

Estate and Gift Tax Relief: Here Today, but Not for Long

By Nancy M. Bonniwell

On December 17, 2010, President Obama signed into law the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (the Tax Relief Act). In addition to extending the Bush-era income tax relief, the Tax Relief Act provided some generous estate, gift and generation-skipping transfer tax relief. Unfortunately, the only sure thing about the generous new estate and gift tax laws is that they are scheduled to last only two years. After that time, our future is unknown.

Under the Bush-era tax cuts, the amount that was exempt from estate tax gradually rose from \$675,000 in 2001 to \$3.5 Million for individuals dying in 2009, and terminating with no estate tax in 2010. The estate tax was scheduled to return in 2011 with an estate tax exemption of only \$1 Million and a top estate tax rate of 55%. The Tax Relief Act changed that radically. **For individuals dying in 2011 and 2012, the estate tax exemption has increased to \$5 million, and the top estate tax rate is 35%.**

An important new aspect of the estate tax law for the next two years is the concept of "portability" of the \$5 million exemption of the first spouse to die to the surviving spouse. If a deceased spouse does not use all of his or her estate tax exemption, the unused por-

tion is available for use by the surviving spouse. The unused exemption amount is only available if an election is made on a timely filed estate tax return of the predeceased spouse. The return must be filed even though an estate tax return would not otherwise be required. In addition, only the last deceased spouse's exemption is available to the surviving spouse. Thus, if an individual was married and widowed three times, only the third deceased spouse's unused estate tax exemption may be used by the surviving spouse.

"Unfortunately, the only sure thing about the generous new estate and gift tax laws is that they are scheduled to last only two years. After that time, our future is unknown..."

The generation-skipping transfer tax and corresponding exemption has been revived for 2011 and 2012. The maximum exemption is \$5 million at a rate of 35%. Unlike the estate tax exemption, a deceased person's unused generation-skipping transfer tax exemption may not be transferred to his or her surviving spouse.

In recent years, even though the estate tax exemption exceeded \$1 million or was not even applicable in 2010, the gift tax exemption was limited to \$1 million. Under the Tax Relief Act, the gift and estate tax exemptions are reunified with a combined exemption of \$5 million. The reunification of the gift and estate tax exemptions allows individuals to make more lifetime gifts without payment of tax if they have reached their prior \$1 million limit. It also gives individuals the opportunity to use the same amount of generation-skipping transfer tax exemption and gift tax exemption during their lifetime.

The new estate and gift tax laws in effect for the next two years provide individuals enhanced opportunities to plan and either avoid or limit their gift, estate and generation-skipping transfer tax liability. Unfortunately, the provisions of the Tax Relief Act will only apply to persons dying or gifts made before January 1, 2013. It is a good time to review your estate plan and consider the gift and estate plan opportunities that are only available for a short time. **WBB**



Nancy M. Bonniwell
Business Law and
Estate Planning
nmb@wbb-law.com
262-646-1527

INSIDE

How Does Wisconsin's Tort Reform Impact Your Business?	2
What is an Easement?	3
At the Firm...	4

Recent Tort Reform in Wisconsin

By Chris J. Trebatoski



Chris J. Trebatoski
Litigation
cjt@wbb-law.com
414-270-2509

Tort reform was a major issue in Wisconsin's gubernatorial election. Indeed, the issue was so important that it was the second bill considered and passed by the legislature this year. The new law became effective February 1, 2011 and applies in all cases filed after February 1, 2011.

Wisconsin's tort reform legislation may have a significant impact upon your business. If you are a health care provider, a long term care facility operator, a manufacturer of products or a professional whose judgment gets questioned in a lawsuit supported by a hired gun expert who is really not an expert at all, the new law definitely impacts your business — and in a positive way.

Health care providers are shielded from criminal and civil liability based upon reports generated or reports made to a reviewer

or evaluator of the incident reported. The purpose of this provision is to prevent utilization of records and reports created in order to help improve the quality of health care, to avoid the improper utilization of the services of health care providers, or to determine the reasonable charges for those services in court proceedings that seek to challenge the actions of a health care provider or its corporate entities in any form of criminal or civil proceeding. The law is quite broad in terms of its definition of health care provider and complicated in the manner in which records are protected. Those with questions regarding the scope of the law or the protections provided should seek counsel based upon the specific circumstances in which they find themselves.

The law also provides a statute of limitations and cap on non-economic damages for claims against long-term health care providers, including adult family homes, residential care apartment complexes, community-based residential facilities, home health agencies, nursing homes and hospices. The non-economic damages cap is \$750,000 and the statute of limitations varies based upon the nature of the actual discovery of the event and whether or not a provider concealed the act or omission. This statute shortens the statute of limitations effectively creating a maximum five year

statute from the occurrence of an unknown event, barring active concealment, and practically creating a three year statute of limitations for obvious injuries.

The law creates a cap on punitive damages of \$200,000 or two times the amount of actual damages, whichever sum is higher, and also seeks to eliminate "junk" science experts by imposing a gate-keeper function on the courts with a very specific limitation identical to that imposed by the federal courts with respect to the level of proof that an opinion is indeed an "expert" opinion prior to admission of the testimony.

The law increases the risk for attorneys and clients who bring frivolous or harassing lawsuits. Previously, before an award of attorney's fees and costs could be made, a party had to be given a chance to withdraw the pleading in question. Now, even if the pleading is withdrawn, an award may be made and, in the event that the pleading is not withdrawn, the court shall award actual attorney's fees and costs in the case of a frivolous claim or defense.

Product liability law has changed significantly. The legislature has significantly curtailed the potential for "enterprise liability" like that found in the lead paint industry. A plaintiff must prove that there is no other party from whom redress for the injury can be sought. The law also pro-

vides a 25 year statute of repose, requires the injury be caused by a product identical to that manufactured by the manufacturer, and that 80% of the manufacturers of that product be named in any enterprise liability lawsuit.

The product liability component of the law also limits the nature of claims to manufacturing defects, design defects and inadequate warning or instruction lawsuits, specifically defining each claim in the statute and limiting any such claim to the claims as defined by statute rather than the courts. In addition to providing a 15 year statute of repose, the law creates five events which further limit a manufacturer's liability. They are: intoxication of the user, compliance with regulation, misuse of the product, inherent characteristics of the product and no reasonable opportunity of the seller to inspect or test the product (for example, sealed containers).

The law also further restricts multiple party liability for damages by substantially changing the manner in which shared liability case damages are calculated.

The law provides protections to Wisconsin businesses and those who sell products in Wisconsin. Just how much protection is provided depends upon the facts of each individual type of claim. **WBB**

What is an Easement?

By Richard J. Rakita

In layman's terms, an easement is the right to use real estate owned by a third party for a specific purpose. There are numerous examples of easements, which would include such things as a shared driveway, an ingress and egress right across a different person's land, a right to maintain a structure which is accidentally placed upon a neighbor's property, a temporary right to use someone else's land in order to do construction or maintenance on an adjoining property, or numerous other scenarios.

"For some reason, easements seem to cause a significant amount of litigation."

Easements normally are created by consensual documents entered into between the true owner of the land and the party who wishes to use some or all of that land for the specific purpose to be set forth in the easement. Easements can also be created against the will of the true owner by a process similar to the concept of adverse possession. This can arise, for example, in situations where a neighbor continues to get back and forth to his house by walking across his neighbor's land with total disregard of the fact that the neighbor has no legal right

to do so. After a period of 20 years, this could result in what is known as a prescriptive easement, whereby the neighbor's right can continue indefinitely. Some easements can be forfeited in the event that the easement holder fails to use the easement over a long period of time.

For some reason, easements seem to cause a significant amount of litigation. In the past several years, our office has had litigation involving claims of easement by necessity, prescriptive easements, easement by implication, abandonment of easements, and misuse of easements. One of the more interesting easement issues that I have seen in my career was a case in which I was involved, along with one of my partners, Chris Trebatowski (we were both in different firms at the time), which dealt with the question of whether or not one could convey riparian rights by easement. The facts in that case were that a subdivision developer had provided, in the subdivision documents, that all future owners of lots would have the right of access to a lakefront area for the purpose of exercising riparian rights to the water, such as the right to put in a pier. The State Supreme Court in that case held that the easement was valid and, in effect, riparian rights could be conveyed by easement. Subsequent to that decision, the state legislature changed the law to severely limit the applicability of the case.

Another case which we recently handled in our office dealt with a condominium association's ability to claim a prescriptive easement over a portion of a bridge and private roadway in order to obtain continued access to their condominium units. The court in that case found that the necessary 20 years of hostile use was established and that those rights did in fact flow to the unit owners.

"Easements normally are created by consensual documents entered into between the true owner of the land and the party who wishes to use some or all of that land ..."

These are only two examples of the myriad types of disputes that can arise in connection with easements. It is not uncommon to find disagreements between the landholder and the easement holder over the scope, location, use, interpretation, length of duration, and right to transfer of the easement. As I said earlier in this article, easements quite often result in significant possibilities for future litigation. **WBB**



Richard J. Rakita
Business Law
and Real Estate
rjr@wbb-law.com
414-270-2531



WEISS BERZOWSKI BRADY
LLP

Milwaukee Office

700 N. Water St., Ste. 1400
Milwaukee, WI 53202
P: (414) 276-5800
F: (414) 276-0458

Delafield Office

400-D Genesee St.
Delafield, WI 53018
P: (262) 646-5812
F: (262) 646-3340

All Business.

www.wbb-law.com

The WBB Reporter is a Weiss Berzowski Brady LLP publication. The newsletter is for general information purposes only and should not be construed as legal advice. Consult an attorney for interpretation and application of the law.

Subscription Information: To subscribe to the print or to the electronic version of *The WBB Reporter* send an email to reporter@wbb-law.com, go to our website at www.wbb-law.com or call 414-270-2559.

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

AT THE FIRM...

Michael Berzowski was named a "Leader in the Law" by the Wisconsin Law Journal this February. The award is presented yearly to Wisconsin attorneys who "have demonstrated their outstanding leadership, vision and legal expertise in Wisconsin's law community," according to the Journal's website.

Congratulations, Mr. Berzowski!

Robert B. Teuber became a partner at the firm at the beginning of the year. Mr. Teuber has been with the firm since 2005.

Welcome... **Ryan M. Billings** has recently joined the firm. Ryan previously worked as an associate for Cravath, Swaine & Moore LLP in New York City. He is a graduate of Princeton University and Harvard Law School and his practice includes Business Law and Litigation.

Registration is now open for our upcoming Real Estate Conference. This annual event will take place at the Wisconsin Club and will feature a variety of topics in the realm of Real Estate Law. Speakers for this complimentary conference are: John P. Brady, Ann K. Chandler, Bryan W. Edgar, Susan J. Marguet, Richard J. Rakita, John A. Sikora, Charles R. Stone, James S. Swiderski, and Chris J. Trebatoski. Please see our website for more details and to register, or contact Bonnie Talbert at 414-270-2565 (blt@wbb-law.com)

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) for more event information.