to the rules of the state for sales and use taxes as well as income taxes."*

Administrative Codes set forth certain activities that by themselves do not create Nexus, such as advertising in newspapers published in or outside the state, sending catalogs into the state, receiving mail or telephone orders outside the state from consumers located in the state, if such orders are shipped either by mail or common carrier into the state, making cash or credit sales over the counter at an

out of state location to Wisconsin customers when the goods are shipped by mail or common carrier by the retailer into the state or a foreign corporation obtaining a certificate of authority from the Wisconsin Department of Financial Institutions to transact business in Wisconsin.

In view of stepped up efforts on the part of taxing authorities to increase revenue, it would be a good idea for people engaged in mail order businesses, making sales outside Wisconsin, having a full time employee in a state or employee temporarily in a state or independent contractors in a state or tangible personal property in a state, to examine their business activities. At a minimum, Wisconsin concerns regularly transacting business in border states should at least scan the laws of those states to make certain that they are in compliance, particularly since some of these laws differ from one state to another.

Because there can be extremely significant tax, interest and penalties with regard to income, sales and use taxes associated with a Nexus determination, this is a great opportunity for some preventative law. There are options, remedies and procedures that can be adopted, should a business discover that it has a Nexus problem. **WBB**



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## Recent Wisconsin court decisions limit the power of arbitration agreements

By Bryan W. Edgar



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These days, many business, consumer and employment contracts contain an arbitration clause. A typical arbitration clause requires that any disputes that may arise between the parties related to the contract must be resolved in arbitration and not in the courts.

Arbitration is an alternative method of dispute resolution in which a neutral third party renders a decision that is binding on the parties. In contrast to courtroom litigation, arbitration can provide a faster, and sometimes cheaper, resolution of a dispute. In addition, some complex issues are better addressed by an arbitrator with expertise in the particular area of dispute. That said, arbitration is not a one-size-fits-all solution. In many situations, litigating a case in court provides a fairer, more just procedure for disputants.

As a result of rising criticism, arbitration has come under fire in recent years, and lawmakers and courts have limited the power of arbitration agreements, particularly in consumer and employment contracts. Two recent Wisconsin court decisions have created some additional limits on parties' ability to agree to arbitrate.

In *Cottonwood Financial LTD v. Estes*, the Wisconsin Court of Appeals examined an arbitration clause in a consumer lending contract. In that case, the arbitration clause provided that the borrower waived her right to participate in any class action arbitrations or lawsuits against the lender.

The court ruled that the arbitration agreement was unconscionable because it violated the Wisconsin Consumer Act. The Consumer Act provides that a consumer may not enter into an agreement that waives any of her rights under the Consumer Act, one of which is the right to participate in a class action lawsuit. Accordingly, consumers and businesspeople alike should be on the lookout for any arbitration agreement that prohibits a consumer from participating as part of a class action. Such a provision may render the entire arbitration agreement unenforceable under the *Cottonwood* case.

In another recent case, the Wisconsin Supreme Court addressed the issue of whether a court's order to arbitrate can be appealed. Generally speaking, when a dispute erupts between parties to an arbitration agreement, one of the parties may choose to sue the other party in court instead of bringing the dispute before an arbitrator. Sometimes, a party is not aware of the arbitration agreement (as they are typically buried in the fine print of a contract). Other times, a party is aware of the agreement but believes it to be unenforceable. When that party files a lawsuit in court, the other party usually requests that the court order that the proceedings be stayed and that the parties be sent to arbitration pursuant to their agreement. If the court finds the agreement to be enforceable, it will order the parties to arbitrate.

Under prior case law in Wisconsin, a court's preliminary order sending the case to arbitration could not be immediately appealed to the Wisconsin appellate courts. Instead, the party seeking to avoid arbitration in the arbitration and wait until after the arbitration was completed before appealing the court's initial arbitration order.

In the recent decision of *Leavitt v. Beverly Enterprises, Inc.*, the Wisconsin Supreme Court overturned earlier Wisconsin cases from

the 1970s which had prevented a party from filing an immediate appeal of a court's initial arbitration order. The *Leavitt* court explained that, in the time since those earlier court decisions were decided, the appellate courts' jurisdiction had been expanded and, therefore, the rule preventing a party from appealing an order compelling arbitration was no longer consistent with the current state of Wisconsin law. Therefore, the court ruled that such an order could be appealed prior to the parties' going to arbitration.

The practical implication of the *Leavitt* ruling is that a party wishing to avoid arbitration may be more inclined to file an immediate appeal instead of participating in the arbitration. An appeal can take months, sometimes years. This could undermine the efficiency of arbitration as an alternative method of dispute resolution. It will be interesting to watch how the state appellate courts deal with the increased number of appeals that may result from this ruling in the future. In the meantime, businesspeople should take notice of the fact that merely including an arbitration clause in a contract does not necessarily ensure that a subsequent dispute with the other party will be kept out of the courts. **WBB**

## Planning For Special Needs Through WisPACT

By Jaime D. Levine

When it comes to estate planning for those with special needs, there is a great concern for planning in such a way so as to not endanger a disabled beneficiary's eligibility for public benefits or placement on waiting lists. These benefits include SSI, SSDI, Medicaid, Medicare, and other home and community based services. The Wisconsin Pooled and Community Trust ("WisPACT") is a non-profit organization designed to address this concern.

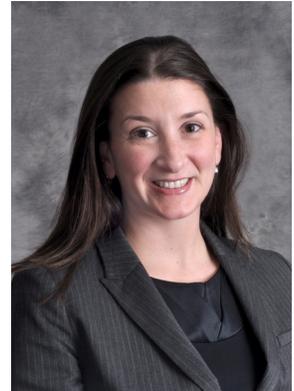
**How does this organization work?** Each disabled beneficiary has a separate sub-account but for investment purposes, the assets of all WisPACT beneficiaries are pooled together allowing the Trustee to charge lower fees which can result in a higher rate of return than separately managed trusts. WisPACT has a master trust document which is adopted by all sub-account beneficiaries. The document is drafted as a special needs trust meaning that each beneficiary's trust assets will be preserved and used to supplement his government benefits to provide him with the "extras". For example, these extras could include, providing for recreational activities, computer, internet, equipment for accessibility, home improvements such as wider hallways for wheelchair access, or the difference in cost between a private and shared room at a facility.

**Who controls the WisPACT trust?** The Trustee of all WisPACT trusts is Associated Trust Company. This Trustee has the ultimate discretion when it comes to investments as well as trust distributions. It is chosen by WisPACT and not by the account creator and therefore inherently lacks a personal connection to the disabled beneficiary. However, with this corporate Trustee there is the confidence that the trust will be administered properly, thereby avoiding the situation where an improper distribution is made by a Trustee who does not consult with an experienced attorney and a Court rules that the trust assets be used in lieu of government benefits. In order to facilitate each sub-account, the creator can designate an Advisor in WisPACT documents. This is the person(s) who hopefully has a personal relationship with the beneficiary and will work with him to request distributions from the corporate Trustee.

**Who can create a WisPACT sub-account?** A disabled beneficiary can create a sub-account for himself (WisPACT Trust I) or a third-party can create a sub-account for a disabled beneficiary (WisPACT Trust II). The purposes of both trusts remain the same with some subtle differences, however a big difference is what happens upon the death of the beneficiary. Upon the death of a beneficiary of WisPACT Trust I, the Trustee is required to reim-

burse any state that provided Medical Assistance during the beneficiary's life—also known as a "payback trust". If anything is left, the remainder can be used for funeral expenses and then distributed to beneficiaries that were designated in the WisPACT documents or to the beneficiary's heirs. On the other hand, upon the death of a beneficiary of WisPACT Trust II, there is no payback to the state and after payment of funeral expenses, the remainder beneficiaries or heirs will receive their share.

**How do you create a WisPACT trust?** An attorney is required to complete the WisPACT documents because of the estate planning, tax and public benefits implications. Either the disabled beneficiary who will be funding the sub-account with his own assets or a third party who will be funding the sub-account by gift or inheritance will work with the attorney to complete the required documentation. On several occasions, this will be done in conjunction with the preparation of an entire estate plan where the WisPACT sub-account is designated as a beneficiary of a third party's will or revocable living trust. By completing the WisPACT documents in advance, prior to funding, all of the necessary details are addressed so that when the time is right, the assets can pass immediately to the WisPACT sub-account without any Court involvement or jeopardizing benefits. **WBB**



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*"The [WisPACT] document is drafted as a special needs trust meaning that each beneficiary's trust assets will be preserved and used to supplement his government benefits..."*



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**Comments?** We'd like to hear from you. Please send an email to the editor: Megan Wiseman at [reporter@wbb-law.com](mailto:reporter@wbb-law.com).

### AT THE FIRM...

**Charles Stone** will be giving a lecture at the U of I law school at Champaign-Urbana on November 19. It will be called: "2,500 years of Chinese law: from Confucius to Mao, they never did like it"

On October 27th, **Philip Miller** spoke on "drafting a simple will" at the Wisconsin Solo and Small Firm Conference. The event was put on by the State Bar of Wisconsin and Milwaukee Bar Association.

Once again, **Michael Berzowski** and **Barry White** conducted their Ethics Seminar, sponsored by the University of Wisconsin Law School. They have been hosting this event for 15 and 6 years respectively.

**Randy Nelson** is scheduled to speak at the "31st Annual Estate Planning Update" on November 19th. This continuing legal education seminar is sponsored by the State Bar.

Time flies when you're having fun... we recently hosted our annual Tax and Business Seminar as well as our Employment Law Conference. As usual, these events were well received. See the events box to the right to mark your calendars with next year's conference dates. →

In a decision issued by the Wisconsin Court of Appeals on September 22, **Chris Trebatoski** and **Bryan Edgar** successfully argued that even though the president of the insured home construction general contractor was living in the house his company was building for his family, the "care, custody, and control" exclusion contained in the company's insurance policy did not preclude coverage for personal property owned by the president and his family when a fire destroyed the home and its contents.

### 2011 Schedule of Events

**REAL ESTATE CONFERENCE**  
March 16, 2011

**ESTATE PLANNING CONFERENCE**  
June 7, 2011

**TAX & BUSINESS SEMINAR**  
September 21, 2011

**EMPLOYMENT LAW CONFERENCE**  
October 19, 2011

**All events will be held at the Wisconsin Club at 900 W. Wisconsin Ave., Milwaukee. Please check our website ([wbb-law.com](http://wbb-law.com)) for more event information.**