THE REPORTER

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President's Message

At this time of the year we find that the Kansas legislative session has ended, and that it is again time for the KBA Annual Meeting.

Section President

Robert M. Hughes
Bever Dye L.C., Wichita

The items of legislative interest to the members of the section were not as great this year, compared to past years. One item of importance is **HB 2363**, which was signed by the governor on May 11. This bill requires notice to be given to the agency responsible for recovering medical assistance payments in Kansas or, if a state other than Kansas, to the attorney general of that state, if the decedent or the decedent's spouse received Medicaid assistance. The bill also authorizes Kansas, or a state other than Kansas that provided medical assistance, to be entitled to notice of the probate action. The bill further requires the administrator or executor of the estate to include in the final settlement of the estate a statement that the person did not receive medical assistance or that the state providing the medical assistance was notified of the probate action. Finally, the bill requires conservators in the final accounting of the conservatorship to reimburse the state Medicaid agency for payment made to the conservatee or the conservatee's spouse.

The Annual Meeting of the KBA is upon us, and will be held June 7-9 at the Hyatt Regency in Wichita. This year the Corporation, Banking, and Business; Tax; and the Real Estate, Probate, and Trust law sections have joined together. Chris Hurst of Foulston Siefkin LLP will give a presentation on Common Mistakes in Drafting Limited Liability Company Agreements and Partnership Agreements. Chris' presentation is scheduled for the afternoon of Friday, June 8.

Our section will hold its annual meeting during the "Brown Bag and Bull Lunch" Section Roundtables and Luncheon on June 9 at 12:30 p.m. I hope all section members who attend the Annual Meeting will be able to attend our section's meeting. It is a good opportunity to exchange ideas and make suggestions to the members of the executive committee. One item on our agenda is the election of Mark Andersen to the executive committee. Mark is a member of Barber Emerson L.C. in Lawrence and practices primarily in the real estate area.

Finally, on behalf of our section I would like to personally thank Ted Knopp and Roger Hughey, longtime members of the executive committee, who have recently resigned. Ted and Roger have worked tirelessly for the benefit of the REPT Section and will be greatly missed. ■

In This Issue ...

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He received his J.D. from the University of Kansas School of Law and his MBA and BBA in finance from Wichita State University (WSU).

He is a member of the executive committee of the REPT Section and serves as the committee's liaison to the KBA Continuing Legal Education Committee. He is a member and past director of the Wichita Estate Planning Council and the Wichita Estate Planning Forum. He is on the WSU Foundation Board of Directors, where he serves as chairman of the Foundation's Giving Committee, and is a member of the National Advisory Council for WSU. Peare is also a member and past chairman of WSU Foundation's Planned Giving Professional Advisory Committee.

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Estate Tax Notes:
Tax Cases and Rules Affecting the Estate and Business Succession Planner

VALUATION

1. *Estate of Gimbel v. Comm.*, T.C. Memo 2006-270 (12-19-06) – Value of stock determined by consideration of foreseeable repurchase of shares and sale restrictions

The decedent died on June 5, 2000 (the valuation date). Included in the decedent's estate were 3,601,267 restricted shares of the common stock of Reliance Steel and Aluminum Co., a publicly traded New York Stock Exchange company (company), which represented approximately 13 percent of the total outstanding shares of the company. Of these shares, 3,548,450 shares were unregistered, and the remaining 52,817 were registered. Due to the number of shares attributed to the decedent, the decedent was considered an affiliate, or an affiliated person, of the company, making the public resale of the estate's shares restricted under applicable federal securities laws. Under the Securities and Exchange Commission (SEC) Rule 144, the estate would not be permitted to sell more than 277,860 shares in any three-month period, requiring a minimum of 39 months to sell the entire block of stock owned by the decedent's estate. The estate could sell the shares in a private placement without application of Rule 144, but any shares so sold would still be restricted and subject to Rule 144, making institutional investors unlikely purchasers of the shares.

From 1997 through 2000, the company reported significant annual increases in its assets, net sales, and net income. This was largely attributable to its numerous company acquisitions and asset purchases. As of the valuation date, the company was negotiating confidentially for the acquisition of another company, which purportedly would have represented the largest acquisition in the company's history and likely would have required the use of most of the company's available cash and then remaining balance in its $200 million outstanding line of credit.

In December 1994, the company's board of directors adopted a formal stock repurchase plan that allowed for the company to repurchase up to 2.25 million shares of its stock. In August 1998, the company's board of directors increased this number to 6 million shares. From December 1994 through the valuation date, the company repurchased in the public market approximately 1.37 million shares of its stock for approximately $27 million. Approximately two weeks prior to the valuation date, the company's CEO made a presentation at a steel industry conference at which he reported that 1999 represented a record year for the company, and that the company would consider repurchasing its shares at around $19 per share, as it had done in the recent past. On the valuation date, the company's shares reached a public trading price high of $21.25, a low of $20.375, and averaged $20.8125 per share. On the valuation date, 18,300 shares of stock were publicly traded, and in the 10 weeks preceding the valuation date, average daily trading volume was approximately 25,000 shares.

Prior to her death, the decedent had not discussed with the company the possibility of it repurchasing her shares upon her death. However, following her death, representatives of the decedent's estate inquired of the company's management whether they were aware of any investors who might be interested in purchasing some of the estate's shares. On behalf of the estate, the company asked its investment banking firm to try to identify private institutional or strategic investors who might be willing to purchase a significant block of the estate's shares. Members of the company's management also began discussing the possibility of the company repurchasing some of the estate's shares. However, the company told the estate's attorney that such a repurchase would have to be evaluated in light of the pending company acquisition, the possible need and ability to obtain additional financing, and the effect that it would have on the company's financial ratios. In October 2000, the board of directors approved the repurchase of up to $50 million worth of the estate's shares at $19.35 per share, and authorized, pending bank approval, an increase in the company's existing credit line by $50 million to finance the purchase. The company eventually repurchased 2.27 million shares of the estate's stock at $19.35 per share, for a total price of more than $43.9 million.

On the estate's federal estate tax return, the company stock was reported at the $20.8125 valuation date trading price, discounted by 20.72 percent to reflect lack of marketability and liquidity relating to the resale restrictions applicable to the estate's shares and to the size of the block of the estate's shares in relation to the volume of publicly traded shares. On audit, the IRS determined that the shares should be discounted from the valuation date trading price by only 8 percent. For trial, both parties retained new valuation experts. The IRS' expert concluded that a 9 percent discount was appropriate, while the estate's expert concluded that a 17 percent discount was appropriate.

The court recognized that for shares of publicly traded stock, the average of the highest and lowest quoted selling prices on the valuation date generally establishes the value of the shares. However, if a taxpayer establishes that the quoted selling prices do not reflect the fair market value of the shares, then some reasonable modification of the selling price and other relevant facts and elements of value may be considered in determining fair market value. The court also recognized that property included in an estate is valued as of the date of the decedent's death, and subsequent post-death events are generally disregarded. However, subsequent events that are reasonably foreseeable as of the valuation date may be considered, because they would be foreseeable by a willing buyer and a willing seller and would, therefore, affect the valuation of the property as of the date of death.

The parties' experts focused primarily on the following four valuation methods to estimate the fair market value of the estate's shares: (1) a secondary public offering of the shares, (2) a private placement with a third party, (3) a repurchase by the company, and (4) open market public sales subject to SEC Rule 144. The court first concluded that as of the valuation date, a disposition of the estate's shares through either a secondary public offering or a private placement was not likely. The court next concluded that as of the valuation date, it was reasonably foreseeable that the company would repurchase some of the estate's shares. The company's repurchase plan had been in place for several years, and the company had a record of repurchasing a significant number of shares. Further, 10 days prior to the valuation date, the company's CEO had stated publicly that the company would favorably consider repurchasing shares at approximately $19 per share. However, the court noted that as of the valuation date, the company was negotiating a large company acquisition that, if successful, would have required significant cash and credit. The court also noted that the largest repurchase prior to the valuation date was in October 1998 when the company repurchased 646,200 shares for more than $11 million. Accordingly, the court concluded that as of the valuation date, it was reasonably foreseeable that the company would be financially able and willing to repurchase 20 percent, or 720,253, of the estate's shares, and upheld the use of a 13.9 percent discount to value such shares, as determined by the IRS' expert at trial.

Finally, the court concluded that the balance of the estate's 2,881,014 shares should be valued at the SEC Rule 144 rate of 277,860 shares per three-month period, resulting in a 31-month sale period. The court upheld the method used by the estate's expert at trial to value the shares under this method, which was to multiply the shares valued under this method by the $20.1825 valuation date trading price, add dividends to be paid on the estate's shares during the 31-month sale period, and apply a present value discount factor of a 13.2 percent expected rate of return, reflecting a 14.4 percent discount from the valuation date trading value. Accordingly, combining the two methods of valuation for the estate's shares resulted in a 14.2 percent overall discount from the valuation date trading value.

ESTATE INCLUSION

2. *Estate of Hester v. U.S.*, 99 AFTR 2d 2007-1288 (DC Va. 3/2/2007) – Assets decedent misappropriated from trust fund included in gross estate

The decedent's wife died on Nov. 11, 1993. She created a trust that contained substantial assets and provided that the decedent would receive a qualifying income interest for life upon the wife's death. The decedent served as trustee of the trust. Early in 1998, the decedent breached his fiduciary duties by transferring all of the trust's assets to himself. He transferred all cash into his individual brokerage account and then engaged in several months of day trading, generating more than $2 million in net losses. He additionally used commingled assets to borrow on the margin, withdrew more than $450,000 in cash, and collected approximately $280,000 of principal and interest from a promissory note held by the wife's estate. The decedent died in October 1998. The executor of his estate published notice as required by Virginia law requiring those with claims against the estate to show cause against the payment and delivery of the decedent's assets to a trust. No one appeared in opposition to the plan of distribution, and an order of distribution was entered in a Virginia court nearly one year after the decedent's death. In early 2000, the executor of the decedent's estate filed a federal estate tax return with the IRS that included the value of all assets on hand, including any remaining misappropriated assets. The estate paid taxes of more than $2.5 million with the return. It paid additional taxes and interest in 2002. In 2003 and 2004, the estate filed claims for refunds totaling more than $2.8 million, seeking to exclude the value of the misappropriated assets, or alternatively, to deduct the amounts. In 2006, the IRS disallowed the claims, and the estate brought a suit for refund.

The estate first contended that it erroneously included the misappropriated assets in the gross estate, thereby inflating the taxable estate. Under this theory, the estate argued that the decedent possessed no interest in the assets after his breach of fiduciary duty, but merely held the assets in a constructive trust for the ultimate trust beneficiaries. The court recognized that the decedent exercised dominion and control over the assets as though they were his own without an express or implied recognition of an obligation to repay and without restriction as to their disposition, commingling the misappropriated assets with his own to the extent that it was impossible for anyone to determine which interest belonged to him and which interest belonged to his children. Consequently, the court held that the decedent controlled the misappropriated assets and did not reimburse them before his death, so they were properly included in the valuation of his gross estate at fair market value.

The estate next contended that if the property was properly included in the decedent's gross estate, the estate should be awarded an offsetting deduction of equal value for claims against the estate pursuant to Code Section 2053(a)(3), or for indebtedness in respect of property included in the gross estate pursuant to Code Section 2053(a)(4). However, the court held that the facts did not support a deduction under either section. First, the beneficiaries of the trust did not make a claim against the decedent or his estate, and there was nothing to suggest that the decedent or his estate ever expected such a claim to be made or paid. Second, the decedent's personal acquisition of funds in violation of his fiduciary duty did not create an indebtedness under Code Section 2053(a)(4) because neither the decedent nor the estate had an unconditional and legally enforceable obligation for the payment of the money. Accordingly, the court held that the IRS properly denied the estate's claims for refund of estate taxes and interest.

PARTNERSHIPS

3. *Estate of Korby v. Comm.*, 98 AFTR 2d 2006-8115 (8th Cir. 12/8/2006) – Family limited partnership assests included in decedents' gross estates

In 2005, the Tax Court held that assets the decedents had transferred to a family limited partnership (partnership) during their lifetimes were includible in their estates pursuant to Code Section 2036(a)(1). At the end of 2006, the 8th Circuit affirmed the decisions of the Tax Court. The court recognized that in reviewing the Tax Court decisions, conclusions of law are reviewed de novo, and findings of fact are upheld unless clearly erroneous. It found no clear error in the Tax Court's determination that an implied agreement existed between the decedents and their sons that allowed the decedents to retain the

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right to income from the partnership after its initial funding. The court cited the following factors, among others, in support of the Tax Court's finding: significant partnership payments to the decedents for the remainder of their lifetimes and retention of less than $10,000 in assets by the decedents, despite the fact they were both in poor health and could expect to incur living expenses beyond what their Social Security benefits would cover. The court also found no clear error in the Tax Court's finding that the transfer to the partnership did not satisfy the exception for bona fide sales for adequate consideration because the decedent husband stood on all sides of the partnership's formation and approved the provisions of the partnership agreement without negotiation or input from the limited partners. Accordingly, the court affirmed the Tax Court's decisions that the partnership assets were includible in the decedents' estates under Code Section 2036(a)(1).

4. Appeals coordinated issue settlement guidelines, Internal Revenue Service (10/20/06) – IRS issues appeals settlement guidelines for family limited partnerships

The IRS has issued appeals settlement guidelines for family limited partnerships and for family limited liability companies, which focus on the following key issues: (1) discounts for transferred interests, (2) includibility in the estate under either Code Section 2036 or 2038, (3) indirect gifts of the entity's underlying assets, and (4) application of accuracy-related penalties.

With respect to discounts, the guidelines state the government's position that under certain circumstances: there should be minimal discounts or no discounts from the pro rata value of the underlying asset value of the entity, which position is based upon current case law; reliance on current studies that support minimal discounts for minority interest and lack of marketability; and certain alternative methods of valuation. The guidelines discuss various cases in this area and conclude that these cases are fact specific, and each case needs to be individually assessed to determine the appropriate discounts.

With respect to the second issue, the guidelines examine whether the transferred interests should be included in the transferor's estate at the date of death fair market value under either Code Section 2036 or 2038. The government's position is that the property is includible under either Code Section 2036 or 2038 where the facts and circumstances indicate the decedent retained a sufficient interest in the transferred property. Again, the guidelines examine various cases in this area.

With respect to the indirect gift issue, the guidelines look at whether there is an indirect gift of the underlying assets of the entity where the transfers of assets to the entity occurred either before, at the same time, or after the gifts of the limited partnership interests were made to family members. The guidelines note that under current case law, transfers of assets to the entity after transfers of limited partnership interests are made to family members are indirect gifts and subject to the gift tax provisions of the code.

Finally, the guidelines examine the circumstances under which the IRS can seek to impose accuracy-related penalties under Code Section 6662 with respect to deficiencies involving transfers of interests in such entities.

CHARITABLE GIVING

5. P.L.R. 200649027 – Judicial reformation of trust not due to Scrivener's error would end trust's qualification as charitable remainder trust

The taxpayers created a trust qualifying as a net income with makeup charitable remainder trust (NIMCRUT) under Code Sections 664(d)(2) and (3). They subsequently filed a court petition to reform the trust. The court issued an order reforming the trust, subject to the IRS issuing a private letter ruling that the reformation would not disqualify the trust as a charitable remainder trust. In their petition, the taxpayers requested the reformation arguing that the attorney who drafted the trust failed to provide and discuss the availability and advantages of creating a charitable remainder unitrust (CRUT) as opposed to a NIMCRUT. They claimed that had they been presented with the alternative, they would likely have opted for a CRUT. Further, they argued that changes in the investment climate, such as the reduction in interest rates in recent years, frustrated the trust's purpose of providing a suitable annual income stream to them. The IRS recognized that modification or reformation of a charitable remainder trust does not violate Code Section 664 if done to correct a scrivener's error. However, the IRS concluded that the judicial reformation in this case was not due to a scrivener's error and would, therefore, violate Code Section 664, disqualifying the trust as a charitable remainder trust.

6. C.C.A. 200644020 – Trust's assignment of IRA to satisfy pecuniary charitable bequests did not qualify trust for charitable deduction

The decedent died owning an individual retirement account (IRA), of which the

designated beneficiary was the decedent's revocable trust. The trust provided for an aggregate $100,000 distribution to three different charities and stated that the distribution could be made in cash or in kind. The balance of the trust residue was to pass equally to the decedent's children. The trustee had the discretion and power to make distributions or divisions of principal in cash or in kind, or both, at fair market values current at the date of distribution, without any requirement that each item be distributed or divided ratably. The trustee completed distribution of the IRA by instructing the IRA custodian to divide the IRA into separate shares for the charities equal in value, at the time of division, to the dollar amount each charity was entitled to under the trust.

The IRS recognized that under Code Section 691(a)(1), the amount of the balance in the IRA at the decedent's death, less any nondeductible contributions, is income in respect of a decedent (IRD). Further, it recognized that if an estate or trust satisfies a pecuniary legacy with property, the payment is treated as a sale or exchange, citing *Kenan v. Comm.*, 114 F.2d 217 (2d Cir. 1940). It held that because the trust used the IRA to satisfy pecuniary legacies, the trust must treat the payments as sales or exchanges. Accordingly, under Code Section 691(a)(2), the payments are transfers of the rights to receive the IRD and the trust must include in its gross income the value of the portion of the IRA that is IRD to the extent the IRA was used to satisfy the pecuniary legacies. Because the terms of the trust did not direct or require that the trustee satisfy the pecuniary legacies from the trust's gross income, the transfer of a portion of the IRA in satisfaction of the pecuniary legacies did not entitle the trust to a charitable deduction allowed under Code Section 642(c)(1).

7. P.L.R. 200649023 – Disclaimer of special power of appointment qualified; Property passing to charity as a result qualifies for estate tax charitable deduction

The decedent died, survived by his wife, daughter, and son. The daughter and son were appointed co-executors of the decedent's estate. Under the terms of the decedent's will, the residue of his estate was to pass to a revocable trust he created during his lifetime. Under the trust, the decedent gave his daughter a special power of appointment to appoint a specific dollar amount to any one or more persons other than (i) the daughter, her estate, her creditors, or the creditors of her estate; (ii) any issue of the decedent, the estate of any such issue, the creditors of any such issue, or the creditors of the estate of any such issue; and (iii) any person related to the decedent by blood or by marriage at any time, such person's estate, such person's creditors, or the creditors of such person's estate. To the extent the daughter failed to appoint such property within one year of the decedent's death, the property was to pass to a foundation, provided it was a qualified charitable organization. The daughter was named successor trustee of the foundation upon the decedent's failure to serve in such capacity. The foundation's agreement of trust provided the daughter the authority to appoint an additional trustee, as well as the power to amend the agreement, provided that no amendment would disqualify the foundation from tax exemption under Code Section 501(a).

The daughter proposed to disclaim the special power of appointment granted to her under the decedent's trust. Prior to execution of the disclaimer, the daughter would not have exercised the special power of appointment to any extent. Under state law, the disclaimer would be made in writing and delivered to the executors of the decedent's estate no later than nine months following the decedent's death. The daughter had not and would not receive any consideration from the foundation or any other person in exchange for making the disclaimer. Prior to making the disclaimer, the daughter also proposed to amend the foundation's agreement so that she would have no rights or powers with respect to disposition of the property passing from the decedent's trust to the foundation as a result of the disclaimer. The amendment would provide that the foundation trustee, other than the daughter, would appoint a special trustee to serve as trustee with respect to any property received by the foundation as a result of the disclaimer, such property to be held in a segregated account separate and apart from any other property of the foundation. The special trustee could not be the daughter, any other issue of the decedent, the spouse of any issue of the decedent, or any entity in which the daughter had an interest or served as an officer, director, or employee. Upon the daughter's death, the segregated fund would be merged with other foundation property, and the position of special trustee would be terminated.

The IRS held the daughter's disclaimer would constitute a qualified disclaimer for purposes of Code Section 2518, provided the foundation's agreement was amended as proposed and was effective under state law. The IRS further held the property passing to the foundation as a result of the disclaimer would qualify for an estate tax charitable deduction under Code Section 2055.

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8. *Galloway v. U.S.*, 97 AFTR 2d 2006-2458 (DC Pa. 5/9/2006) – Estate tax charitable deduction denied for partial gift of residuary share to charity

The decedent created an inter vivos revocable trust in 1991, which he subsequently amended on three separate occasions. At the time of his death in 1998, the decedent's trust provided that the residue would pass in four equal shares to his son, his granddaughter, and two charitable entities. The residual gift was to be paid on two separate dates: 50 percent in early 2006 and 50 percent on Jan. 1, 2016. At that point, the trust would cease to exist. The trust also provided that if either the son or granddaughter was not living at the time of final distribution, his or her share would be distributed to the remaining beneficiaries. If both the son and daughter were deceased at the time of final distribution, the entire residue would pass to the charitable beneficiaries. On its federal estate tax return, the trust claimed a deduction under Code Section 2055(a) for nearly $400,000. The IRS denied the deduction pursuant to Code Section 2055(e)(2), determining that the trust constituted a split interest trust, and required the estate to pay additional taxes of more than $160,000.

At trial, the IRS contended that the case involved a classic split interest, where interests in the same property passed to both charitable and noncharitable beneficiaries. It pointed out that the trust at issue was created from one document and one set of property, and was held for both individual and charitable beneficiaries. In response, the estate argued the trust did not split interests in the same property. It contended the trust was for all intents and purposes, and in practical effect, two separate trusts, and had the decedent initially split his assets into two equal shares and created two separate but identical trusts (except with respect to the identity of the beneficiaries), this matter would not be before the court. It argued the charitable beneficiaries had an undivided 50 percent interest in the trust, as did the individual beneficiaries. It further argued the IRS should not be permitted to elevate form so far over substance that the charitable intent and effect of the trust were ignored, to the detriment of both the individual beneficiaries and the charitable organizations designated by the trust. The court agreed with the IRS, holding the trust was a split interest, stating the trust was created from one document and one set of property, and was held for both individual and charitable beneficiaries. Accordingly, it held the IRS correctly denied the charitable deduction requested by the trust on the basis of Code Section 2055(e).

GIFT TAX

9. P.L.R. 200633015 – Trusts qualified under Code Section 2503(c); Contributions excluded from total gifts for gift tax purposes

The taxpayers, husband and wife, created three irrevocable trusts for their three grandchildren. Under the terms of each trust, the trustee has discretion to distribute income and principal to or for the benefit of the primary beneficiary during the beneficiary's lifetime. If the primary beneficiary dies prior to attaining age 21, two of the trusts provide that the trust assets are to be distributed pursuant to the beneficiary's exercise of a testamentary general power of appointment. The other trust provides that the primary beneficiary may, with the consent of a trustee who is not an adverse party, appoint the remaining trust assets to the primary beneficiary's estate. Upon attaining age 21, the primary beneficiary of each trust has the right to terminate his or her respective trust. If the beneficiary exercises such right, the remaining trust assets will be distributed outright to the beneficiary. If the beneficiary does not exercise such right within 60 days after receiving notice, the right to terminate will lapse. In the absence of exercise of the termination power, each trust continues after the primary beneficiary attains age 21, and the trustee's authority to make discretionary distributions to the primary beneficiary continues. Upon the death of the primary beneficiary, the trust assets are to be distributed pursuant to the primary beneficiary's exercise of a testamentary special power of appointment limited to the taxpayers' descendants. If the primary beneficiary fails to appoint the remaining assets, the trust will continue, and the trustee may make discretionary distributions to the beneficiary's descendants, or if none, then to the beneficiary's siblings and their descendants, as the trustee deems in the best interest of the beneficiary or beneficiaries. Each trust states that the taxpayers do not intend that such distributions be limited to the amounts necessary for maintenance, education, and support. The taxpayers made cash transfers to two of the trusts in years one through five, and to the third trust in years four through eight. None of the transfers exceeded the gift tax annual exclusion amounts for the respective years under Code Section 2503(b). All three grandchildren are currently under age 21.

The IRS held from the date of inception through the date the primary beneficiary attains age 21, each of the three trusts satisfies the requirements of Code Section 2503(c). Accordingly, the taxpayers' contributions to the three trusts are excluded from their respective total gifts for federal gift tax purposes. Further, their future contributions to each of the three trusts while the primary beneficiary is under age 21 will be excluded from their total gifts for federal gift tax purposes, except to the extent any contributions exceed the amount described in Code Section 2503(b). The IRS additionally held each of the trusts was a skip person. Accordingly, all contributions by the taxpayers to the trusts were direct skips, as would be future contributions. Finally, the IRS held in accordance with Code Section 2632(b)(1), the taxpayers' unused generation skipping transfer exemptions were automatically allocated to contributions to the trusts to the extent necessary to make the inclusion ratio for such property zero.

10. P.L.R. 200647001 – Gift to trust incomplete; Grantor not trust owner

During his lifetime, the taxpayer created a trust, naming a corporate trustee. Trust income and principal were distributable to a class of beneficiaries consisting of the taxpayer, his spouse (if and when he married), parents, descendants, brother, brother's spouse, any descendants of his brother, and any qualified charity. Distributions were to be made in accordance with unanimous agreement of the distribution committee, or by unanimous agreement of the taxpayer and one member of the distribution committee. The distribution committee consisted initially of the taxpayer's brother and nephew, and the trust provided that during the taxpayer's lifetime, there would always be two members on the distribution committee, each of whom was an adult member of the class of permissible trust distributees, specifically excluding the taxpayer and his spouse. At the taxpayer's death, the trust residue would be distributed as appointed by the taxpayer pursuant to a limited testamentary power of appointment. In the absence of appointment, the trust residue would be distributed to certain foundations in a specified order, or if none of the foundations were in existence, then to other qualifying charities as selected by the trustee.

The IRS first concluded it found no circumstances that would cause the taxpayer to be treated as the owner of any portion of the trust under Code Sections 673, 674, 676, or 677. It additionally held the circumstances attendant on the operation of the trust would determine whether the taxpayer would be treated as the owner of any portion of the trust under Code Section 675, which was a question of fact to be determined when the federal income tax returns of the parties involved were examined. The IRS next held the taxpayer's transfer of property to the trust would not be a completed gift because of the taxpayer's

retained limited testamentary power of appointment. Further, because the taxpayer's brother's and nephew's powers to distribute trust property to themselves were exercisable only with the consent of the other or of the taxpayer, the brother and nephew would not be treated as having a general power of appointment, and they would not be treated as making a taxable gift if trust property was distributed to the taxpayer.

RETIREMENT BENEFITS

11. "Employee Plans News, Special Edition," www.irs.gov (2/13/2007) – IRS clarifies earlier guidance issued on rollovers from qualified plans to nonspouse beneficiary's inherited IRA

In a special edition of its online newsletter, the IRS clarified guidance it previously issued in Notice 2007-7 regarding nonspouse rollover rules. It stated the general rule of Q&A-19 was not intended to override the special rule in Q&A-17.

The Pension Protection Act of 2006 added Code Section 402(c)(11). Beginning in 2007, if a participant in a retirement plan dies leaving his or her accrued benefit under the plan to a nonspouse designated beneficiary, the designated beneficiary may be able to roll over the inherited funds into an IRA set up to receive such funds. The rollover must be accomplished by a direct rollover, and the retirement plan must provide for the type of rollover. Q&A-19 in the notice describes the general rule that determining required minimum distributions in the case of a nonspouse beneficiary rollover are determined under either the five-year rule or the life expectancy rule. Q&A-17 in the notice describes a special rule that is an exception to the general rule of Q&A-19. If, under a plan, the five-year rule applies for determining required minimum distributions, a nonspouse designated beneficiary may, nevertheless, treat the plan as using the life expectancy rule provided the rollover into the IRA is made prior to the end of the year following the year of the participant's death.

12. Notice 2006-100, 2006-100 I.R.B. 51 (12/01/2006) – IRS issues guidance for reporting and wage withholding under Code Section 409A

The IRS issued guidance to employers and payers on their reporting and wage withholding requirements for calendar years 2005 and 2006 with respect to deferrals of compensation and amounts includible in gross income under Code Section 409A. According to the guidance, employers and payers need not report annual deferrals of compensation that are not includible in income under Code Section 409A on Form W-2 or Form 1099-MISC for 2005 or 2006. However, amounts includible in income under Code Section 409A for 2005 and 2006 must be reported on the appropriate form. The guidance supersedes Notice 2005-94, 2005-52 I.R.B. 1208, which alerted employers and payers that they may have to file amended information returns to report amounts includible in income for 2005.

OTHER

13. P.L.R. 200709004 – Varying interest distributions did not create second class of S corporation stock

An S corporation, its shareholders, and its option holders entered into a shareholders' agreement, which contained provisions related to minimum distributions to the shareholders by the corporation. Distributions under such provisions were to be based on the shareholders' varying interests in the corporation's income for the current or immediately preceding taxable year. Such distributions entailed year-end and quarterly distributions that enabled shareholders to make timely estimated and final tax payments. The distributions were made directly to the shareholders rather than to their respective taxing authorities on their behalf. In addition, the corporation declared dividends and made pro rata distributions to its shareholders based on the number of shares owned by the shareholders as of the record date. Such distributions were made in accordance with state law, which provides that all shares of the same class are equal. The IRS concluded that the corporation's governing provisions related to the distributions did not cause the corporation to have more than one class of stock for purposes of Code Section 1361(b)(1)(D).

14. Rev. Rul. 2007-13, 2007-11 I.R.B. 684 – IRS explains tax treatment of life insurance transfers to and from grantor trusts

In two different factual situations, the IRS explains the tax treatment of transfers of life insurance contracts to and from grantor trusts. In situation 1, Trust 1 and Trust 2 are grantor trusts, both of which are treated as wholly owned by the grantor under the Code. Trust 2 owns a life insurance contract on the life of the grantor and transfers the life insurance contract to Trust 1 in exchange for cash. Situation 2 contains identical facts, except that Trust 2 is not a grantor trust.

The IRS recognized that the grantor who is treated for federal income tax purposes as the owner of a trust that owns a life insurance contract on the grantor's life is treated as the owner of the contract for purposes of applying the transfer for value limitations of Code Section 101(a)(2). Accordingly, it held in the first situation, the transfer of a life insurance contract between two grantor trusts that are treated as wholly owned by the same grantor is not a transfer for a valuable consideration within the meaning of Code Section 101(a)(2). It further held in the second situation, the transfer of a life insurance contract to a grantor trust that is treated as wholly owned by the insured is a transfer to the insured within the meaning of Code Section 101(a)(2)(B) and is, therefore, excepted from the transfer for value limitations under Code Section 101(a)(2).

15. A.M. 2007-004 – IRS raises questions about prepaid forward sales

In this legal advice memorandum, the IRS set forth its legal analysis regarding whether a contract for the sale of stock and a share lending agreement (transaction), involving the same parties and pertaining to the same shares, results in a current sale of the shares for federal income tax purposes. The factual scenario analyzed involved a seller who owned common stock in a publicly traded corporation (company). The seller's basis in the shares was $3 per share. On Sept. 15, 2002 (execution date), the seller entered into an arm's length sales contract with an unrelated third-party purchaser, at which time the common stock of the company had a fair market value of $20 per share. The seller received $1,600 of cash upon execution of the sales contract. In return, the seller promised to deliver to the purchaser on Sept. 15, 2005 (valuation date), a number of shares of common stock of the company to be determined by a formula. Under the formula, if the market price of the company's common stock was less than $20 per share on the valuation date, the purchaser would receive 100 shares; if the market price was at least $20 per share but less than $25 per share, the purchaser would receive a number of shares having a total market value equal to $2,000; and if the market price was more than $25 per share, the purchaser would receive 80 shares. In addition, the seller had the right to deliver to the purchaser on the valuation date cash equal to the value of the common stock that the seller would otherwise be required to deliver under the formula.

(Continued on Page 19)

About the Author

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Real Estate Update

KANSAS SUPREME COURT

IRON HORSE AUTO INC. V. LITITZ MUTUAL INSURANCE CO. ET AL.
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 96,772 – APRIL 27, 2007
Insurance Coverage; Mortgage Clause

ATTORNEYS: Steve R. Fabert, of Fisher, Patterson, Sayler & Smith LLP, for appellant. Todd A. Luckman, of Stumbo, Hanson & Hendricks LLP, for appellee Capital City Bank. Charles N. Henson and Allison M. Kenkel, of Wright, Henson, Clark, Hutton, Mudrick & Gragson LLP, amicus curiae brief for the Kansas Bankers Association.

FACTS: Iron Horse Auto owned improved real estate as part of its used car dealership business operations. It had a commercial insurance policy with Lititz Mutual Insurance providing, inter alia, fire insurance on its office building with a policy limit of $79,500. The policy also identified William Frye as a named insured and listed Capital City Bank as a mortgage holder on the insured building. After Lititz denied certain claims, including one for a fire loss, Frye as named insured filed suit against its insurer. Lititz defended on the basis that Frye and/or his wife had participated in setting the fire that caused the claimed loss. The bank intervened as a third party and included a claim against Lititz for failing to pay the bank's damages pursuant to the mortgage holder provisions in the policy. The district court granted summary judgment in favor of the bank.

ISSUE: Insurance contracts

HELD: Court rejected Lititz' argument that K.S.A. 40-2,118(c) excused the payment to the bank or that the policy provisions and endorsements specifically excluded coverage for the bank. Court held the Legislature did not intend for K.S.A. 40-2,118(c) to nullify or invalidate all standard or union mortgage clauses or to preclude an insurer from voluntarily providing coverage under a standard or union mortgage clause. The legislation simply clarifies that an insurer is not required to provide coverage for or make payments to a claimant where the named insured commits a fraudulent insurance act, unless the insurer had voluntarily provided such coverage under the insurance policy. Court also held the plain and unambiguous language of Lititz's policy provided for loss payments to the bank.

STATUTES: K.S.A. 40-2,118; K.S.A. 2006 Supp. 21-4603d(b); and K.S.A. 84-9-306, -9-109(d)(11)

MOONEY V. CITY OF OVERLAND PARK
JOHNSON DISTRICT COURT – AFFIRMED
NO. 95,468 – MARCH 23, 2007
Eminent Domain

ATTORNEYS: Kurt S. Brack, of Holbrook & Osborn P.A., and M. Ellis Rainey II, of Rainey & Rainey, for appellants. Timothy P. Orrick and Renee M. Gurney, of Foth & Orrick LLP, for appellee.

FACTS: Landowners (Mooneys) appealed jury's determination value of their property taken by city of Overland Park by eminent domain. Mooneys challenged (1) district court's exclusion of their proffered testimony about a prior sale of a portion of their land to Southwestern Bell and (2) district court's admission of prior appraisal by an appraiser hired by Mooneys as a statement against interest for impeachment.

ISSUES: (1) Excluded evidence of prior sale and (2) admission of evidence of prior appraisal

HELD: City's contention that evidence of prior sale was disqualified because Southwestern Bell has power of eminent domain is rejected. General rule, that sale of land subject to condemnation by purchaser but which is transferred by private sale and deed cannot be used as comparable sale evidence, is not applicable because evidence indicates an arm's length transaction occurred. No abuse of discretion by trial court's exclusion of this evidence. Trial court properly allowed city to use prior appraiser's valuation opinion in cross-examination of Mooneys. When owners of land subject to eminent domain hire an appraiser to assess value of the condemned land and submit the written appraisal to court-appointed appraisers, the valuation opinion is a statement attributable to the landowners that is admissible as an admission under K.S.A. 60-460(g) in a subsequent trial de novo in the eminent domain proceedings.

STATUTE: K.S.A. 60-226(b)(6)(A), -460(a), -460(g)

LANE V. ATCHISON HERITAGE CONFERENCE CENTER INC.
ATCHISON DISTRICT COURT
AFFIRMED
COURT OF APPEALS – REVERSED
NO. 94,634 – MARCH 16, 2007
Tort Claims Act; Recreational Use Exception

ATTORNEYS: John J. Benge, of the Benge Law Firm, for appellant. Teresa L. Watson, of Fisher, Patterson, Sayler & Smith LLP, for appellee. Wm. Scott Hesse, assistant attorney general, amicus curiae brief for state of Kansas.

FACTS: Lane was injured when he slipped and fell on ice at the loading dock of the Atchison Heritage Conference Center (AHCC) in December 2002. He brought this negligence action against the AHCC to recover for his injuries. The AHCC moved for summary judgment on the basis that it was immune from liability under the recreational use exception to the Kansas Tort Claims Act (KTCA). The district court granted summary judgment to AHCC. The Court of Appeals reversed the decision, concluding that the recreational use exception of the KTCA did not apply where the facility's recreational use was only incidental to its primary function. Because the AHCC's "primary function" was not recreational, the Court of Appeals held that the AHCC had not met its burden of establishing immunity from the KTCA.

ISSUES: (1) KTCA and (2) recreational use exception

HELD: Court stated that immunity from liability under the recreational use exception to the KTCA does not depend upon the "primary use" of the property but rather depends on the character of the property in question. Court stated the recreational use exception applies when property is "intended or permitted" to be used for recreational purposes. The correct test to be applied is whether the property has been used for recreational purposes in the past or whether recreation has been encouraged. Court concluded that AHCC has been used on numerous occasions for recreational events and activities. The injury alleged here took place at such a recreational event (New Year's Eve dance). Thus, the district court correctly granted the AHCC's motion for summary judgment regarding the recreational use exception to tort liability under the KTCA.

STATUTE: K.S.A. 2006 Supp. 75- 6103(a), -6104(o)

MILLER V. BARTLE ET AL.
DOUGLAS DISTRICT COURT – APPEAL DISMISSED
NO. 95,418 – FEBRUARY 2, 2007
Eminent Domain; Jurisdiction

ATTORNEYS: James Bartle, for appellants. Dan Biles and Eldon J. Shields, of Gates, Biles, Shields & Ryan P.A., and Sally A. Howard, for Kansas Department of Transportation.

FACTS: The Bartles appeal from a jury award in an eminent domain proceeding initiated by Kansas Department of Transportation (KDOT) for the partial taking of their property for a highway improvement project in Douglas County. The Bartles did not appeal the jury determination of the fair market value of the property taken, but claim on appeal that they have been denied equal protection and due process of law under the U.S. Constitution. They base their claim upon legislation authorizing a payment of 125 percent to those persons whose property was taken to construct the Kansas Speedway in Wyandotte County. The district court rejected both of the Bartles' constitutional claims.

ISSUE: Whether the district court had jurisdiction under the Eminent Domain Procedures Act (EDPA) to consider the Bartles' claims.

HELD: Court dismissed the appeal. Court stated the only issue to be determined in an appeal from a condemnation award is the compensation required by K.S.A. 26-513(e), the fair market value of the property taken. Court held that consistent with the plain language of the EDPA, the very nature of an eminent domain proceeding, and the past decisions of the court interpreting the EDPA, the Court concluded like the district court that there was no jurisdiction in the proceeding to address the constitutional or attorney fee claims raised.

STATUTES: K.S.A. 2005 Supp. 12-1773; K.S.A. 26-501 *et seq.*, -513(a), (e); K.S.A. 2005 Supp. 26-508

KORYTKOWSKI ET AL. V. CITY OF OTTAWA ET AL.
FRANKLIN DISTRICT COURT – AFFIRMED
NO. 95,483 – FEBRUARY 2, 2007
Inverse Condemnation

ATTORNEYS: James B. Jackson, for appellant. Robert L. Bezek Jr., of Bezek, Lowry & Hendrix, for appellee City of Ottawa. John M. Cassidy, for Kansas Department of Transportation.

FACTS: Korytkowski and others filed an inverse condemnation action against the city of Ottawa and the secretary of Kansas Department of Transportation alleging that a highway construction project so unreasonably increased indirect travel to their properties and so unreasonably restricted access from their properties to the system of state highways that it constituted a taking of their property without just compensation. The district court granted summary judgment to the city find there was not a taking as provided under the laws of the Kansas or U.S. constitutions.

ISSUE: Has there been a compensable taking of plaintiff's property?

HELD: Court held that where the landowner's property was not physically taken and access to the abutting roadway was not disturbed, the necessity of a more indirect route to and from the landowner's property did not constitute a taking under Kansas law based on either "right of access" or "restricted access."

STATUTE: K.S.A. 77-701 *et seq.*, -709

KANSAS COURT OF APPEALS

GATES ET AL. V. GOODYEAR ET AL.
LEAVENWORTH DISTRICT COURT – AFFIRMED IN PART AND DISMISSED IN PART
NO. 95,941 – APRIL 13, 2007
Landlord/Tenant; Conversion; Punitive Damages

ATTORNEYS: Keith C. Sevedge and Robert D. Beall, for appellants. Robert Hadley Hall, for appellees.

FACTS: Gates was the landlord of a lease with Goodyear and Roberts of premises for residential and commercial purposes and from which the tenants would operate their trucking business. Gates filed a petition alleging failure to pay rent and sought possession of the premises and judgment for back rent and interest. After the tenants were forcibly removed, the court permitted the tenants to have access for the purpose of removing personal property. The tenants filed a motion to hold Gates in contempt for violating the access order and the action was converted to a chapter 60 action. After a bench trial, on Aug. 16, 2005, the district court found: (1) the lease was a tenancy from month to month and a "hybrid" residential and commercial lease; (2) the tenants were not in arrears in rental payments when the initial petition was filed; (3) the forcible entry and detainer action was defective because Gates did not strictly comply with the applicable procedures to terminate the lease; (4) K.S.A. 58-2565(d) was inapplicable to vest lien rights of a landlord in the tenant's property; (5) Gates' damage claims were unfounded and his claims to ownership of the retained property were unsubstantiated; (6) Gates' retention of the tenants' property constituted conversion; and (7) the conversion was willful and wanton and justified punitive damages. The court set damages in November 2005 finding Gates' liable for missing property in the amount of $29,483.62, some of the returned property was damaged in the amount of $13,468.68, and punitive damages set at $10,000. Gates timely appealed the November judgment only, challenging

principally the conclusion that he converted the tenants' property but also the court's ruling on his motion to strike punitive damages.

ISSUES: (1) Jurisdiction, (2) notice of appeal, and (3) punitive damages

HELD: Court held the issues on appeal were limited due to the restricted language in Gates' notice of appeal. The notice of appeal only covered Gates' claim involving K.S.A. 58-2565 and punitive damages. Court held that in the absence of a qualified retention of the tenants' property under K.S.A. 58-2565, the court agreed with the district court's conclusion that Gates' action constituted a conversion under Kansas law. Court held the district court did not err in allowing the tenants to amend to seek punitive damages and the motion was not untimely. Court stated that Gates did not challenge the sufficiency of the motion to amend, the sufficiency of the evidence to support the finding punitive damages were warranted, or the amount of punitive damages assessed. Court held the award of punitive damages based on the tenants' timely motion to amend was upheld.

STATUTES: K.S.A. 58-2565(d) and K.S.A. 60-102, -216, -2103(b), -3703

IN RE MECHANIC'S LIEN AGAINST CITY OF KANSAS CITY
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 97,086 – MARCH 23, 2007
Mechanic's Lien

ATTORNEYS: Stephen R. Miller, David R. Vandeginste, and Heath A. Hawk, of Miller Law Firm P.C., for appellants. Jason B. Prier and Timothy P. Orrick, of Foth & Orrick LLP, for appellee.

FACTS: Trans World leased commercial property from Unified Government of Wyandotte County (Unified Government), and contracted electric and sheet metal companies (Mark One) to make improvements on the property. Mark One filed mechanic's lien when it was not paid for labor, materials and services. Unified Government filed motion for judicial review of the lien. At nonevidentiary hearing, district court found no evidence that Unified Government authorized or consented to the improvements, and set aside Mark One's lien as fraudulent. Mark One appealed.

ISSUE: Fraudulent mechanic's lien

HELD: Issue of first impression in Kansas. K.S.A. 58-4301 is discussed and applied. Mark One's argument for application of a summary judgment standard is rejected. District court complied with statute and its findings were supported by substantial competent evidence.

STATUTE: K.S.A. 58-4301, -4301(c), -4301(e), -4301(e)(2)

BRENNAN ET AL. V. KUNZLE ET AL.
JOHNSON DISTRICT COURT
AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS
NO. 94,273 – MARCH 16, 2007
Fraudulent Nondisclosure; Inspections; As-Is Clause

ATTORNEYS: Michael E. Whitsitt, for appellants/cross-appellees. Gary A. Schafersman, Eldon Shields, and James L. MowBray, of Wallace, Saunders, Austin, Brown and Enochs Chtd., for appellees/cross-appellants.

FACTS: Christian and Janet Kunzle purchased a house from Derek and Catherine Brennan for approximately $1 million. The Kunzles partially financed the house by taking out a mortgage for $435,000 with the Brennans and signing a promissory note. The Brennans sued the Kunzles after the Kunzles defaulted on their mortgage and promissory note. The Kunzles counterclaimed against the Brennans for fraud, misrepresentation, negligence, and breach of implied warranties. The central issue involved a failure by the Brennans to disclose a professional inspection report to the Kunzles. This report revealed potential latent defects in the house. The Kunzles argue that the failure to disclose the report constituted fraud by silence. The Brennans contend that the Kunzles would have discovered the hidden defects if they had inspected for water leaks before the sale. Although acknowledging that the Kunzles had conducted a number of inspections of the house, the trial court implicitly determined that had the Kunzles hired professional inspectors specifically for water leak issues, they would have learned of the defects. The trial court granted summary judgment for the Brennans for $433,924.24 plus interest, but denied the Brennans attorney fees to defend the counterclaims.

ISSUES: (1) Foreclosure of sellers' mortgage and (2) inspections

HELD: Court reversed the district court's granting of summary judgment because the question of Kunzles' counterclaim for fraud by silence presented a genuine issue of material fact regarding the reasonableness of the Kunzles' inspections. An "as-is" clause in a real estate contract does not shield a seller from liability for fraud. Court affirmed the granting of summary judgment in favor of the Brennans on the claims of fraudulent and negligent misrepresentation, negligence, and breach of implied warranties. Court also held there was no error by the district court in granting judgment on the Brennans' mortgage foreclosure action because the Kunzles' counterclaims did not provide a defense to and would not have affected the mortgage foreclosure. Court held the promissory note and mortgage allowed the Brennans to recover attorney fees incurred in enforcing the promissory note and in foreclosing the mortgage but do not allow for attorney fees in defending the counterclaims asserted by the Kunzles. Court reversed the award of interest and remanded the case for the trial court to recalculate interest at the fixed rate of 7.93 percent.

STATUTES: K.S.A. 2006 Supp. 16-207 and K.S.A. 60-213(j), -242(b)

THE CITY OF ANDOVER V. SOUTHWESTERN BELL TELEPHONE
BUTLER DISTRICT COURT – AFFIRMED
NO. 96,823 – MARCH 9, 2007
Arbitration

ATTORNEYS: Timothy S. Pickering, Bruce A. Ney, and Melanie N. Sawyer, of Southwestern Bell Telephone L.P., of Topeka, for appellant. Norman G. Manley, of Davis, Manley & Lane, for appellee.

FACTS: Andover sued Southwestern Bell (SWBT), alleging that the phone company's negligence in not promptly locating its buried cables forced the city into later making a contract with SWBT to move those cables. SWBT successfully moved the cables and was paid for its work. But the parties contract had an arbitration clause and, when sued by Andover, SWBT unsuccessfully sought arbitration of the claim. The district court found Andover's claim was for unjust enrichment and refused to compel arbitration because under Kansas law, claims in equity are not subject to contract provisions requiring arbitration of disputes.

ISSUE: Compelling arbitration

HELD: Court held the damages claimed by Andover were not caused by SWBT in the course of doing the relocation work described in their agreement. Andover claims damages for the failures of SWBT prior to execution of the contract. The arbitration clause is not nullified by allowing Andover to proceed with its claim in tort. To the contrary, had any disputes arisen regarding the ability, cost, or timeliness of SWBT in relocating the cables, Andover would have been compelled to submit its claims to arbitration. Court stated that even though the district court improperly interpreted the petition as a claim in equity rather than tort, the court arrived at the proper conclusion. Andover's tort claim is not a disguised contract claim and is outside the subject matter of the arbitration provision. Andover cannot be compelled to submit to arbitration because claims in tort are exempt from arbitration.

STATUTE: K.S.A. 5-401(b), (c)

AYALLA V. SOUTHRIDGE PRESBYTERIAN CHURCH
JOHNSON DISTRICT COURT – AFFIRMED
NO. 96,118 – MARCH 2, 2007
Real Estate Contracts; Statute of Frauds

ATTORNEYS: Eva Ayalla, appellant pro se. William E. Hanna, of Stinson Morrison Hecker LLP, for appellee.

FACTS: Southridge Presbyterian Church offered to sell a residential home for $134,500. Ayalla made a written offer to purchase the home for $130,000 on April 26, 2005. The written offer was made on a residential real estate sale contract furnished by Southridge's real estate agent, Jim Henderson. Ayalla gave Henderson a check for $1,000 as earnest money and Henderson and Ayalla's mortgage broker negotiated closing costs. On April 28, 2005, Henderson orally told Ayalla's mortgage broker that Southridge had accepted the offer. The following day, Henderson orally told Ayalla personally that Southridge had accepted the offer. Henderson and Ayalla agreed to meet May 1, 2005, to complete the paper work. Before the meeting, Henderson called Ayalla and told her that Southridge had accepted a higher offer of $142,500 from the Hamiltons. Ayalla filed suit for an injunction and damages. The trial court granted summary judgment to Southridge finding that no enforceable contract under the statute of frauds existed between the parties for the sale of the property.

ISSUE: Real estate contracts

HELD: Court held the material facts were not in dispute. Court stated the trial court correctly explained to Ayalla that Henderson's signature on the sale contract did not satisfy the signature requirement of the statute of frauds. Henderson's signature was not meant to be an acceptance of Ayalla's offer but simply a certification that the form was an approved real estate contract form. Court held Ayalla's fraud claim was not properly plead and she did not rely on any misrepresentation. Court stated that even if Ayalla was attempting to assert a claim for equitable relief, the doctrines of promissory estoppel and part performance were not applicable. Court denied Southridge's claim for costs and attorney fees finding there was no evidence that Ayalla pursued this appeal frivolously or for the purposes of harassment or delay.

STATUTES: K.S.A. 33-106; K.S.A. 50-626(a); and K.S.A. 60-209(b)

MUHL ET AL. V. BOHI ET AL.
FRANKLIN DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
NO. 96,262 – FEBRUARY 23, 2007
Partition Fence; Trespass; Conversion

ATTORNEYS: R. Scott Ryburn and Christopher M. Small, of Anderson & Bird LLP, for appellants. Steven B. Doering, for appellees.

FACTS: Muhls and Bohi owned properties with common boundary and a partition fence in disrepair with ingrown trees. Bohi hired Davis to remove the fence with backhoe, cut down trees, and pile cut trees on Bohi's property. Muhls sued for trespass, conversion, and conspiracy. District court granted summary judgment to Bohi and Davis. Muhls appealed on trespass and conversion claims.

ISSUES: (1) Trespass and (2) conversion

HELD: No Kansas case on this exact issue. A duty to build, maintain, or remove a partition fence confers on a landowner the privilege to lawfully enter onto the adjoining landowner's property at reasonable times and in a reasonable manner to build, maintain, or remove the fence. Because genuine issue of material fact exists regarding actual distance of the encroachment onto Muhls' property, district court erred in granting summary judgment. Reversed and remanded on this claim. No error to grant summary judgment on conversion claim. Trees removed from Muhls' property stated claim for trespass rather than conversion. *Johns v. Schmidt*, 32 Kan. 383 (1884), is compared.

STATUTE: K.S.A. 29-301, -302, -303, -304, -305, -308, and -316

FOUR SEASONS APARTMENTS LTD. V. AAA GLASS SERVICE INC.
LYON DISTRICT COURT – AFFIRMED
NO. 96,455 – FEBRUARY 23, 2007
Statute of Limitations; Consumer Protections Act

ATTORNEYS: Thomas A. Krueger, of Krueger Law Offices, for appellant. Monte L. Miller, of Miller & Larson Chtd., for appellee.

FACTS: In 1993, Four Seasons entered into an oral contract with AAA Glass Service for the purchase and installation of new doors in one of Four Seasons apartment buildings. The fire department inspected the apartments for building code violations on three separate occasions, but it failed to notice that the doors did not meet building code regulations until March 17, 2005, and it did not notify Four Seasons until April 1, 2005. On May 13, 2005 Four Seasons sued AAA for breach of implied warrant of fitness and later included claims for violation of the Kansas Consumer Protection Act (KCPA). After a bench trial, the district court ruled the three-year statute of limitations began to run in 1993 and Four Season's 2005 claims are now time barred.

ISSUES: (1) Statute of limitations and (2) KCPA

HELD: Court held that Four Season's KCPA claim was time barred. Court stated the three-year statute of limitations does not contain a discoverability provision and there was no justifiable basis for creating one where none exists. Court stated that even if there were a discoverability provision, Four Season's KCPA claim would have been extinguished before commencement by any possible period of repose. Court held the district court did not err in finding that Four Season's breach of an implied warranty of fitness was time barred as well by the three-year statute of limitations. Court stated the breach

occurred at the time the doors were sold and installed in 1993, since the claimed implied warranty related to their compliance with the local building code at that time.

STATUTES: K.S.A. 50-623 *et seq.*, -626(b)(1)(D) and K.S.A. 60-508, -512, -513(b), -515, -523, - 524

PICARD ET AL. V. SUGAR VALLEY LAKES HOMES ASSOCIATION
LINN DISTRICT COURT – AFFIRMED
NO. 96,225 – FEBRUARY 16, 2007
Homeowners Association; Elections; Quorum

ATTORNEYS: Robert Lowe, appellant pro se. J. Darcy Domoney, of Winkler, Domoney & Schultz, for appellee.

FACTS: Sugar Valley was incorporated in 1973. In 1974, Hidden Valley Lakes Association merged into Sugar Valley and the merger was filed with the secretary of state. In 1978, Sugar Valley amended its bylaws changing board membership to five, three from Sugar Valley and two from Hidden Valley. In 1996, substantial amendments were made to the bylaws, including restrictions based on payment of association dues. At the 2004 annual meeting, there was an election for four members to the board. Robert Lowe was one of the candidates. Proxies were mailed to all association members and the ballots stated that only members in good standing would be counted. Plaintiffs, including Lowe, filed an action in district court alleging multiple variations of the Kansas corporation statutes. The district court held that Sugar Valley correctly met the quorum requirements at the annual meeting, that the amended bylaws concerning association rights had been used continuously for 10 years, failure to amend the articles of incorporation was a technicality overcome by many years of ratification, and that failure to pay association dues can result in loss of membership rights, including the right to vote.

ISSUES: (1) Board member, (2) elections, (3) home owners association, (4) quorum, and (5) right to vote

HELD: Court held that the district court correctly concluded that the members of Sugar Valley ratified the election of five members to the board despite the fact that the articles of incorporation were not timely amended. Court stated that Lowe failed to demonstrate any harm or prejudice by the oversight of the board in failing to timely amend the articles of incorporation. Court stated the limitation on membership rights based on payment of association dues or assessments had been in the bylaws since inception. Court held that failing to pay assessments does not result in the loss of membership. Instead it results in the loss or suspension of a membership right. Court found the district court correctly determined the quorum requirements for the January 2004 annual meeting and the court did not err in granting summary judgment to Sugar Valley. Court also held Lowe failed in his burden to prove the invalidity of the 1996 annual meeting before it could be disregarded.

STATUTES: K.S.A. 2006 Supp. 17-6301(b); K.S.A. 17-6009(b), -6505(b), (c); and K.S.A. 60-211(a)

NEWMAN MEMORIAL HOSPITAL V. WALTON CONSTRUCTION CO. ET AL.
LYON DISTRICT COURT – REVERSED
NO. 94,473 – JANUARY 12, 2007
Limitation of Actions

ATTORNEYS: Wyatt A. Hoch, Carolyn L. Matthews and James D. Oliver, of Foulston Siefkin LLP, for appellant. Harold S. Youngentob, John A. Bausch, and Nathan D. Leadstrom, of Goodell, Stratton, Edmonds & Palmer LLP, for appellee.

FACTS: Newman Memorial Hospital (Hospital), a county hospital located in Emporia, sued Everton Oglesby Askey Architects (Architects) and various contractors and subcontractors involved in design and construction of medical office building with significant slab-on-grade floor problems. Architects filed motion for summary judgment, asserting the Hospital's claims were time barred. District court denied the motion, relying on language in property tax exemption statute, K.S.A. 2002 Supp. 79-201a Second, to find limitation periods on contract and implied warranty claims did not apply because the Hospital was acting in a governmental rather than proprietary manner in building and leasing the office building for lease to physicians at commercial rates. Jury found Architects liable for $907,693 in damages. Architects appealed on issues, including district court's ruling that the Hospital was not subject to statute of limitations defense.

ISSUES: Governmental or proprietary function or activity for purposes of K.S.A. 60-521

HELD: Denial of Architects's motion for summary judgment is reversed, and Architects is granted summary judgment against county hospital based on statute of limitations defenses. Under facts, actions of county hospital in constructing and leasing a medical office building is a proprietary rather than governmental function, thus statutory limitations periods apply. Under facts, equitable estoppel does not exist to prevent architectural firm under written contract with county hospital from pleading and relying on statute of limitations defense. Hospital's action for breach of implied warranty of workmanlike performance, and for breach of written contract, are time barred by K.S.A. 60-512(1) and K.S.A. 60-511(1).

STATUTES: 42 U.S.C. § 1320a-7(a)(1) and 7(b), 1395nn (2000); K.S.A. 2005 Supp. 76-3301 *et seq.*, -3302(a)(1), -3302(b), 79-201a Second; K.S.A. 2002 Supp. 79-201a Second; and K.S.A. 16-4601 *et seq.*, 60-256, -509, -511(1), -512(1), -521, 79-201a Second

OFFICE OF THE ATTORNEY GENERAL
STATE OF KANSAS

OPINION 2006-30
DECEMBER 14, 2006

ISSUES: Cities and Municipalities – Buildings, Structures, and Grounds; Development and Redevelopment of Areas In and Around Cities – Purpose of Act; Redevelopment Project Costs; and Infrastructure Outside Redevelopment District

SYNOPSIS: Redevelopment project costs that are payable from bonds issued pursuant to the Tax Increment Finance Act are for projects that are located within the boundaries of a redevelopment district. The Legislature has not authorized the payment of costs associated with the construction of infrastructure improvements located outside the boundaries of a redevelopment district even though such infrastructure may be necessary to the redevelopment of the district.

STATUTES: K.S.A. 12-1770; K.S.A. 2005 Supp. 12-1770a; 12-1771; 12-1772; 12-1773, as amended by L. 2006, Ch. 201, § 5; 12-1777; 12-17,140; 12-17,141

(Continued on next page)

OPINION NO. 2007-1
JANUARY 29, 2007

ISSUES: Taxation – Miscellaneous Provision-Rate of Interest on Delinquent or Unpaid Taxes and Overpayments of Taxes Contracts; Promises – Interest; and Charges – Interest on Judgments

SYNOPSIS: K.S.A. 2005 Supp. 79-2004(d) requires use of K.S.A. 79-2968 rates in determining the interest owed on debts arising out of unpaid delinquent real estate taxes until those debts are paid or until the real property is sold in foreclosure, whichever occurs first.

STATUTES: K.S.A. 2005 Supp. 16-204; K.S.A. 72-8204a; 79-408; 79-1412; K.S.A. 2005 Supp. 79-1801; K.S.A. 79-1804; 79-1805; K.S.A. 2005 Supp. 79-1945; K.S.A. 79-2001; K.S.A. 2005 Supp. 79-2004; 79-2004a; 79-2101; K.S.A. 79-2301; 79-2302; 79-2303; 79-2306; 79-2322; 79-2401; K.S.A. 2005 Supp. 79-2041a; 79-2801; K.S.A. 79-2803; K.S.A. 2005 Supp. 79-2804; 79-2804g; 79-2804h; 79-2926; 79-2927; 79-2968

OPINION NO. 2007-2
JANUARY 29, 2007

ISSUES: Counties and County Officers – County Appraiser; Appointment, Term, and Qualifications; Meaning of "Full Time"; and Appraisal Districts

SYNOPSIS: K.S.A. 2005 Supp. 19-430 requires that county appraisers for counties having a population of 25,000 or more devote full time to such work. However, K.S.A. 19-428 allows any county to join with others in order to jointly hire a district appraiser. K.S.A. 19-428 does not prohibit counties with populations of more than 25,000 from hiring a district appraiser. Reading the two statutes in pari materia, it is our opinion that the "full time" criteria in K.S.A. 2005 Supp. 19-430 does not per se require exclusivity as to one county if the county joins with one or more other counties to hire a district appraiser pursuant to K.S.A. 19-428. The phrase "full time" as used in K.S.A. 2005 Supp. 19-430 means that the county appraiser must devote the hours normally identified by the county or counties hiring such appraiser as deemed necessary to satisfy all the duties and responsibilities of that office.

STATUTES: K.S.A. 2005 Supp. 19-101a, as amended by L. 2006, Ch. 192, § 4 and Ch. 207, § 4; K.S.A. 19-425; 19-428; K.S.A. 2005 Supp 19-430; 44-511; K.S.A. 58-103; 79-1412a

OPINION NO. 2007-5
JANUARY 29, 2007

ISSUES: Cities and Municipalities – Buildings, Structures, and Grounds – Definitions; Permissible Use of STAR Bonds; Theme Park Amenities, Amusement Park Rides, Shelters, Multistory Parking Decks; and Below Grade Sports Stadium to be Owned by or Leased to Developer

SYNOPSIS: The limitation against using TIF/STAR bond proceeds for "costs incurred in connection with the construction of buildings or other structures to be owned by or leased to a developer" should be read broadly to prohibit use of such proceeds for financing property commonly thought of as a structure. Thus, while TIF/STAR bond proceeds may be used for many public improvements, including buildings and other structures, they may not be used to finance construction of such buildings or structures if they are to be owned by or leased to a developer.

STATUTES: K.S.A. 3-701; K.S.A. 2005 Supp. 12-1750; K.S.A. 12-1770; K.S.A. 2005 Supp. 12-1770a; 12-1773, as amended by L. 2006, Ch. 192, § 3 and Ch. 201, § 5; 12-1774; K.S.A. 12-1794; 12-17,104; 68-1101; K.S.A. 2005 Supp. 77-201; K.S.A. 84-2-105; L. 2005, Ch. 132, § 1; L. 2004, Ch. 183, § 4; L. 2001, Ch. 103, § 2; L. 1998, Ch. 17, § 5(b); L. 1997, Ch. 93, § 1; L. 1993, Ch. 213, § 2; L. 1988, Ch. 78, § 4(b); L.1988, Ch. 79, § 1, 6; L. 1980, Ch. 68, § 3; L. 1979, Ch. 52, § 4; L.1976, Ch. 69, § 4

U.S. BANKRUPTCY APPELLATE PANEL
10TH CIRCUIT

IN RE THOMAS
CASE NO. KS-06-068
FEBRUARY 12, 2007
Manufactured Home; Claim Preclusion

ATTORNEYS: J. Michael Morris, pro se, for appellant. Michael D. Doering, for plaintiff-defendant-appellee.

FACTS: A bankruptcy debtor's property consisted of a parcel of real property with an affixed manufactured home. Debtor issued a mortgage to the original lender, which was then assigned to Wachovia Bank (Wachovia). Wachovia failed to properly perfect the security interest in the manufactured home by failing to comply with the Kansas Manufactured Housing Act (KMHA). As a result, Wachovia's interest in the manufactured home pursuant to KMHA was an unperfected security interest in personal property. Wachovia instituted an action in state court seeking relief from the stay and ability to foreclose on the real property. The state court issued an order granting the request and Wachovia conducted a foreclosure sale of the real property.

ISSUE: Whether a real property foreclosure proceeding in state court precludes a trustee from asserting a claim in bankruptcy court against the personal property not at issue in the state proceeding.

HELD: Wachovia's failure to properly perfect title in the manufactured home rendered it personal property under KMHA. The state's quiet title and foreclosure proceeding excluded the manufactured home since it was personal property. Accordingly, the trustee's claim in bankruptcy court that the manufactured home was personal property of the estate was not a claim adjudicated in the state proceeding.

STATUTES: K.S.A. 8-2401, 58-4201-12, 58-4214, 60-213, 77-109; 11 U.S.C. § 544(a); U.S.C. § 158

U.S. BANKRUPTCY COURT
DISTRICT OF KANSAS

IN RE MURPHY
CASE NO. 05-17923
APRIL 3, 2007
Homestead; Consumer Protection Act

FACTS: Debtors' homestead exemption includes a mobile home. Debtors closed on the purchase of this mobile home from ARC in 2004, giving a mortgage to National City Mortgage Co. Because of alleged problems and defects in the mobile home, debtors ceased making mortgage payments and revoked acceptance of the mobile home on Jan. 19, 2005. The debtors also claim exempt "Other Contingent and Unliquidated Claims of Every Nature." Debtors have a counterclaim against National City Mortgage Co. and claims against ARC for $130,000 arising out of breach of warranty and revocation of acceptance as to debtor's homestead. Debtors claim that ARC commit-

ted deceptive acts that violate the Kansas Consumer Protection Act (KCPA) and entitle them to actual damages or civil penalties, along with attorneys' fees. They also assert breach of the implied warranty of merchantability and, because ARC never provided them with a certificate of title to the mobile home, that the transaction is void as being fraudulent. The trustee argued that the homestead exemption does not encompass causes of action.

ISSUE: Does the Kansas homestead exemption extend to debtors' several causes of action relating to alleged defects in the mobile home or deceptive practices committed by its seller?

HELD: While the causes of action may not be identical to insurance coverage for a casualty loss, they are somewhat analogous and irretrievably bound up with the debtors' homestead. The homestead exemption would have little meaning if an action for damages to one's homestead or for misconduct on the part of the homestead's seller were not also exempt. Debtors' claimed homestead exemption in the causes of action asserted in connection with the purchase of their mobile home is allowed in the scheduled amount of $130,000.

STATUTES: K.S.A. 84-2-314 (1996) and K.S.A. 58-4204(h)(2005)

IN RE ADVANTAGE PROPERTIES, INC.
CASE NO. 06-12363-11
MARCH 14, 2007
Substantial Plan Consummation; Foreclosure

ATTORNEYS: D. Michael Case on behalf of debtor. Karl R. Swartz for creditor. Richard A. Wieland for U.S. trustee.

FACTS: Advantage Property (Debtor) defaulted on the mortgage of a strip shopping mall. The mortgage was held by Emprise Bank (Creditor). Creditor obtained a foreclosure judgment. Debtor filed a Chapter 11 petition prior to the foreclosure sale taking place. Debtor confirmed a Chapter 11 plan in which it would pay Creditor its entire secured claim. Debtor later defaulted on the terms of the plan. After failing to cure the default, Creditor accelerated the debt and obtained a new order authorizing foreclosure of the mortgage. Debtor filed a second Chapter 11 petition in response.

ISSUE: Whether a Chapter 11 Debtor defaulting on the terms of a substantially consummated plan may obtain a subsequent Chapter 11 reorganization to avoid foreclosure.

HELD: After the Debtor's reorganization plan was confirmed and substantially consummated, no extraordinary change in circumstances occurred justifying a second reorganization plan. The court also found that denying Debtor a second Chapter 11 reorganization terminates the automatic stay allowing Creditor to foreclose.

STATUTES: 11 U.S.C. § 341, 362(c), 1101(2), 1127, 1141, 349(b)

IN RE WHITE
CASE NO. 01-23966
FEBRUARY 09, 2007
Loan Rescission; Truth in Lending

ATTORNEYS: Kenneth M. Gay for debtor-plaintiff. Brandon T. Pittenger and Julie A. Haverly of McNearney & Associates LLC, for defendant. Lance T. Weber of Weber, Pickett & Gale LLC, for third-party defendant.

FACTS: Debtor executed a contract for deed to acquire a principal residence. Debtor then refinanced through Centex and granted a mortgage to secure the loan. Centex closed the loan and paid off the contract for deed, but, failed to ensure legal title was transferred to debtor. Centex also failed to provide Debtor with a statement of disclosures and notices to rescind the loan as required by the Truth in Lending Act (TILA). A year and a half after closing the loan Debtor filed a Chapter 13 petition. Debtor then filed this action against Centex seeking to rescind the loan and void its mortgage. Centex filed a third-party complaint against the closing agent, Netco.

ISSUE: Whether a debtor may rescind a loan a year and a half after closing when the lender failed to provide disclosures and notices required by the TILA.

HELD: TILA violations are measured by a strict liability standard. Under the TILA, the borrower is entitled to rescind the loan up to three days after closing if the lender provides the borrower with the disclosures and notices required by the TILA, and, up to three years after closing if the lender fails to provide such disclosures and notices. Debtor is entitled to rescind the loan, is not liable for any finance or other charge, and is entitled to an award of statutory damages in the amount of $2,000 for the failure of Centex to honor debtor's notice of rescission.

STATUTES: 11 U.S.C. § 363, 364; 15 U.S.C. § 1601, 1635, 1638, 1640; 28 U.S.C. § 157, 1334

IN RE COLON
CASE NO. 04-42174
JANUARY 26, 2007
Homestead; Mortgage Legal Description

FACTS: Debtors purchased a home in Topeka. The mortgage was eventually refinanced and assigned to Washington Mutual. The mortgage included the correct address and tax parcel identification number of the property, but incorrectly described the property as "Lot 29" instead of "Lot 79." The Shawnee County Register of Deeds indexed the mortgage according to the incorrect description, "Lot 29." Upon filing Chapter 13, debtors claimed the home as an exempt homestead. The trustee initiated an adversary proceeding to avoid the lien against the debtor's homestead for benefit of the bankruptcy estate.

ISSUE: What steps would a bona fide purchaser take to obtain good title, and, whether review of the mortgage as it was recorded would have put the Trustee on constructive notice of the mortgage against the debtor's property?

HELD: The recorded mortgage was insufficient to impart constructive knowledge of the mortgage to the trustee. Because the trustee did not have constructive notice of the mortgage and may avoid the mortgage as a bona fide purchaser under § 544(a)(3), or as a hypothetical lien creditor under § 544(a)(1).

STATUTES: 11 U.S.C. § 101-1330, 544(a); 28 U.S.C. § 157(b), 1334; K.S.A. 19-1205, 19-1206, 58-2203, 58-2204, 58-2222

IN RE LEROY
CASE NO. 05-41993
JANUARY 8, 2007
Automatic Stay; Sheriff's Sale

FACTS: Debtors owned real property upon which they executed a note and mortgage. Mortgagee filed a foreclosure action after debtors failed

to make payments. Debtors then filed for chapter 13 bankruptcy. The bankruptcy was dismissed on May 31, 2006, for failure to make timely payments under the plan. Debtors filed a Motion to Reinstate on June 15, 2006. On July 11, 2006, a foreclosure sale of Debtors' home was held. The sale was confirmed by an order entered July 14, 2006. The Order of Reinstatement was entered Oct. 16, 2006.

ISSUE: Does the automatic stay in a chapter 13 bankruptcy void a sheriff's sale that takes place in the interim between a bankruptcy being dismissed and then reinstated?

HELD: No. The automatic stay provided by § 362 was lifted upon dismissal of Debtors' Chapter 13 case. Debtors did not seek either an emergency hearing or injunctive relief to prevent the foreclosure sale pending the court's decision. The property in question was no longer property of the estate when the stay did go back into effect upon reinstatement.

STATUTES: 11 U.S.C. § 105, 350(b), 362, 1322(c)(1); K.S.A. 60-2414(m)

IN RE LETTERMAN
CASE NO. 05-60235
DECEMBER 21, 2006
Homestead and Insurance Proceeds

ATTORNEYS: Mark Lazzo for the debtor. Ted Knopp for the creditor.

FACTS: The matter before the court is an objection to Debtor's claimed homestead exemption. Debtor and his wife moved from their home because of a natural gas leak about a month prior to filing this petition. The leak was promptly fixed. About two weeks after moving in with his daughter, Debtor's house burned down. Debtor's chapter 13 plan calls for Debtor to sell the property and use the proceeds to pay his secured and unsecured creditors. The trustee and creditor object to the homestead exemption because Debtor did not reside in the property.

ISSUE: Did Debtor have the intent to use his insurance proceeds to restore his property or to acquire another homestead?

HELD: Debtor did not occupy the property on the date of the petition and did not intend to return to the property. In addition, the court found that Debtor did not intend to reinvest the proceeds of the sale of the property in another homestead in Kansas or to rebuild the property.

STATUTE: K.S.A. 60-2301

KANSAS 2007 LEGISLATIVE HIGHLIGHTS

SCR 1602 – Valuation of Residential Property. If adopted by voters in November 2008, **SCR 1602** would amend the Kansas Constitution to authorize the Legislature to limit (or freeze) valuation increases for single-family residential parcels that are owned by, and the principal place of residence for, Kansas residents age 65 and above. The amendment, which would not be self-executing, also would grant the Legislature the authority to limit application of the valuation-limitation provision, as well as enact other legislation necessary to administer the new constitutional provision. If approved by voters, the earliest possible action could come during the 2009 Legislature with respect to tax year 2009 valuations.

SB 53 – Release of Dormant Judgments. The bill amends K.S.A. 60-2403, and requires that a district court judge release a judgment of record after it has been dormant for at least two years. Shifts responsibility from clerk of the court, to district court judge.

SB 58 – Trustee Transfer of Real Estate. The bill amends KSA 58a-810(c) and to clarifies that a property titled in the name of a trust may be conveyed either in the name of the trust, or in the name of the trustee, provided that the name of the trust is clearly set forth in the conveyance.

SB 137 – Branch Banks. The bill provides that no bank shall establish or maintain a branch in the state of Kansas on the premises or property where an affiliate engages in commercial activities. This bill was requested by the Kansas Bankers Association, and essentially prohibits the mixing of banking and commerce on the commercial premises of an affiliate (e.g., Wal-Mart), and requires all banks, regardless of charter, to compete stand-alone-branch to stand-alone-branch.

SB 308 – Uniform Commercial Code (UCC). This lengthy bill adopts the UCC documents of title regulation authorizing electronic documents of title, which may affect, among other things, agricultural liens and fixture filings.

SB 360 – Real Estate Appraisers. The bill amends the Real Property Appraisers Act to allow for inactive status for a period not to exceed two years.

Senate Sub. for HB 2264 – Corporation Franchise Tax. The bill amends K.S.A. 79-5401 and provides for the phase out of the corporation franchise tax over five years applicable to corporations, associations, limited liability companies, limited partnerships, and business trusts. Beginning in tax year 2007, the exemption threshold would be increased from $100,000 of net worth to $1 million of net worth. The rate subsequently would be reduced from the current $1.25 per $1,000 of shareholder equity or new worth, to $0.9375 in tax year 2008, $0.625 in tax year 2009, and $0.3125 in tax year 2010. The tax would be repealed altogether effective in tax year 2011.

Senate Sub. for HB 2295 – Real Estate Brokers and Salespersons; Contracts. The bill amends the Real Estate Brokers and Salespersons Act. Many of the revisions deal with the examination and fingerprinting of applicants, and disciplinary issues related to criminal convictions. Effective July 1, 2008, each contract for the sale of residential real estate shall contain as part of such contract the following language: "Kansas law requires persons who are convicted of certain crimes, including certain sexually violent crimes, to register with the sheriff of the county in which they reside. If you, as the buyer, desire information regarding those registrants, you may find information on the home page of the Kansas Bureau of Investigation (KBI) at http://www.kansas.gov/kbi or by contacting the local sheriff's office."

HB 2036 – Disclosure of Thermal Efficiency. This bill amends K.S.A. 66-1227 and 66-1228, requiring the disclosure of the energy efficiency of certain commercial, industrial, and residential buildings. With respect to commercial and industrial buildings, the bill replaces the 2003 International Energy Conservation Code with the 2006 version of that code. With respect to previously unoccupied new residential single family or multifamily units of four units or less, the builder or seller must disclose to the buyer or prospective buyer information regarding the energy efficiency of the structure prior to the signing of the contract and prior to closing if changes have occurred or are requested, or at any other time upon request.

HB 2111 – Lenders; Appraisers; Tax Sales. This bill amends K.S.A. 58-2344 and 79-2401a. The bill (i) amends a statutory provision that restricts what real estate loan information may be disclosed by a lender to an appraiser. The amendment clarifies that a lender may not disclose the amount of a proposed real estate loan with the intent to influence the preferred or required value of any real estate to secure such loan; (ii) permits lenders to provide a copy of the sales contract for use by the appraiser in accordance with the Uniform Standards of Professional Appraisal Practice; (iii) amends the law to correct a statutory reference for the definition of "lender"; and (iv) authorizes counties to permit cities to make repairs to unoccupied, residential real estate being sold for delinquent taxes, special assessments, or both, to bring the property into compliance with housing code standards during the redemption period.

HB 2161 – Enforcement of County Codes. This bill amends K.S.A. 19-101d, to add Leavenworth County to the list of counties that may prosecute violations of county codes and resolutions in district court.

HB 2249 – Sales Validation Questionnaires. The bill amends K.S.A. 79-1437f, and provides that real estate sales validation questionnaires shall be made available to a person licensed pursuant to the Real Estate Brokers and Salespersons Act for purposes of fulfilling such person's statutory duties and providing information on market value of property to clients and customers.

HB 2268 – Consumer Protection Act (KCPA); Termite Inspections. The bill adds provisions to the KCPA dealing with inspections for wood destroying insects. Any person performing inspections in connection with a real estate transaction or a real estate loan must hold a valid certification pursuant to Kansas Pesticide Law, which authorizes the person to use or supervise the use of restricted use pesticides in the control of wood destroying insects. Violations of these requirements would be a deceptive act or practice under the KCPA. Inspections performed by employees of the Kansas Department of Agriculture would be exempt from the Kansas Pesticide Law.

HB 2283 – Manufactured Home Liens. The bill amends K.S.A. 8-135 (vehicles), K.S.A. 58-4204 (manufactured homes), and K.S.A. 84-9-311 (Kansas UCC). This bill was requested by the Kansas Bankers Association and amends the law regarding security interests in vehicles and manufactured homes to clarify that a security interest is perfected when the surrendered title has been delivered and the application has been submitted, with the required fee, to the Kansas Division of Motor Vehicles (KDOR). Previously, if KDOR failed to show the lien on the new certificate of title, and the debtor filed bankruptcy, the trustee could bring a lien avoidance action under 11 U.S.C. § 544 arguing that the creditor was not perfected. If the creditor submits a valid and timely notice of security interest to KDOR, the creditor will be deemed perfected even if KDOR fails to show the lien on the title.

MULTI-STATE ISSUES

IRS PRIVATE LETTER RULING 200712013 NOVEMBER 20, 2006

Reverse Like-Kind Exchanges; Sale of Relinquished Property to Related Party Will Not Trigger Gain

In Private Letter Ruling 200712013, the IRS concluded that § 1031(f) will not apply to trigger recognition of any gain realized when:

(1) Taxpayer purchases like-kind replacement property from an unrelated third party via and exchange accommodation titleholder (EAT);

(2) Taxpayer sells relinquished property to related party for cash consideration received by a qualified intermediary (QI); and

(3) Related party disposes of relinquished property within two years of the acquisition.

Related party's disposal of relinquished property within two years of the acquisition will not trigger taxable gains pursuant to § 1031(f)(1). In the instant case, taxpayer and related party did not engage in a like-kind exchange. Taxpayer transferred relinquished property to related party through a QI, who also purchase replacement property from an unrelated third person for taxpayer. Taxpayer's transfer of relinquished property to the QI and subsequent receipt of like-kind replacement property from the QI is treated as an exchange with the QI, who is not related to taxpayer. Treas. Reg. § 1.1031(k)-1(g)(4).

In addition, § 1031(f)(4) will not apply to prevent nonrecognition of the gain or loss in the exchange. Taxpayer did not transfer relinquished property to related party as part of a transaction or series of transactions, structured to avoid the purpose of § 1031(f)(1). The related parties in this case did not exchange high basis property for low basis property in anticipation of the sale of the low basis property. Only taxpayer held property before the reverse like-kind exchange and continued to hold like-kind property after the exchange. Related party did not hold property before the exchange. Accordingly, related party's proposed disposal of relinquished property within two years of the acquisition will not result in a "cashing out" of an investment or shifting of basis between taxpayer and related party.

Under the given facts and representations, § 1031(f) will not apply to trigger recognition of any gain realized when (1) taxpayer purchases like-kind replacement property from an unrelated third party via EAT, (2) taxpayer sells relinquished property to related party for cash consideration received by a QI, and (3) related party disposes of the relinquished property within two years of the acquisition. ■

About the Author

***Calvin J. Karlin**, Lawrence, is a member of Barber Emerson L.C. His practice includes estate and trust planning and litigation.*

He received his B.A. and J.D. from the University of Kansas, where he was Phi Beta Kappa, Order of the Coif, and Kansas Law Review *note and comment editor.*

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Probate and Trust Cases

IN RE ESTATE OF SAUDER
KANSAS SUPREME COURT
APRIL 27, 2007

ATTORNEYS: Bryan K. Joy, of Joy Law Office, P.A., Burlington, for co-administrators. Stephen J. Smith, of Coombs, Hull & Smith LLC, Burlington, for landlord and harvester.

The co-administrators of an estate sought a determination as to crops planted by the decedent tenant, but not harvested at the time of death and of crops planted and harvested after death on property prepared by the decedent. The Court rejected the landlord's and subsequent harvester's claim that written sharecrop leases are personal services contracts that should terminate at death, because they specifically apply to and bind the heirs, successors, executors and administrators of the parties. The Court relied upon K.S.A. 58-2519 (and an agricultural treatise by professor James Wadley and presidential aspirant Sam Brownback) to conclude that oral leases continue following the tenant's death. Since a lease continues in effect upon the death of a tenant unless the parties have contracted otherwise, the fiduciary of the tenant's estate has the obligation to see that the tenant's obligations are met.

The Court recognized that a failure by decedent's successors to plant crops would defeat the essence of a farm lease and justify the landlord's rescission of the lease. The Court further noted that Kansas follows the minority position of imposing a duty upon the landlord to make reasonable effort to secure a new tenant if the prior tenant surrenders possession. The Supreme Court remanded the case to the district court to determine the appropriate restitution to the estate for labor and expenses.

VORHEES V. BALTAZAR
KANSAS SUPREME COURT
MARCH 16, 2007

ATTORNEYS: Patrick R. Miller, of Dezube Miller P.A., Overland Park, for appellant, Voorhees. Zachery E. Reynolds, of The Reynolds Law Firm P.A., Fort Scott, for appellee, administrator.

Vorhees suffered injuries in a two vehicle accident with Baltazar, in which Baltazar died. On Jan. 26, 2004, 17 days before the statute of limitations was to run, Vorhees filed suit against Baltazar and the administrator of Baltazar's estate. An administrator had not yet been appointed and on Feb. 11, 2004 (the day before the statute of limitations was to run), Vorhees filed a petition for appointment of an administrator. Both proceedings were filed in Linn County, although they both stated that Baltazar had lived in Pittsburg (which is actually in Crawford County).

The Kansas Supreme Court noted that, "under Kansas law, absent an administrator or an executor, an estate lacks the ability to sue or be sued." It also noted that a decedent is not capable of being sued. The administrator who was eventually appointed for Baltazar argued that because neither defendant (decedent nor administrator) was in existence before the statute of limitations ran, dismissal was required. After reviewing a number of cases from Kansas and other states with slightly different factual and procedural aspects, the Court held that the capacity of the defendant administrator was alleged in Vorhees' timely filed negligence petition (that was served within the extended time granted by the district court) and would support the lawsuit without the need for an amendment following the subsequent appointment of an administrator (albeit a different administrator than Vorhees had requested). Citing K.S.A. 60-209(a) and 59-2201, the Court stated there was "no need to formally change the name of the original defendant 'Administrator of the Estate of Francisco J. Baltazar' to 'Steven Horak, Administrator of the Estate of Francisco J. Baltazar." Justices McFarland and Allegrucci dissented from this conclusion.

REESE V. MURET
KANSAS SUPREME COURT
283 KAN. 1
FEBRUARY 2, 2007

ATTORNEYS: Rachael K. Pirner and Tyler E. Heffron, of Triplett, Woolf & Garretson LLC, Wichita, and Scott T. Curry-Sumner, The Netherlands, for appellant intervenor, Waldschmidt. Orvel B. Mason of Mason & Velasquez P.A., Arkansas City, for appellee, Reese.

The Kansas Supreme Court upheld the district court's denial of genetic testing in both probate and paternity cases where the decedent was married to the child's mother at the time of birth, was named as the father on the birth certificate, acknowledged the child as his in divorce proceedings, and paid child support until the mother "disappeared" with the child. The Court followed the Kansas Parentage Act presumption of fatherhood when a man is married to the child's mother. K.S.A. 38-1115(a)(1). The Court could not find that it was in the child's best interest to have genetic testing in such circumstances, even though the intervenor (decedent's second wife) asserted that the best interest test should be inapplicable to an adult child.

IN RE PRITCHARD
KANSAS COURT OF APPEALS
MARCH 2, 2007

ATTORNEYS: Allan E. Coon and L. Franklin Taylor, of Norton, Hubbard, Ruzicka & Kreamer L.C., Olathe, for appellant, Neff; Michael S. Martin, Westwood, for appellant, Schulteis (administrator of the estate). Eric Kjorlie, Topeka, for appellee, Margaret Pritchard; and J. David Farris, Atchison, for appellee (special administrator of the estate of Donald E. Pritchard).

The administrator of the estate (Schulteis) and his attorney (Neff) appealed the district court's decision affirming the magistrate's granting of a money judgment and attorney fees against them in favor of decedent's widow, Margaret, based upon their failure to provide her notice of her right to claim a homestead as to property before it was sold. Margaret and the decedent had moved from their home in McLouth, to live with a child in Meriden during decedent's final days, and they listed the McLouth home (that was solely owned by decedent) for sale. The Meriden address was shown as Margaret's address in the estate proceedings, and by Margaret herself.

The administrator's attorney (Neff) argued that he had no duty to inform Margaret of her possible homestead rights (to protect the McLouth home proceeds from being available for decedent's debts). The Kansas Supreme Court held that neither the administrator (Schulteis) nor his attorney (Neff) had the duty to inform the widow of her possible homestead and other statutory rights (but, as the Court noted, this duty now exists by virtue of an amendment to K.S.A. 59-2233, effective July 1, 2006). The Court also held that the lower courts had no jurisdictional, factual or legal basis to grant a personal money judgment against the non-party attorney Neff; and that the district court erred in awarding attorney fees against Schulteis and Neff.

The Court further held that the unappealed confirmation of the sale of the McLouth property made moot the question of whether the widow had homestead rights. It also held that she was estopped from contesting payments made by the administrator that she requested.

VANNORDSTRAND V. HAMILTON
TENTH CIRCUIT BANKRUPTCY APPELLATE PANEL
BAP NO. KS-05-091
JANUARY 31, 2007

ATTORNEYS: Lynn Lauver, Topeka, for debtor/appellant. Jan Hamilton, Topeka, pro se trustee/appellee.

Debtor filed for Chapter 13 bankruptcy relief on March 1, 2002. His plan was confirmed on June 20, 2002. In February 2004, while still making payments under the plan, debtor inherited approximately $40,000. Although property inherited more than 180 days after the filing of a Chapter 7 bankruptcy petition is not estate property, Chapter 13 estate property includes that acquired before the case is closed, dismissed, or converted. Debtor's plan also specifically delayed vesting of bankruptcy estate property until discharge, which made it easier for the Kansas bankruptcy court and BAP to find that the inheritance became property of the bankruptcy estate.

ROYAL V. CO-PERSONAL REPRESENTATIVES OF NORMAN L. SANFORD
TENTH CIRCUIT BANKRUPTCY APPELLATE PANEL
BAP NO. WY-06-102
MARCH 28, 2007

The Chapter 7 trustee sought to avoid the bankrupt's disclaimer of an interest in his father's estate as a fraudulent transfer. The decision cites 5th, 7th, 8th, and 10th circuits decisions, and a 9th Circuit BAP, recognizing that valid disclaimers do not constitute fraudulent transfers in bankruptcy. The BAP remanded the matter to the Wyoming bankruptcy court, however, for a specific determination of whether the disclaimer qualified under Wyoming statutory requirements.

MANN V. BOATRIGHT
TENTH CIRCUIT COURT OF APPEALS
NO. 05-1559
FEBRUARY 15, 2007

The 10th Circuit affirmed the district court's dismissal of a daughter's federal court attempt to undo a Colorado probate court's incapacity, guardianship and conservatorship determinations for her father. The lack of federal court jurisdiction is based on the Rooker-Feldman doctrine (which was last at issue in the U.S. Supreme Court in the Anna Nicole Smith case).

WILSON V. WILSON
KANSAS COURT OF APPEALS
APRIL 6, 2007

ATTORNEYS: Brian S. Carroll, of Carroll Law Office P.A., Marysville, for appellant. Kent E. Oleen, Manhattan, for appellee.

Soon after a divorce, the father withdrew funds from his children's Uniform Transfer to Minors Act (UTMA) accounts and certificates of deposit (CDs). Although he claimed the withdrawals reimbursed him for earlier expenditures he had made for the children, he had not claimed any debts from his children or the accounts as assets in the divorce. The district court found that the father violated his fiduciary duties under the UTMA and had converted the CDs. There was evidence of forgery of one child's signature on one of the CDs and another child was deceived into signing his, with the indication that it would be transferred for a higher interest rate. Although the court acknowledged that UTMA accounts may be used to pay a minor's expenses (even those necessities a parent is obligated to provide), the timing, covertness, and failure to maintain contemporaneous records

indicated a willfulness that justified punitive damages, in addition to actual damages. Judge Weingart's decision was affirmed by the Court of Appeals.

2007 LEGISLATION

SB 58 amends K.S.A. 58a-810(c) of Kansas Uniform Trust Code to add authorization for conveyance in the name of the trustee (provided that the trust name is clearly set forth), in addition to existing authorization for conveyance in the trust name. Effective July 1, 2007.

SB 76 amends K.S.A. 59-1507b, which is applicable to small estates (less than $20,000) to broaden the definition of personal property that can be transferred without letters of administration or letters testamentary. Effective July 1, 2007.

HB 2010 enacts the Revised Uniform Anatomical Gift Act effective July 1, 2007. It replaces the uniform act Kansas originally adopted as K.S.A. 65-3209 *et seq.* in 1968. The 30-page statute is designed to expand the ability to make anatomical gifts and to have better records and discovery of such a choice. Gifts may be made on the driver's license, other identification card, in a will, by communication to two disinterested adult witnesses, or by a signed record witnessed by two adults at least one of whom is disinterested. Anyone can sign a refusal by will or other written record (or even orally under certain circumstances) that would bar anyone else from donating his or her body or parts. A minor can make a gift on a driver's license (or other state identification card for a child over age 16), but a parent can revoke the gift if death occurs before age 18. A new felony for buying or selling organs prior to death, for removal and delivery after death, is included. ■

Estate Tax Notes

(Continued from Page 7)

To secure the seller's obligations under the sales contract, the seller pledged to the purchaser 100 shares of stock on the execution date under a pledge agreement as part of the sales contract. This was the maximum number of shares that the seller would be required to deliver to the purchaser under the sales contract. The seller transferred the shares to a pledge account held by a third-party trustee, who was unrelated to the purchaser. Under the pledge agreement, the seller retained the right to vote the shares and to receive dividends, but the pledge agreement instructed the trustee to enter into a share lending agreement with the purchaser in order to loan the pledged shares to the purchaser or another person at the purchaser's direction. After the execution date, the purchaser executed the share lending agreement with the trustee, borrowed the 100 shares from the pledge account, and sold the shares to a third party. Under the terms of the share lending agreement, the shares delivered to the purchaser were unrestricted shares and had dividend and voting rights attached. The share lending agreement gave the seller the right to demand that the purchaser transfer shares identical to the borrowed shares into the pledge account if certain conditions were met.

In its analysis of the transaction, the IRS noted that the sales contract, pledge agreement, and share lending agreement all related to the same stock of the company. The seller's obligation to deliver shares on the valuation date under the sales contract was completely offset by the purchaser's obligation to return identical shares under the share lending agreement. The sales contract and the share lending agreement acted as opposites and counteracted each other. Accordingly, to determine whether ownership transferred on the execution date, the IRS recognized that all three contracts must be considered together.

As of the execution date, and throughout the term of the sales contract, the purchaser had the right to most of the gain from the appreciation of the shares and bore all of the risk of loss. The purchaser had the right to sell, pledge, or repledge the shares to a third party, and when sold, the shares were completely unencumbered to the third party. Accordingly, on the execution date, the seller received full payment in cash for the shares, and the purchaser had unfettered use of the shares. Because the purchaser had the ability to instruct the trustee to enter into a share lending agreement with the purchaser, the purchaser acquired and held nearly all of the benefits and burdens of ownership in the pledged shares on the execution date. Therefore, the IRS concluded the transaction was a completed sale under Code Section 1001 on the execution date. The IRS differentiated the transaction from that described in Revenue Ruling 2003-7, 2003-1 C.B. 363, in that one component of this transaction was the share lending agreement under which the purchaser obtained dominion and control over the shares as of the execution date. The IRS further concluded Code Section 1058, which would provide for nonrecognition of the gain, did not apply to the transaction because the seller transferred its shares in exchange for cash and other consideration, none of which represented an obligation under an agreement to return identical shares. Rather, the seller's ability to acquire shares on the valuation date would be a purchase. Finally, the IRS concluded if the seller acquired shares on the valuation date, the seller's basis in the shares would equal $400 (the $2,000 value of the shares less the $1,600 cash received on the execution date). ■

CLE Docket

JUNE

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JUNE

7-9 **125th KBA Annual Meeting – Just the Beginning**
Hyatt Regency, Wichita

13 **The Casemaker Explosion**
(12:30 p.m.)
Harvey County Bar Association, Newton

15 **Legislative & Case Law Institute Video Debut**
3 sites: Overland Park, Topeka, and Wichita

23 **Legislative & Case Law Institute Video Replay**
Multiple sites statewide & Washington, D.C.

25 **Brown Bag Ethics Video Replay**
(Morning and Afternoon)
Topeka

26 **Brown Bag Ethics Video Replay** (Morning)
Multiple sites: Dodge City, Overland Park, Topeka, and Wichita

26 **Keeping the "Gold" in the Golden Years – Elder Law Video Replay** (Afternoon)
3 sites: Overland Park, Topeka, and Wichita

27 **Keeping the "Gold" in the Golden Years – Elder Law Video Replay** (Morning)
3 sites: Overland Park, Topeka, and Wichita

27 **Brown Bag Ethics Video Replay** (Afternoon)
Multiple sites: Overland Park, Phillipsburg, Topeka, and Wichita

28 **Brown Bag Ethics Video Replay** (Morning and Afternoon)
Topeka

29 **Legislative & Case Law Institute Video Replay**
Topeka

VIDEO REPLAY WEEK