FIFTEENTH
ANNUAL TAX SYMPOSIUM

October 21, 2006
SHERATON DETROIT NOVI
NOVI, MICHIGAN

PRESENTED BY THE LAW OFFICES OF
MADDIN, HAUSER, WARTELL, ROTH & HELLER, P.C.

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MADDIN, HAUSER, WARTELL, ROTH & HELLER, P.C.
FIFTEENTH ANNUAL TAX SYMPOSIUM PROGRAM

Registration and Breakfast	**8:00-8:30**	
MARK R. HAUSER – Opening Remarks	**8:30-8:35**	
WILLIAM E. SIGLER **Structuring Your Estate in the Wake of Bankruptcy Reform**	**8:35-9:10**	**Page 1**
MARK R. HAUSER **Avoiding "Dealer" Status to Obtain Capital Gains In Real Estate**	**9:10-9:40**	**Page 18**
RICHARD F. ROTH **Creative Ideas with Problem Properties**	**9:40-10:10**	**Page 39**
Question and Answer	**10:10-10:25**	
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BREAKOUT SESSION A		
GARY M. REMER **The Future Look of Retirement Plans**	**10:45-11:25**	**Page 53**
CHARLES M. LAX **The Boomer's Dilemma: Social Security at 62, 66 or 70**	**11:25-11:50**	**Page 65**
MARC S. WISE **Equity-Based Compensation Alternatives for Closely Held Businesses**	**11:50-12:15**	**Page 78**
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BREAKOUT SESSION B		
GEORGE V. CASSAR, JR. **With This Prenup, I Thee Wed**	**10:45-11:15**	**Page 98**
ROBERT D. KAPLOW **I Love Insurance Trusts –** **The Use of Irrevocable Life Insurance Trusts (ILIT)**	**11:15-11:45**	**Page 121**
GEOFFREY N. TAYLOR **Estate Planning for Second Marriages and Blended Families**	**11:45-12:15**	**Page 133**
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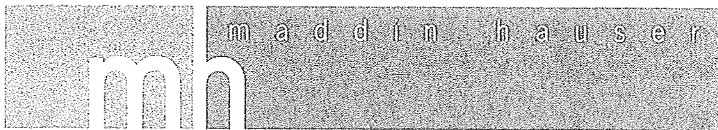
Seminar Qualifies for Four CPE Credits



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October 21, 2006

Dear Tax Symposium Participants:

Welcome to our Fifteenth Annual Tax Symposium. It is hard for many of us to believe that we at Maddin Hauser have sponsored 15 programs for our friends. Each year's Symposium requires a significant commitment by the Firm to prepare the program, invitations and materials, but it is truly a "labor of love."

This year's program contains a number of new topics which reflect our changing world. "Structuring Your Estate in the Wake of Bankruptcy Reform" and "Creative Ideas with Problem Properties" reflect the reality of today's economy. "The Boomer's Dilemma: Social Security at 62, 66, or 70" reflects the aging of our population. On the other hand, we have included topics which have been visited in the past but are updated to 2006. For example, "I Love Insurance Trusts – The Use of Irrevocable Life Insurance Trusts (ILIT)" provides a fresh look at the use of irrevocable living insurance trusts. "Estate Planning for Blended and Nontraditional Families" looks at traditional estate planning concepts, but applies them to nontraditional families and situations.

While our Annual Tax Symposium features many of the tax and corporate members of the Firm, you should be aware that we are a "full service law firm." Please visit our web site at www.maddinhauser.com to find out more about Maddin Hauser. As always, we appreciate your attendance at this program and welcome your comments and suggestions.

Very truly yours,

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STRUCTURING YOUR ESTATE IN THE WAKE OF BANKRUPTCY REFORM

By: William E. Sigler, Esq.

I. INTRODUCTION

A. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").

1. Purpose. BAPCPA was largely pushed by the credit card companies. Although it concentrates on consumer debt, it has several provisions dealing with matters that affect estate planning clients and their asset protection planning.

2. Effective Date.

a. BAPCPA was signed by the President on April 20, 2005.

b. Most provisions became effective 180 days thereafter on October 17, 2005.

c. Certain provisions became effective upon enactment on April 20, 2005.

3. Coverage.

a. BAPCPA only applies in bankruptcy. Thus, state law exemptions as to homesteads and IRAs are unaffected outside of the jurisdiction of the bankruptcy courts.

b. State law exemptions may have to be foregone to avail oneself of bankruptcy protection.

c. Many changes which received media attention apply only to consumer debt.

B. Organization of Outline.

1. Why plan?

2. State law rules.

3. BAPCPA.

4. Impact on common estate planning strategies.

II. REASONS FOR PLANNING

A. Reasons for estate planning.

1. Provide for family.

2. Save taxes.

3. Provide sound asset management for children.

4. Assure the continuity of family business.

5. Provide for retirement.

B. Reasons for asset protection planning.

1. Litigious society. Our society is becoming increasingly litigious. Lawsuits against lawyers, doctors, engineers, architects and officers and directors of corporations and financial institutions have become commonplace. Judgments in these cases can be very large.

2. Economy. Uncertain economic times, differences in regional economies, economic troubles experienced in industries that were once stable and by companies that once dominated the economy have all contributed to financial and creditor

problems. These problems are frequently magnified by increasing debt loads on families.

3. Asset protection. Because of the economic problems of the mid-80s and the slump that began in 2000, clients and their financial and legal advisors began focusing more on techniques and arrangements designed to insulate the client's assets from unexpected financial reversals. The centerpiece of the planning was frequently a family limited partnership or asset protection trust. Plans were built around these devices in hopes of allowing clients to have the full enjoyment of their wealth, free from the claims of contingent, unknown, unforeseeable and often overzealous creditors.

III. STATE LAW RULES

A. Uniform Fraudulent Transfer Act ("UFTA").

1. UFTA. The UFTA is a uniform act that has been adopted by many states, including Michigan (MCL 566.31, et seq.). It operates to set aside transfers of assets that are made with the intent to defraud a creditor.

2. Transfer. A "transfer" is defined to mean every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of the lien or other encumbrances.

3. A transfer with the actual intent to defraud is void. A transfer made by a debtor is fraudulent as to a creditor, whether the creditor's claim arose within a reasonable time before or after the transfer was made, if the debtor made the transfer with an

actual intent to hinder, delay, or defraud any creditor of the debtor.

4. Actual intent to defraud. The actual intent to defraud could void a conveyance even after the debtor is solvent after the transfer. However, since actual intent is difficult to prove, courts recognize circumstantial evidence or "badges of fraud" to prove the "intent to delay, hinder or defraud" a creditor.

5. Badges of fraud. Examples of "badges of fraud" include the following:

   a. Insolvency. Insolvency of the debtor at the time of or immediately after the asset is transferred.

   b. Secrecy. Undue secrecy surrounding the transfer, such as the failure to record a deed or other document of transfer.

   c. Transfer of all property. Transfer of all of a debtor's property.

   d. Transfer to a closely related party. A transfer of property to a transferee who is closely related to the debtor-transferor.

   e. Pending litigation. Pending or threatened litigation against the debtor.

   f. Deviation from normal formalities. Entering into a transaction (e.g., gift, creation of trust, etc.) without following the usual formalities.

g. Secret reservation of an interest. The debtor's secret reservation of an interest or enjoyment from the transferred property.

h. Continued enjoyment of property. Continued possession and use of the property by the debtor-transferor after the purported transfer.

i. A transfer shortly before or after debt incurred. Transfer of assets by the debtor shortly before or after a substantial debt was incurred.

6. Insolvency. Insolvency is the most crucial and often determinative badge of fraud. A transfer will not usually be held to be fraudulent is the debtor-transferor has retained sufficient assets to satisfy the claims of creditors. A transfer without adequate consideration, such as a gift, gives rise to a presumption of fraud if the donor is insolvent at the time of the transfer or is rendered insolvent as a result of the transfer.

7. Statute of Limitations. Various statutes of limitations may apply to lawsuits alleging a fraudulent conveyance. In Michigan, the six year statute of limitations on contracts may apply or the statute of limitations on fraudulent concealment may apply. The statute of limitations on fraudulent concealment is two years after discovery of the claim. A one year statute of limitations may apply to transfers made by a debtor which are fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

8. Transfer fraudulent if debtor is insolvent. A transfer by a debtor who is insolvent or who will be rendered insolvent by the transfer is fraudulent as to preexisting creditors, unless the transfer is made for fair consideration.

9. Insolvency. Generally, a debtor is insolvent if either of the following conditions is met:

   a. The sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation; or

   b. The debtor is generally not paying his or her debts as they become due.

B. Liability for Spouses Debts

1. Separate property. Absent an agreement to the contrary, a spouse's separate property is generally at risk for the debts and obligations of the other spouse.

2. Tenancy by the entireties. A creditor can generally not reach assets owned jointly by a husband and wife as a tenancy by the entireties, unless it is a joint debt. This protection is not available for federal tax liens. *U.S. v. Craft,* 122 S. Ct. 1414 (April 17, 2002).

C. Other property which is exempt from creditor claims under Michigan Law is listed on Exhibit "A."

IV. FEDERAL RULES: THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005

A. Exemptions.

1. Section 522 of the Bankruptcy Act was substantially amended to create additional exemptions for "retirement funds" and to limited state law homestead exemptions. However, it left open the ability of a debtor to choose between state law exemptions and federal exemptions in bankruptcy.

2. Section 522(b)(3)(A) of the Bankruptcy Act was specifically made subject to Sections 522(o) and (p), dealing with homesteads, to make it clear that the state law exemptions are subject to the homestead caps.

B. Domicile Requirements.

1. Under prior law, the exemptions that could be claimed by a debtor were determined by the place of the debtor's domicile for 180 days preceding the date of filing for bankruptcy or for a "longer portion of such 180 day period than in any other place."

2. This rule has been changed by BAPCPA to prevent a debtor from moving to a jurisdiction with more liberal state exemptions (e.g., Texas or Florida) and then filing bankruptcy within a relatively short time thereafter.

3. 730 days has been substituted for 180 days, but "if the debtor's domicile has not been located in a single state for the 730 day period, then the place in which the debtor's domicile is located for 180 days immediately preceding the 730 day period or for a longer portion of such 180 day period than any other".

4. For example, assume that an individual lives in Indiana for 18 months prior to filing bankruptcy. Before that, the bankrupt lived in Ohio for two months, California for six months, and New York for four months. The bankrupt must, if he or she chooses the state exemptions, claim exemptions under New York law, even though he or she had no connection with New York for over two years.

C. The Bankruptcy Estate; Exemptions; and Exclusions

1. General. The idea behind Chapter 7 bankruptcy protection is that the debtor must turn over all the assets of the debtor, except those assets which are excluded or exempted from the bankruptcy estate. The debtor is allowed to elect whether to use exemptions granted under state law (except in "opt-out" states where state law exemptions must be used) or those granted under federal law. Exclusions are available to everyone in bankruptcy, regardless of whether the individual chooses the state or federal exemptions.

2. The Bankruptcy Estate.

a. All interest in property, except assets exempted from the bankruptcy estate.

b. The debtor's interest in controlled community property.

c. Property that is brought back into the bankruptcy estate as the result of being a fraudulent conveyance.

d. Property preserved for the benefit of the estate.

e. Any interest in property that would have been property of the bankruptcy estate if that interest had belonged to the

debtor on the date of filing for bankruptcy and which the debtor acquired or became entitled to acquire within 180 days after that date (i) by bequest, devise or inheritance, (ii) as a result of a property settlement, or a final decree of divorce, or (iii) as a beneficiary of a life insurance policy or a death benefit under a benefit plan.

f. Income and revenue from property that does not constitute earnings from services performed by the debtor after the commencement of bankruptcy.

g. An interest in property that the bankruptcy estate acquires after the bankruptcy is filed.

3. Choice of exemptions.

a. BAPCPA generally retains the ability on the part of the debtor to choose between federal and state exemptions. Michigan's exemptions are listed on Exhibit "B." There have been a lot of issues about these exemptions, including whether a state can accept a list of exemptions that just apply in bankruptcy.

b. However, it adds a new class of federal exemptions in the retirement plan area and substantially restricts the availability of state homestead exemptions.

4. Interplay with state exemptions.

a. Under BAPCPA, certain state law exemptions may no longer apply even when the state law exemptions are elected by the debtor or when the debtor has no choice but to use the state law exemptions because the state has "opted-out" of the federal exemptions.

b. E.g., homesteads.

5. Exclusions. BAPCPA adds new exclusions concerning Section 529 plans, educational IRAs, employer withholding for employee contributions to retirement benefits, and contributions to certain health insurance plans.

D. Homestead Exemption

1. A debtor may not exempt an interest in a homestead acquired during the 1,215 day period preceding the date of filing for bankruptcy that exceeds $125,000.

2. The threshold is adjusted for inflation every three years.

3. One problem has already arisen in connection with the application of this cap, because in Arizona the bankruptcy court has held that it does not apply in "opt-out" states. *In re McNabb,* 2005 WL 1525101 (Bkrtcy D. Ariz., Judge Haines).

E. Retirement Benefits

1. BAPCPA contains a big liberalization in the protection of qualified plans, IRAs and some non-qualified plans by providing exemptions from the bankruptcy estate. However, this protection is available only in the context of a bankruptcy proceeding, and does not affect the rights of creditors in other contexts.

2. Although there is some uncertainty, it appears that the protection for qualified plan benefits would apply even if the state law exemptions are elected.

3. Under *Patterson v Shumate,* 504 U.S. 753 (1992), the protection of qualified plans depended upon whether the plan

was subject to ERISA. Under BAPCPA, it depends upon the tax qualification of the plan.

4. There is a $1,000,000 limitation, but it does not apply to employer plans or to rollovers from employer plans to IRAs. Thus, it principally affects individually established IRAs and Roth IRAs.

F. Educational Account Benefits

1. Education IRAs. Contributions to education IRAs are excluded from the bankruptcy estate if made more than one year prior to filing and the following requirements are met:

   a. The designated beneficiary was a child, grandchild, stepchild or step-grandchild;

   b. The funds have not been pledged as security for an extension of credit and are not in excess of the contributions permitted under Section 4973(e) of the Internal Revenue Code; and

   c. Contributions within one year of bankruptcy are included in the estate and any contributions in the second year preceding bankruptcy are excluded only to the extent of $5,000 per beneficiary.

2. Section 529 Plans. The exclusion for Section 529 Plans is similar to the exclusion for education IRAs. Thus, the protection is limited to the contributions permitted under Section 529(b)(6) of the Internal Revenue Code. Also, the one and two year time limits and the $5,000 limitation apply.

G. Fraudulent Transfers

1. Intent to defraud. The bankruptcy trustee may set aside transfers made by the debtor with the actual intent to hinder, delay or defraud a creditor.

2. Less than "reasonably equivalent value." A trustee may also avoid a transfer if the debtor "received less than reasonably equivalent value in exchange for such transfer" and any of the following factors are present:

   a. The debtor was insolvent at the time of the transfer or became insolvent as a result of the transfer;

   b. The debtor was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor constituted an unreasonably small amount of capital; or

   c. The debtor intended to incur debts that would be beyond the debtor's ability to pay.

H. "Self-Settled" Trusts

1. A new provision was added to Section 548 of the bankruptcy code allowing the bankruptcy trustee to look back 10 years to avoid certain transfers. The intent of this section is to close the so-called "millionaire's loophole" involving domestic asset protection trusts.

2. The bankruptcy trustee may set aside a transfer if all of the following requirements are met:

   a. The transfer was made to a self-settled trust or similar device;

b. The transfer was made by the debtor;

c. The debtor is a beneficiary of the trust; and

d. The debtor made the transfer with the actual intent to hinder, delay or defraud any entity to which the debtor was or became indebted.

V. SURVEY OF ESTATE PLANNING AND ASSET PROTECTION TECHNIQUES

A. Outright gifts. Unless the transfer is a fraudulent conveyance, assets given away are not subject to bankruptcy or to the claims of creditors.

B. Spendthrift Trusts – Donor not a beneficiary. A "spendthrift trust" is a trust that does not permit voluntary assignment or alienation by the beneficiary. Determining whether a spendthrift trust is subject to the claims of creditors involves many of the same considerations that apply to gifts, e.g., whether the transfer was a fraudulent conveyance. With respect to the beneficiary of the spendthrift trust, the assets would be available to the creditors of the beneficiary to the same extent that the assets are available to the beneficiary. Note that a couple of states (most notably Alaska and Delaware) have statutes that also permit self-settled spendthrift trusts.

C. Life Insurance. Although some states limit the protection afforded to life insurance to the cash surrender value, most states, including Michigan, grant an unlimited exemption.

D. Irrevocable Life Insurance Trusts. Since the settler-insured is generally never a beneficiary of an irrevocable life insurance trust, the assets in the trust should be protected against the claims of the settlor's creditors, provided that no fraudulent conveyance is involved. If the irrevocable life insurance trust is a spendthrift trust, then the

assets would be available to the creditors of the beneficiary only to the extent that they are available to the beneficiary.

E. Marital property partitions. This is primarily an issue for community property states. However, it is still important to note that the assets of one spouse are not subject to the claims of the creditors of the other spouse, assuming no fraudulent conveyance, etc.

F. Qualified personal residence trust ("QPRT"). A QPRT is a way of discounting the value of a personal residence for gift tax purposes. The parent retains the right to occupy the personal residence for a period of time, after which it passes to the beneficiaries. Since the parent would not likely have a power of sale over the entire interest in the property without the consent of the beneficiaries, this technique could be attractive as an asset protection planning tool. Although the right to occupy the personal residence during the term of the trust could be subject to execution and sale in payment of the parents' debts, that term interest would mostly likely not be an attractive asset to a creditor.

G. Grantor retained annuity trusts and grantor retained unit trusts. Like a QPRT, these techniques are used to shift assets to beneficiaries at a relatively low gift tax cost. In the absence of a fraudulent conveyance, only the retained interest would be subject to creditors.

H. Qualified plans. As noted above, qualified plans are generally exempt from the claims of the participant's creditors. However, this protection does not always extend to distributions.

I. Disclaimers. Suppose that the debtor's uncle dies leaving him $1 million dollars under his Will, which further provides that if the debtor predeceases the uncle, then the $1 million dollars will pass in trust for the debtor's children. What is the result if the debtor disclaims

that gift prior to filing bankruptcy? What if the debtor disclaims the gift after filing bankruptcy? The answer is not clear, but the disclaimer may be effective if made prior to filing bankruptcy, as long as state law does not treat the disclaimer as a transfer of property by the debtor. The disclaimer would probably be voidable if made within 180 days after filing bankruptcy.

J. Family limited partnership. Family limited partnerships are frequently established to protect assets from creditors. Some commentators have begun to speculate whether the 10 year recovery period afforded trustees in bankruptcy with respect to the transfers to a "self-settled trust or similar device" would apply to family limited partnerships, particularly if those transfers are considered fraudulent.

K. Domestic asset protection trusts. The viability of domestic asset protection trusts will probably depend upon the development of case law over time. With respect to bankruptcy, it will be dependent upon the application of the "self-settled trusts or similar device" provision by the bankruptcy courts.

Exhibit A

UNIFORM TABLE OF MICHIGAN EXEMPTIONS

Category of Exempt Property	Extent of Exemption Under Michigan Law	Authority (Citation is to Michigan Compo Laws Ann. unless otherwise indicated)
Homestead (Principal Residence)	$3,500	§ 600.6023(1)(h) and Mich. Const. Art. X, § 3
Wages	If debtor has dependents, 60% plus $2.00 weekly for each minor under 18 years; if no dependents, 40%	§ 600.5311
Benefits and Insurance WWH Veteran's Benefits Korean Veteran's Bimefits State Employee Retirement Judge's Retirement Legislative Retirement Public School Retirement Public Welfare Benefits Workers' Compensation Unemployment Compensation Fraternal Benefit Society Life Insurance	All	 § 35.926 § 35.977 § 38.40(1) § 38.2308(1) § 38.1057(1) § 38.1346(1) § 400.63(1) § 418.821 § 421.30 § 500.8181 § 500.2207
Tenancy by Entirety	All exempt against joint debts	§ 600.2807(1)
Personal Property a. Family Pictures b. Wearing Apparel c. Provisions & Fuel d. Arms and Accouterments Required by Law to be Kept by any Person e. Household Goods f. Seat, Pew or Slip g. Cemetery Lot, Tombs and Burial Rights h. Certain Animals i. Tools Needed to Carry on Occupation or Trade (Automobile Included)	 All All 6 months supply All $1,000 In place of worship All family 10 sheep, 2 cows, 5 swine, 100 hens, 5 roosters plus 6 months supply of feed $1,000	 § 600.6023(1)(a) § 600.6023(1)(a) § 600.6023(1)(a) § 600.6023(1)(a) § 600.6023(1)(b) § 600.6023(1)(c) § 600.6023(1)(c) § 600.6023(1)(d) § 600.6023(1)(e)
Money Paid by Any Stock of Mutual Life or Health or Casualty Insurance Company	All	§ 600.6023(1)(f)
Shares of Mutual Building and Loan Association	Par value of $1,000	§ 600.6023(1)(g)
IRA--Individual Retirement Account or Annuity	All as permitted by 11 U.S.CA § 522 except for any amount contributed within 120 days before filing	§ 600.6023(1)(k) § 522(b)(2) (referencing § 522(b)(3))
Pension, Profit-sharing, Stock Bonus or Other Plan	Qualified under § 401 or an annuity under § 403(b) of the IRC, except for any amount contributed within 120 days before filing	§ *600.6023(1)(l)*
Burial Grounds	If described in a deed and recorded in register's office	§ 128.112
Partnership Property	Except against a claim against the partnership	§ 449.25(2)(c)

Exhibit B

TABLE OF MICHIGAN BANKRUPTCY EXEMPTION

Category of Exempt Property	Extent of Exemption Under Michigan Law	Authority (Citation is to Michigan Compo Laws Ann. unless otherwise indicated)
Homestead	$30,000; $45,000 if elderly or disabled	§ 600.5451(n)
Tenancy by Entirety	All exempt except against joint debts	§ 600.5451(0) and § 557.151
Personal Property		
a. Family Pictures	All	§ 600.5451 (a)(i)
b. Wearing Apparel	All, except furs	§ 600.5451(a)(iii)
c. Provisions & Fuel	6 months supply	§ 600.5451(b)
d. Arms and Accouterments Required by Law to be Kept by Any Person	All	§ 600.5451(a)(ii)
e. Household Goods	$3,000	§ 600.5451(c)
f. Seat, Pew or Slip	$500	§ 600.5451 (d)
g. Cemetery Lot, Tombs and Rights	All family	§ 600.5451(a)(iv)
h. Farm Animals, Feed and Crops	$2.000	§ 600.5451 (e)
i. Tools Needed to Carry on Occupation	$2.000	§ 600.5451(i)
j. Professionally Prescribed Health Aids	All	§ 600.5451(a)(v)
Money Paid by Any Stock of Mutual Life or Health or Casualty Insurance Company	All	§ 600.5451 (j)
Shares of a Mutual Building and Loan	Par value of $1,000	§ 600.5451(k)
IRA--Individual Retirement Account or Annuity	All as permitted by 11 U.S.C.A. § 522. except for any amount contributed within 120 days before filing	§ 600.5451(1) § 522(b)(2) (referencing § 522(b)(3))
Pension, Profit-sharing, Stock Bonus or Other Plan	Qualified under § 401 or an annuity under § 403(b) of the IRC, except for any amount contributed within 120 days before filing.	§ 600.5451(m)

AVOIDING "DEALER" STATUS TO OBTAIN CAPITAL GAINS IN REAL ESTATE

Presentation by Mark R. Hauser, Esq.

Outline by Michael K. Hauser, Esq.

Adapted from the article "Avoiding Dealer Status to Obtain Capital Gains" by Michael K. Hauser, Journal of Real Estate Taxation (2nd Quarter 2005)

I. DEALER STATUS

A. "Dealer" status is not a defined term, but is an informally used term for taxpayers who hold property primarily for sale in the ordinary course of a trade or business under Code Sec. 1221(a)(1) (such as developing, improving, marketing and/or actively selling land in the everyday operation of a business). Non-dealer property is classified as a capital asset, held for investment (such as speculative land investments held in the hope of attaining market appreciation).

B. The dealer vs. investment issue has been widely litigated in the area of real property. Where there are gains, the taxpayers generally argue that land is held as a capital asset to obtain the reduced tax rates applicable to long-term capital gains (other than for C corporations), and the IRS argues the land was held as an ordinary asset. When there are losses, the taxpayer argues for ordinary status to offset ordinary income and to avoid limits on capital losses, and the IRS argues for capital status. Ordinary status may also lead to self-employment income or loss, which could be another benefit for or against capital asset status (in light of self-employment tax).

C. Property will generally be considered held as a capital asset unless:

1. The taxpayer is engaged in the "trade or business" of selling real property; (the "trade or business" rule);

2. The specific property at issue is held "primarily for sale in that business"; (the "primary for sale" rule); and

3. The specific property is sold in the "ordinary course" of that business (the "ordinary course" rule).

D. Avoiding "dealer" status will also enable sales to be eligible for installment sale treatment under Sec. 453 and tax-free exchange treatment under Sec. 1031 (the test for Sec. 1031 is stricter as any property failing the "primarily for sale" rule will not qualify, regardless of the "trade or business" and "ordinary course" rules).

E. The dealer status analysis must be done on a property-by-property basis. Even if a taxpayer is otherwise a dealer, he may hold a specific parcel for investment, but his burden for establishing that fact will be higher.

F. The following factors, cited in Biedenharn Realty Co. v. U.S., 526 F.2d 409 (5th Cir. 1976), are typically looked at to determine whether a specific property is held as a dealer or for investment:

1. The nature and purpose of the acquisition of the property and the duration of the ownership (intent is also judged during the period of ownership, up through the moment just before the decision to sell was made);

2. The extent and nature of the taxpayer's efforts to sell the property;

3. The number, extent, continuity and substantiality of the sales (this is the most important factor);

4. The extent of subdividing, developing, and advertising to increase sales;

5. The use of a business office for the sale of the property;

6. The character and degree of supervision or control exercised by the taxpayer over any representative selling the property; and

7. The time and effort the taxpayer habitually devoted to the sales.

G. The "trade or business" rule permits capital asset status, even where a taxpayer has made many sales, if those sales are not sufficiently frequent to amount to the conduct of a business. (*See* Matz v. Comr., T.C. Memo. 1998-334 (1998), where 63 properties were sold in 25 years; Ronhovde v. Comr., T.C. Memo. 1967-243 (1967), where holding a single tract of land did not amount to a trade or business).

H. The "primarily for sale" rule permits capital asset status where property was held primarily for investment or for rental, or even for dual potential purposes, so long as the selling intent was not dominant. (Malat v. Riddell, 383 U.S. 569 (1966)).

I. The "ordinary course" rule permits capital asset status where sales are made due to "unanticipated, externally induced factors." (Biedenharn Realty).

II. POTENTIAL STEPS TO PREVENT DEALER STATUS IN APPROPRIATE CIRCUMSTANCES

A. Some form of the word "investment" is helpful if used in the name of the ownership entity, in the statement of purpose found in operating

agreements and purchase agreement recitals; however, avoid all forms of the words "dealer" and "developer" in these documents.

B. On the tax return, list the business activity as investment, treat expenses as investment expenses, interest payments as investment interest expense and list the property as an investment on the balance sheet.

C. Own every parcel of property in a different legal entity which files its own tax return (not a single-member LLC disregarded as an entity separate from its owner). Under principles of partnership tax law and corporate tax law, every entity which files its own tax return is treated as a separate taxpayer, even if the owners individually are dealers. There is much case law to this effect, although the IRS could try to collapse entities into one, especially if the taxpayer-owner fails to follow all entity formalities.

D. Increase the holding period of property (by first leasing it or allowing it to be tied up under an option or purchase agreement for an extended period), refrain from the use of a broker, and minimize selling efforts conducted by that entity (sales would be better conducted by an independent entity, even one with common ownership).

E. Sell a large parcel in one bulk sale, rather than making numerous smaller sales.

F. Refrain from all physical development of the land, unless incidental to a rental intent. Construction and development activities will often be fatal to a capital asset argument.

G. Purely legal/non-physical steps, e.g., obtaining entitlements such as zoning changes, other government approvals and commitments from utility companies, will not typically be fatal to a capital asset argument,

but will push the property closer to crossing the fuzzy line between dealer and investment property. The Tax Court has held that "[a]lthough residential zoning is a necessary element for subdivision, it does not, per se, convert property to [ordinary income] status." Paullus v. Comr., T.C. Memo. 1996-419 (1996). Yet, filing condominium documents strongly evidences development intent, beyond mere speculation/planning, likely ending capital asset status.

III. ENTITY PLANNING AND RELATED-PARTY SALES TO A DEVELOPMENT CORPORATION

A. As noted above, "dealer" status is determined at the partnership or corporate level. Theoretically, if an individual owns 99% of ten different LLC's, and the individual's wholly-owned S corporation owns the other 1%, these ten LLC's are ten different taxpayers and each would be looked at separately. In practice, the identity of the owners of an entity will have some relevance, but case law provides that characterization of assets as capital or ordinary is determined at the entity level. To attain entity-level characterization in such circumstances, it would be preferable to have the ownership percentages vary among the different entities. *See e.g.* Cary v. Comr., T.C. Memo. 1973-197 (1973). Since the number, frequency and continuity of sales by an entity is a key factor in determining dealer status, there certainly would be advantages of having ten LLC's which each had one sale, instead of one LLC making ten sales. Single-member LLC's are not considered independent entities, except for those electing to be taxed as corporations.

B. If a partnership holds "ordinary" assets, then the partners cannot take capital gain treatment by selling their partnership interests due to the "hot asset" look-through rules of Sec. 751. However, at the moment there is no "collapsible corporation" provision, and thus for

corporations which hold "dealer"-status land, ordinary income can be converted to capital gain by selling ownership interests. This is also true for LLC's which elect to be taxed as corporations. However, buyers will not typically like to purchase stock due to basis problems.

C. In some situations, selling an entity, rather than selling the real estate, can also make the difference as to whether the taxpayer will have at least a one year and one day holding period to be able to claim long-term capital gain. For example, an LLC might have owned land for 10 months, but the members of the LLC owned their LLC interests for 14 months. Although the matter is not free of doubt, taxpayers may be able to make a valid argument that their partnership/LLC interest or corporate stock is property which they held for more than 12 months. However, if selling the entities is an obvious device to dramatically inflate a short holding period, this method has proven meritless.

D. Where property is tainted as "dealer" property, the taint stays on the property even after a contribution or distribution to or from a partnership.

E. A strategy used by many land developers involves forming a partnership to purchase and then hold land for over a year, during which time preparations are made for developing the land, such as obtaining government approvals, but prior to the commencement of any physical development activities. After the long-term holding period has been met and when development is ready to begin, the partnership then sells the land to a commonly owned corporation. By using this method, taxpayers attempt to obtain capital gain treatment on the land sale, followed by ordinary income treatment on the property development and sale to outside parties. A number of cases have litigated this precise issue and the results have been mixed.

1. Bramblett v. Comr., 960 F.2d 526 (5th Cir. 1992), involved a sale of land from a general partnership to a corporation. The same individuals owned both entities in the same proportions. The partnership did not engage in any dealer-type activities (no frequent sales, no aggressive selling or marketing efforts, and no development activities). The partnership then sold land which had been held for three years to the identically-owned corporation, which in turn developed the land. The taxpayers took the position that capital gain was appropriate on the sale by the partnership, while the corporation would recognize ordinary income on its profits. The IRS argued, in essence, that the corporation should be ignored, as it merely acted as an agent for the partnership. The court held that merely having the same ownership did not create an agency relationship. The key factors were that:

   a. All entity formalities were observed;

   b. Development-type activities were carried out solely in the name of the corporation;

   c. The relationship between the two entities was at arm's length (e.g., the selling price was fair market value – the capital gain portion was not inflated); and

   d. The parties had an INDEPENDENT BUSINESS PURPOSE for the transaction in that the general partnership did not have limited liability protection, and thus it was in the interest of the individuals to move the property to a corporation with limited liability prior to developing the land. The business purpose requirement should be seen as an absolute prerequisite to success.

2. In Phelan v. Comr., T.C. Memo. 2004-206 (2004), the Tax Court tested and affirmed Bramblett in a similar case but in which the selling partnership was in fact a limited liability entity, leading the IRS to argue that the sale to a land development corporation lacked a business purpose. The case boiled down to the business purpose issue. The sale included only a portion of the total parcel owned by the partnership (which was to be developed currently), while the remaining portion of the parcel was retained (without the intent to currently develop it). The court found that the sale to the corporation achieved the business purpose of segregating the liabilities of the two portions of the property – if development of the one area created some liability for the corporation, with this structure the property held by the partnership would be shielded. Thus, the taxpayer succeeded in getting capital gain treatment.

3. In Paullus v. Comr., T.C. Memo. 1996-419 (1996), an entity whose "primary activity was the development and operation of golf courses" made seven land sales in a twelve-year period to related development and construction corporations, which built homes adjacent to the golf courses. The taxpayer's land sales were deemed to be incidental to the entity's primary business and thus did not amount to a separate trade or business – thus, capital asset status was preserved on the sales.

4. In light of recent cases such as the three just described, the status of the law with respect to sale of land to related development corporations appears more favorable than it once did. In a 1971 Tenth Circuit case, Brown v. Comr., 287 F.2d 787 (10th Cir. 1971), the court found that a related party land sale led to ordinary income, and stated: "cases abound supporting the proposition that [a] taxpayer may not conduct his

business through a closely controlled corporation, and secure capital gains treatment on the profits ... [g]ain realized from an interest in land transferred to a closely held corporation, which in turn disposes of that interest to the ultimate purchaser, has been held ordinary income by the United States courts."

5. In another older case, Boyer v. Comr., 58 T.C. 316 (1972), the sale of land to a related development corporation at an "artificially inflated price" caused the corporation to lose money on the development. In the absence of a fair profit allocation between the entities, the court found that the development entity was an agent of the sellers and did not truly conduct an "independent business venture." After attributing the development corporation's activities to the sellers, the gain on the sale to the corporation was deemed ordinary income. Certainly, there are many cases on both sides of the issue.

F. A non-binding IRS advisory document released in 2002, Information Letter 2002-0013, analyzed the use of this related party sale method. The document did not question the ability of a taxpayer, in proper circumstances, to obtain capital gain on the sale of land to an identically owned development corporation, stating that "the intent of the seller entity is determinative." The document indicated that the IRS "typically argues that an agency relationship exists between the seller entity and the related purchaser entity," meaning that the purchaser entity's activities should be imputed to the seller entity in determining whether the seller entity held the land as an investment. Thus, the taxpayer should be careful to document that neither entity operated in the name of, or for the account of the other entity. The document stated that the "most important factor appears to be the magnitude of the seller entity's pre- and post-transfer activity with respect to the property," in light of cases which held that development

activities by seller entities, such as platting land, participating in efforts to promote governmental infrastructure improvement, and seeking zoning changes, were factors which led to the denial of capital gain treatment. The document also cited as important factors:

1. The length of time the property was held by the selling entity;

2. The existence of a contract to sell the land to a third-party at the time the selling entity first acquired the property;

3. The seller entity's involvement in the real estate business generally; and

4. The seller entity's stated purpose with respect to the land on various documents.

G. One essential component of using the related-party sale strategy is to have a corporation, rather than a partnership, serve as the development entity. Section 707(b)(2)(B) provides that a gain on the sale of property between two commonly owned partnerships will always result in ordinary income if the property is ordinary income property in the hands of the purchasing partnership. It is also notable that Sec. 1239 prohibits capital gain treatment on sales of depreciable property to related parties (over 50% common ownership), but that rule does not apply to non-depreciable property such as land. However, even on sales of non-depreciable property, having 80% common ownership gives the IRS room to argue that the transaction was a tax-free contribution to a corporation under Sec. 351. Thus, common ownership north of 50% but south of 80% may be advisable.

H. As noted above, one of the most important factors in determining whether a related party sale arrangement will operate successfully is the existence of "arm's length" terms in determining the sales price of

land sold to a development entity. Even if a development corporation is not deemed to be an agent for the selling partnership, Sec. 482 enables the IRS to reallocate profits between related entities to clearly reflect the income of each entity. Therefore, it is very important that adequate documentation should exist to justify the sales price on a related party land sale, and thus a certified appraisal is recommended. If an agency relationship exists, however, capital gain treatment would be lost entirely (as opposed to a mere re-allocation under Sec. 482).

I. A business purpose is essential for related-party sales. Bramblett illustrates the scenario where land is held individually, or in an entity with unlimited liability, and is sold to a limited liability entity. Phelan illustrates the scenario where a portion of a parcel of land is sold to a new entity to segregate the liabilities of the two portions from each other. Other possible business purposes include:

1. Significant differences in ownership between the two entities;

2. Lenders or investors require a sale to a new entity to avoid possible liabilities in a "recycled entity";

3. Part of the parcel will be held for potential future donation to a city government or church for recreational or religious use; or

4. Any other motivation unique to the circumstances, justifiable by logic and documentary evidence, other than the tax rate differential between ordinary income and capital gain.

J. Related-party sales may preserve capital gain treatment on pre-development market appreciation, but won't they cause profits to be realized in the future to be taxable now? Not if the related-party sale is set up as an installment sale. Related parties can indeed enter into installment sales involving capital assets – the caveat being that if the

purchasing entity sells the property to a third party within two years, gain on the original related-party sale is triggered as of that moment. Interest must be charged at the published AFR, and all loan terms should be at arm's length (with full documentation, recordation, etc.) Selling LLC interests, rather than the property itself, is generally not advisable as it negates business purpose (no purging the old entity of liabilities). The down payment made should not be de minimis – a respectably sized down payment should be made, triggering some current taxable gain.

K. The IRS generally will not issue letter rulings concerning whether an asset is held for sale or for investment under Sec. 1221(a)(1).

IV. SECTION 1237 RELIEF ON LOT SALES

A. For land that has been owned for five years, Sec. 1237 provides a special rule, which could loosely be termed a "safe harbor," enabling taxpayers in certain circumstances to obtain capital gain treatment on the sale of land. Generally, if a taxpayer has held a tract of land for investment for at least five years and sells any lot or parcel within that tract, then the land will not be considered dealer property "solely because of the taxpayer having subdivided such tract for purposes of sale" or because of "advertising, promotion, selling activities or the use of sales agents in connection with the sale of lots in such subdivision." The tract must never have been held "for sale" and, in the year of the sale, that taxpayer must not have held any other real property "for sale." After five lots or parcels from the tract have been sold, gain from further sales will be ordinary income to the extent of 5% of the sales price.

B. A special "attribution" rule makes Sec. 1237 unavailable to any taxpayer who owns an interest in a partnership which holds property "for sale" in the same year by deeming the taxpayer to be the owner of

the partnership's property. A legislative history report suggests that the attribution rule treats S corporation stock like a partnership interest.

C. Another requirement of Sec. 1237, applied on a lot-by-lot basis, is that "no substantial improvement that substantially enhances the value of the lot or parcel sold" could have been made either by the taxpayer, a related party, or certain lessees or government entities, if the improvement caused an increase in value of more than 10%. Examples of substantial improvements include buildings, hard surface roads, and utility lines, while examples of insubstantial improvements include the building of a temporary field office, the performance of "surveying, filling, draining, leveling and clearing operations, and the construction of minimum all-weather access roads." If the tract has been held for at least ten years, "water, sewer, or drainage facilities or roads" will not be considered substantial improvements, but only if the taxpayer can demonstrate that such improvements were necessary to make the lots marketable. However, the ten-year rule will often be of little or no benefit since taxpayers who use it must exclude the improvements from the property's cost basis, increasing the amount of taxable gain.

V. CONDOMINIUM CONVERSION PLANNING PART 1 – THE PRE-CONVERSION SALE

A. When buildings that are held for rental are sold to unrelated parties, the gain is generally capital gain (except as to Sec. 1245/1250 gain), not ordinary income. However, Sec. 1239(a) provides that, when depreciable property is sold to an entity with greater than 50% related ownership, the sale will result in ordinary income rather than capital gain. Rental buildings often have a low basis due to depreciation. However, if the rental building is merely converted into ordinary

income property, such as condominium units, all of the gain generally becomes ordinary income. Thus, in a condominium conversion of a rental building, the safest strategy to preserve capital gains is to sell the building to a new corporation which has a new outside investor who owns at least 50% of the stock.

B. An alternative to the 50% strategy, which has not yet been tested in the courts or ruled on by the IRS, involves selling the rental building to a corporation with greater than 50% common ownership, perhaps even identical ownership. Although such a sale would generally invoke Sec. 1239(a), the theory is that when the corporate purchaser converts the building into condominium units held for sale, the property is non-depreciable inventory IN THE HANDS OF THE PURCHASER. Assuming this theory were upheld, Sec. 1239(a) would not convert capital gain into ordinary income. Here, it is paramount to prevent the selling partnership from being a "dealer" and concurrently ensure that the purchasing corporation is in fact a "dealer." In order to achieve this result, the key planning points are:

1. Do not take depreciation on the tax return of the corporation after the purchase;

2. Do not have the partnership engage in any condominium-related activities. All such activities must be carried out in the name of the corporation, and preferably should be done after the sale;

3. The corporation should demonstrate an intent to immediately convert the building into condominium units held for sale, as soon as is practicable (granted, there may be many delays due to existing leases, government regulation, etc.);

4. Although this method could work with 100% common ownership, keeping the common ownership below 80% would be advisable in light of the Sec. 351 argument which could be made by the IRS, as described above;

5. Have the sale price on arm's length terms, preferably backed up by an appraisal of the property as a rental building;

6. If the related-party sale is treated as an installment sale, make sure there is a significant down payment (perhaps 15%); and

7. As noted above, there should be an INDEPENDENT BUSINESS PURPOSE, other than getting capital gain.

VI. CONDOMINIUM CONVERSION PLANNING PART 2 – THE "ORDERLY LIQUIDATION"

A. An alternative strategy for getting capital gain treatment on the sale of condominium units relies on the concept of an "orderly liquidation" under Gangi v. Comr., TC Memo. 1987-561 (1987). In this strategy, there is no sale prior to the condominium conversion – rather, the rental entity itself "liquidates" the building as individual units, and purportedly the conversion activities do not rise to the level of the "trade or business" of selling condominium units.

B. In Gangi, two individuals, who were residential builders, formed a partnership and constructed a 36-unit apartment building, intending to keep it as a retirement investment. They rented it for eight years, spending minimal time on management. The business relationship deteriorated, and the partners decided to sell the building. They determined that the building did not produce enough rental income to justify selling it intact, but rather the most profitable way to sell it would be as condominium units. The partnership spent a minimal amount of

money on legal and engineering work, and on minor repairs (which the building needed anyway). The units were listed for exclusive sale by a real estate brokerage half-owned by the brother of one of the partners. This conversion was the only time that either partner had engaged in condominium activity. Most of the units were sold within one year. The IRS argued that the conversion shifted the partnership's intent from investment/rental to sale in the ordinary course of business. The court ruled, however, that the partners decided to "liquidate their investment and terminate the business, a business decision necessitated by the ... real estate market and a desire by [the partners] to go their separate ways ... [and] a business judgment was made to convert the building to condominiums." The court ruled that the original investment intent should be viewed as the dominant factor, with the selling activity not rising "to the level of holding property 'primarily' for sale to customers."

C. Gangi relied heavily on Heller Trust v. Comr., 382 F.2d 675 (9th Cir. 1967). In that case, two partners built 194 duplexes. Occupancy was only about 75% and the partners differed on how to improve that. After a partnership division, one family received the duplexes and the stock of a related management corporation. The duplexes, which had been previously advertised only for rent, were now extensively advertised for sale in newspapers and on the radio. The sales and advertising was all done by the management corporation, which operated a model unit, employed salesmen and printed brochures. 169 duplexes were sold over a three-year period. The taxpayer took capital gain treatment, arguing that the duplexes were sold because of the owner's deteriorating health and because the duplex rental operation was a business failure. The court ruled that, since the taxpayer's primary purpose was "rental" up until shortly before the first sales, the facts indicated that the series of sales were made pursuant

to a liquidation intent and therefore the capital gain provisions applied. *See also* Goldberg v. Comr., 223 F.2d 709 (5th Cir. 1955) (90 rental houses sold quickly by a corporation without advertising due to a heavy demand for housing – deemed to be the liquidation of a rental business and capital gain treatment was allowed).

D. Very few sources have cited Gangi since it was released in 1987. PLR 8938004 did positively cite Gangi for the notion that courts consider the original intent of a party in determining whether it held property for rent or for sale. The ruling cited the court's characterization of Gangi as the liquidation of an investment. The ruling also noted that where a taxpayer liquidates its assets, the sales are necessarily substantial and extensive, and thus this factor is not weighed as heavily (against capital gain) in such situations.

E. Thus, in the condominium conversion context, a crucial question is when to measure the "primary" intent for holding property. Although the original intent, upon acquisition, is one factor, courts have ruled that the initial intent is not usually a controlling factor. Biedenharn Realty Co., Inc. v. U.S., 526 F.2d 409 (5th Cir. 1976). Biedenharn also stated that "We do not hereby condemn to ordinary income a taxpayer merely because, as is usually true, his principal intent at the exact moment of disposition is sales. Rather, we refuse capital gains treatment in those instances where over time there has been such a thoroughgoing change of purpose ... as to make untenable a claim either of twin intent or continued primacy of investment purpose." The Biedenharn analysis regarding timing was expanded on, and clarified, in Cousins Properties v. U.S., 40 AFTR 2d 77-5262, (Ct Cl. 1977), an unpublished opinion of the Court of Claims, wherein the court stated: "When the court must determine whether the primary purpose of holding the property in question was for some purpose *other* than sale, the *dominant* purpose during the period immediately *prior* to the

ultimate decision to sell is controlling … If the evidence indicates that at this prior period the taxpayer would not have made the sale in question but for the occurrence of a changed condition or a sudden and unexpected opportunity, it will be presumed that he was not holding the property 'primarily' for sale." (Citing Biedenharn and Tibbals v. U.S., 362 F2d 266 (Ct. Cl. 1966)). This language, though helpful, was stated in the context of a sale of several entire apartment buildings, rather than the sale of individual units.

F. In PLR 8338114, the IRS stated that the "conversion of an existing building into condominium units usually changes the tax status of the building from property used in a trade or business [e.g. rental] or held for investment to property held primarily for sale. As a result, the income from the sale of the individual condominium units is usually ordinary income rather than capital gain." (Emphasis added). Similarly, a legislative history document from 1984, House Conference Report 98-861, stated that "under present law, the entire gain on the conversion of property into condominiums and the individual sale of those condominiums generally is treated as ordinary income to the seller." (Emphasis added). The terms "usually" and "generally" imply that there are exceptions, although rare. In 1984, the House considered a bill which would make condominium sales partially capital gain and partially ordinary income, to save taxpayers from having to first sell the buildings to related entities, but the bill failed.

G. In PLR 8415002, a taxpayer acquired eight condominium units (he was a passive investor as there was an outside manager). His stated intent was to buy the units, upgrade them and sell them at a profit. The units were temporarily rented, but that was a secondary purpose, and significant renovations were done in year one and selling began at the end of year two. The IRS characterized all gain as ordinary income. Although this PLR is clearly distinguishable from the case

here, two items are notable about this ruling. First, the IRS cited positively the case of Cousins Properties (see above) for the principle that sales may produce capital gain when the sales are "not the normal source of business income." Second, although the taxpayer himself was basically passive, the IRS attributed the activities of the sales broker and others to him in determining that the units were sold in a "business-like manner," and noted that he closely monitored the broker's activities, firing the first one and then retaining another. The IRS did state that "the cases differ on when it is proper to attribute another's activities [to a taxpayer]."

H. A number of cases oppose the Gangi strategy. The seminal case was Home Co. v. Comr., 212 F.2d 637 (10th Cir. 1954). In that case, a real estate company, which was engaged in development, construction and brokerage activities, built two projects consisting of single-family dwellings for rental purposes. The units were designed for military personnel, and were subject to government restrictions. Due to war-related issues, the rental operations were unprofitable during the period from 1943 to 1945 and, at the end of 1945, the taxpayer decided to sell the units individually (after the army removed war-related sales restrictions). The taxpayer commenced a very active sales and marketing campaign, and listed the units with real estate firms, and most of the 60 units sold during 1946. The court stated that a capital asset can be liquidated in the most advantageous manner, producing capital gain, but not if the taxpayer "enters the real estate business and carries on the sale in the manner in which such a business is ordinarily conducted." In that case, the court found that the sales were in the ordinary course of a real estate business since the taxpayer "carried on an active sales campaign, did extensive advertising, employed real estate agents, paid commissions, made sales through its own agents, actively solicited purchasers for the

property, in fact, did everything one ordinarily does in carrying on such a business."

I. An interesting case cited by Gangi was Parkside, Inc. v. Comr., 571 F.2d 1092 (9th Cir. 1977). In that case, **the roles were reversed**: the taxpayer wanted to avoid classification as a "personal holding company" and thus tried to convince the court his sale of 47 duplexes was in the ordinary course of business. The IRS argued the duplexes were capital assets. The court looked to Sec. 1221 to determine the answer. The facts were similar to Gangi except that sales and advertising expenses, and selling efforts, were greater. The overall case arguably presented just as strong of a case for "capital" status, but the court allowed the taxpayer to have "ordinary" asset treatment.

J. A review of cases and rulings in the Gangi area suggest that these factors favor capital gain status for condominium conversions:

1. The property had always been held for rental, with no anticipated condominium conversion (until the end);

2. Physical changes made to facilitate the conversion are minimal;

3. All units sell over a short period of time (a liquidation);

4. Selling efforts are done through a commission-based independent brokerage company, which pays for all advertising, the cost of the model unit employees, etc.

5. Some unanticipated change precipitated the conversion (an external change such as a changed rental market, or an internal change such as management divisions)' and

6. The ownership entity had never had activities outside of ownership of the building, and the actual owner-members had not previously done any other condominium conversion.

CREATIVE IDEAS WITH PROBLEM PROPERTIES

By: Richard F. Roth, Esq.

I. <u>NON-RECOURSE MORTGAGE – COMMERCIAL, INDUSTRIAL or MULTI-FAMILY PROPERTY</u>

A. Review Loan Documents – Important First Step.

1. Default provisions.
2. Remedy and cure provisions.
3. Guaranty.
4. Assignment of rents.
5. Prepayment penalty.
6. Security interest.

B. Due Diligence – Important Second Step.

1. Review carve-out provisions of mortgage for personal liability (see attached example).
2. Check for carve-out problems.
    a. Environmental issues.
    b. Waste.
    c. Security deposits.
    d. Real estate taxes.

C. Financial Review of Revenue and Expenses.

1. Reasons for the financial distress.

2. Is property worth saving?

D. Workout.

1. Deferment of interest.

2. Reduction of interest rate.

3. Capitalization of deferred interest.

4. Infusion of cash.

5. Equity participation.

6. Moratorium on payments.

7. Re-amortize the loan.

8. Full and complete release.

E. Advantage of Cooperation.

1. Refinancing other properties (see attached letter).

2. Better settlement of monetary obligations.

F. Foreclosure by Advertisement.

1. Preferred remedy.

2. Fastest.

3. Efficient.

4. Deficiency – Lender must bid true value of property.

G. Judicial Foreclosure.

1. Court action.

2. Expensive and inefficient compared with foreclosure by advertisement.

H. Deed in Lieu.

1. Easiest.

2. Does not wipe out junior liens.

3. Fastest.

4. No redemption period

I. Receivership (see attached order).

II. <u>TAX ISSUES</u>

A. Basis.

1. Amount realized.

2. Cost Basis.

B. Mortgage.

1. Inclusion of Acquisition Mortgage in Cost Basis.

2. Non-acquisition Mortgage.

3. Principal Payments.

C. Debt Workout.

1. Avoiding Cancellation of Debt Income.

a. Rescission.

b. Contested Liability.

c. Fixed and Enforceable Debt.

d. Debt Discharge.

e. Gift.

f. Compensation for Performance of Services.

g. Other Rules.

i. Release of Collateral.

ii. Release of Contingent Liability.

iii. Release of Guarantor.

D. Debt Reduction or Cancellation.

1. Impact on Debtor or Mortgagor.

a. General.

b. Cancellation of Debt Income.

c. Exceptions – Insolvent Taxpayer.

i. Insolvency Exception.

ii. Bankruptcy Exception.

iii. Reduction of Tax Attributes.

(a) Timing of Reduction.

(b) IRC §108(b)(2)(E) Basis Reductions.

d. Exceptions – Solvent Taxpayer.

E. Voluntary/Involuntary Foreclosure and Abandonment.

1. Sale or Exchange Treatment.

2. Gain or Loss Recognition.

3. Fair Market Value.

4. Effect of Right of Redemption.

5. Abandonment.

    a. Sale or Exchange Treatment.

    b. Foreclosure Sale.

    c. Deed in Lieu of Foreclosure.

    d. No Cancellation of Debt Indebtedness.

    e. Capital Loss.

    f. Like-Kind Exchange.

CARVE-OUT PROVISIONS

(from a Guaranty)

Notwithstanding anything to the contrary herein, however, the liability of each Guarantor shall be unlimited during the Loans, and on a joint and several basis with respect to the following (hereinafter, the "Limited Recourse Exceptions"):

1. Fraud or material misrepresentation by the Borrower or any Guarantor made in or in connection with obtaining or administering the Loans, including the loan application, Offer to Lend and the financial statements submitted therewith;

2. Failure to pay taxes or assessments prior to delinquency which are assessed or become due or become a lien against the Property prior to the date that Lender or its successor obtains legal and equitable title to the Property;

3. Reasonable costs incurred by Lender to protect and preserve its collateral and/or prevent physical waste;

4. The misappropriation by Borrower, any principal of Borrower, or any Guarantor of (i) proceeds of insurance covering any portion of the Property; or (ii) proceeds arising from the sale or condemnation of any portion of the Property;

5. All court costs and reasonable attorneys' fees incurred by Lender which are the responsibility of the Borrower or any Guarantor under any documents executed in connection with the indebtedness;

6. Misapplication by Borrower or its agents or affiliates, any principal of Borrower, or any Guarantor of rents or income collected with respect to the Property;

7. Collection of rents more than one (1) month in advance by Borrower or its agents or affiliates, or any principal of Borrower, or any Guarantor;

8. The removal or disposition by Borrower or its agents or affiliates of any fixtures or personal property in violation of the terms of any documents executed in connection with the indebtedness;

9. Any intentional or negligent physical waste of the Property by Borrower;

10. Any environmental liability incurred by Lender or Borrower pursuant to the documents executed in connection with the indebtedness, including any environmental indemnity;

11. Any indemnity or other agreement of Borrower to hold Lender harmless from and against any losses, liabilities, damages, injuries, costs and expenses, including reasonable attorneys' fees, of any and every kind, arising under the documents delivered to Lender at closing in connection with the indebtedness, and/or arising as a

result of the breach of any representation, warranty, covenant or agreement of Borrower or any Guarantor in connection therewith;

12. The entire principal balance of Loans and all interest accrued thereon, in the event of any filing by Borrower, any principal of Borrower, or any Guarantor who owns more than fourteen (14%) percent membership interest in the Borrower of a voluntary petition under the Federal Bankruptcy Code, or the taking by Borrower, any principal of Borrower, or any Guarantor who owns more than fourteen (14%) percent membership interest in the Borrower of any comparable action under any federal or state laws; and

13. Damages incurred by Lender as a result of the application or enforcement of any law, governmental standard or regulation applicable to Borrower and/or the Property.

LETTER OF COOPERATION

Troubled Apartments, LLC
6789 Lovely Oaks Drive
Bloomfield Village, Michigan 48345

Re: Settlement Agreement (the "Agreement") by and among Freddie Mac ("Lender"), Troubled Apartments, LLC ("Borrower") and Charles Brown and Sally Brown (collectively, the "Guarantors")

Dear _____________:

Lender hereby acknowledges that Borrower and Guarantors have cooperated with Lender in connection with the transfer of the property contemplated in the above-referenced Agreement.

Sincerely,

FREDDIE MAC

By:___________________________

Name:_________________________

Its:___________________________

629263

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

FEDERAL NATIONAL MORTGAGE ASSOCIATION, ISSUER AND TRUSTEE FOR PASS THROUGH CERTIFICATES WISCONSIN AVENUE SECURITIES FANNIE MAE MULTIFAMILY REMIC TRUST 1998-M6,

Case No. ____________

Hon:

Plaintiff,

vs.

TROUBLED APARTMENTS, L.L.C., a Michigan limited liability company,

Defendant.

____/

HUFF HUFF & PUFF, PC
H.R. Puff (P88888)
Attorney for Plaintiff
123 Anystreet Avenue, Suite 456
Southfield, Michigan 48034
(248) 357-6666

MADDIN, HAUSER, WARTELL, ROTH & HELLER, P.C.
Richard F. Roth (19692)
Attorney for Defendant
28400 Northwestern Highway, Third Floor
Southfield, Michigan 48034
(248) 354-4030

____/

PARTIAL CONSENT JUDGMENT APPOINTING RECEIVER

At a session of said Court, held in Pontiac, Michigan, on:______________________

PRESENT: HON.__________________
Circuit Court Judge

The parties having consented to the form and substance of this Partial Consent Judgment; and the Court being otherwise fully advised in the premises:

NOW THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. The Court finds that the appointment of a Receiver is proper for good cause shown pursuant to the parties' agreement and for the following reasons:

(a) it was agreed to by the parties as a matter of private contract;

(b) at a time when Troubled Apartments cannot meet its debt service obligations, Lender has a vested interest in protecting the value of the Property and to prevent the risk of the Property being lost, removed or materially injured.

(c) Lender has a vested interest in ensuring that the Property is adequately insured.

(d) Lender has a vested interest in ensuring that the Property is subject to proper maintenance and repair.

(e) Lender has a vested interest in ensuring that the rents, profits and income from the Property are being properly used for the benefit of the Property and for the payment of debt service.

(f) Lender has a superior right to such rents, profits and income because Troubled Apartments is in default under the Loan Documents.

(g) Lender has a vested interest in ensuring that the Property and the rents, profits and income therefrom are not otherwise subject to any waste, diversion or diminution.

2. McKinley, Inc. is authorized to do business in the State of Michigan, possesses the necessary qualifications, is not an attorney for or related to any party to this action, and is hereby appointed Receiver of the property of Defendant Troubled Apartments.

3. Receiver is authorized, subject to control of this Court and the laws regarding receivership, to do any and all acts necessary to the proper and lawful conduct of the receivership. Specifically, the following orders are entered with respect to the Receiver:

(a) the Receiver is authorized to have complete and exhaustive control, possession of the Property, together with any and all bank accounts, credit card receipts, demand deposits, reimbursement rights, bank deposits, security deposits, and all other forms of accounts, accounts receivable, payment rights, cash and cash equivalents, along with any and all information necessary to operate the Property, including but not limited to

all security codes, combinations, passwords and other access codes, and all other collateral securing the indebtedness owed to Plaintiff;

(b) Defendant and all persons acting under its direction are ordered to deliver possession to the Receiver, without any right of offset or recoupment of the Property, and all other collateral securing the indebtedness owed to Plaintiff, including but not limited to: 1) cash collateral (whether consisting of cash on hand, cash in any and all bank accounts or other accounts, all rights to security deposits, including but not limited to amounts that Defendant may have deposited with utility companies, and all other cash and cash equivalents); 2) all keys; 3) all loans and communications and correspondence files relating thereto; 4) all security deposits, rent, prepaid rent, other sums relating to the use, enjoyment, possession, improvement or occupancy of all or any part of the Property and any accounts of any of the foregoing; 5) a current list of the occupants of the Property, including data with respect to each occupant; 6) any and all accounts receivables and accounts payable reports; 7) any and all documents pertaining to ongoing litigation; 8) any and all contracts in effect with respect to the Property, and all communications and correspondence pertinent thereto; 9) any and all contracts, bids or other materials relating to any contractor work at the Property; 10) any and all payroll records, employee files, applications and other materials relevant to those persons employed at the Property; and 11) such other records pertaining to the management of the Property;

(c) Defendant and any persons acting under Defendant's direction is directed to deliver the Property to the Receiver and be enjoined from in any way disturbing the possession of the Property or Personal Property or other property that is the subject of this Order, be prohibited and restrained from disposing of, dissipating, mishandling or misappropriating any of the Property or other such property, be prohibited from taking any actions that would, directly or indirectly, have an adverse impact on the value of the Property, and be prohibited and restrained from collecting any rents or other sums due to Defendant, all until further order of the Court;

(d) Effective immediately, the Receiver is ordered to take any and all actions the Receiver deems reasonable and appropriate to prevent waste to and to preserve, secure, manage, maintain and safeguard the Property and all other forms of property to which the Receiver is entitled to take possession and control under this order;

(e) the Receiver is vested with the books and records of the Defendant with respect to operation of the Property and other property subject hereto, including any and all information related to: 1) rent rolls and leases affecting the Property; 2) amounts paid by lessees and other obligors of Defendant; 3) liens, encumbrances and other interests against or affecting the Property; 4) property taxes owed by Defendant; 5) all types of insurance affecting the Property; 6) plans, specifications, surveys and

drawings of the Property; 7) access codes to any of the Property; 8) all operating statements of Defendant; and 9) all other aspects of the Property;

(f) the Receiver is authorized to receive and collect any and all sums due or owing to the Defendant in any manner related to the Property, whether the same are now due or shall hereafter become due and owing, to deposit such sums into an account established and maintained by the Receiver, and to expend such sums on the operation and management of the Property in the ordinary course of its business;

(g) the Receiver is authorized to institute, prosecute, defend, compromise, and/or intervene in or become a party to such actions or proceedings in state or federal courts which may in his opinion be necessary for the protection, maintenance and preservation of the assets of the Defendant and for the carrying out of the terms of the Court's order appointing the Receiver, including but not limited to the collection of rents and other amounts now or hereafter becoming due, the removal of tenants or other persons from the Property, and/or the defense against any action brought against the Receiver acting in such capacity;

(h) the Receiver is authorized to maintain appropriate property insurance for the Property, public liability insurance, workmen's compensation insurance, fire and extended coverage insurance, burglary and theft insurance, and other types of insurance normally obtained in connection with the operation and management of the Property and the Receiver is authorized to continue any current policies in place, and is authorized, with Approval[1], to purchase further insurance as the Receiver deems appropriate;

(i) the Receiver is authorized to pay all current and past due real estate taxes, personal property taxes and any other taxes and assessments against the Property, with Approval;

(j) the Receiver and Plaintiff are authorized to enter into further lending transactions by which Plaintiff may lend monies to the Receiver (on a nonrecourse basis as to Receiver) to enable the Receiver to perform its duties hereunder, in which case the Receiver may issue one or more receiver's certificates to evidence such borrowings to evidence a first and prior lien and security interest on the Property, Personal Property and on all other collateral of Plaintiff, in favor of Plaintiff as security for such borrowings, on the same terms and conditions as set forth in the Mortgage;

---

[1] Any time "Approval" is required with respect to any action of the Receiver, such action will be authorized only if and when the Receiver receives the written consent of Plaintiff to such action or when the Receiver obtains entry of an order of this Court.

(k) the Receiver is authorized to: 1) negotiate and enter into new leases, occupancy agreements and contracts in the ordinary course of the business of the Property; 2) modify existing leases, occupancy agreements and contracts in the ordinary course of the business of the Property; 3) pay all utilities, expense and other obligations secured by or which may give rise to liens, and all other outstanding obligations to suppliers and services in the ordinary course of business, including obligations incurred prior to the commencement of the receivership so long as the Receiver determines that it is prudent to do so in order to maintain business relationships that are beneficial to the conduct of the receivership; 4) make repairs necessary to the maintenance of the Property in order to preserve the Property in the ordinary course of business; and 5) comply with all requirements and regulations applicable to the Property;

(l) the Receiver may apply income from the Property, subject to the lien rights of Plaintiff, as follows: 1) the Receiver's approved fees and expenses; 2) the current operating expenses of the receivership in the ordinary course of business; 3) to the obligations owed to Plaintiff under the Loan Documents; and 4) to such other obligations incurred with Approval;

(m) the Receiver may maintain sufficient cash on hand to enable the Receiver to meet those expenses, the payment of which is authorized herein, in an amount to be agreed to between the Receiver and the Plaintiff;

(n) except in the event of gross negligence, willful misconduct, or actions in violation of orders of the Court, the Receiver will have no personal liability for any obligations incurred in the course of the receivership, any and all such liabilities will be limited to the assets (including the cash and cash equivalents) received and generated by the Receiver in the course of the receivership, such liabilities will be subject to the existing lien of Plaintiff, and Defendant will hold the Receiver harmless except in connection with any willful misconduct or gross negligence by the Receiver;

(o) the authority granted to the Receiver is self-executing, unless the action specifically requires Approval; and

(p) the Receivers shall have such additional powers as are provided by law and as this Court may direct.

4. The Receiver shall obtain a bond in the amount of $10,000.00 to satisfy the requirement of MCL 600.2926.

5. The Received is entitled to monthly compensation in an amount of either 5 percent of the monthly gross revenues generated from the Property from the Property or

$4,000.00, whichever is greater. The Receiver will retain a management company at the Receiver's expense. The Receiver is further entitled to a construction management fee of 5 percent for all capital expenditures.

6. Plaintiff herein is granted an equitable interest in the Property, and Plaintiff is empowered with the same authority to dispose of or preserve the Property as awarded to the Receiver above, subject to the prior written approval of this Court as necessary.

7. The Receiver will, within 30 days of qualification and appointment, file in this action, an inventory of all property of which the Receiver has taken possession. If the Receiver subsequently comes into possession of additional property, he will file a supplemental inventory as soon as practical.

This Order and Consent Judgment does not resolve the last pending claim or close the case.

____
CIRCUIT COURT JUDGE

Approved as to form and content:

HUFF HUFF & PUFF, PC	MADDIN HAUSER WARTELL ROTH & HELLER P.C.
________________________	________________________
H.R. PUFF (P88888) 123 Anystreet Avenue, Suite 456 Southfield, Michigan 48034 (248) 357-6666	RICHARD F. ROTH (P19692) 28400 Northwestern Hwy, Third Floor Southfield, Michigan 48034 (248) 827-1895
Attorneys for Plaintiff	*Attorney for Defendant*

THE FUTURE LOOK OF RETIREMENT PLANS

By: Gary M. Remer, Esq.

I. AN OVERVIEW OF THE PENSION PROTECTION ACT OF 2006

A. The Pension Protection Act of 2006 (the "Act") has as its primary focus the funding of defined benefit plans and the protection of the Pension Benefit Guaranty Corporation, the government entity that insures defined benefit plans. However, the Act is not limited to defined benefit plans.

B. The Act requires most defined benefit pension plans to become fully funded over seven years. The plan's funding status is determined by comparing the value of the plan's assets against the plan's liabilities as calculated under the Act. If the plan is less than fully funded, the funding shortfall is amortized over seven years. The employer's contributions must cover the present value of benefits accrued during a plan year, the amortized shortfall, and interest.

C. The Act shortens the maximum permitted vesting schedule for employer contributions made under most defined contribution plans. The employer contributions must vest on a three-year cliff or six-year graded schedule. This is the same schedule that applies to employer matching contributions. Plans that currently vest employer contributions according to a five-year cliff or seven-year graded schedule must apply the faster vesting rules to contributions made for plan years beginning in 2007.

D. State wage and hour laws cannot prevent employers from using automatic enrollment to increase participation in 401(k) plans.

1. The Act creates a new nondiscrimination safe harbor that employers with automatic enrollment may use to avoid conducting ADP and ACP tests. The safe harbor resembles the traditional 401(k) plan safe harbor but the Act's safe harbor requires

employers to provide a minimum match of 100% on elective deferrals up to 1% of compensation and 50% on deferrals between 1% and 6%. Employers may also take advantage of the Act's safe harbor by making a 3% contribution to each participant, regardless of whether the participant makes contributions to the plan. The safe harbor contribution must fully vest within two years. To qualify for the safe harbor, employers must automatically enroll participants to contribute 3% of compensation during their first year of participation. This rate increases by 1% each year until participants contribute 6% of compensation to the plan.

2. The safe harbor rules also require that employers who are automatically enrolled have 90 days to stop participating in the plan and withdraw their contributions and any earnings. These distributions are taxed in the year received and are not subject to the 10% premature distribution penalty that normally applies to distributions made to participants prior to age 59½. Employers must give participants a notice explaining the plan's automatic enrollment rules and describing a participant's rights to opt out.

3. The Act's safe harbor is effective for plan years beginning in 2008. Employers may continue to use the traditional 401(k) plan safe harbor rules after the Act's safe harbor rules become effective.

E. The Act makes permanent the pension and individual retirement arrangement provisions under the Economic Growth and Tax Relief Reconciliation Act of 2001, which were to sunset at the end of 2010. These include the following:

1. The elective deferral limit for 401(k) plans is $15,000 in 2006, with cost-of-living increases in $500 multiples thereafter.

2. The dollar limit under IRC §415(c)(1)(A) for annual additions with respect to defined contribution plans is $44,000 for 2006, with cost-of-living increases in $1,000 multiples thereafter.

3. The compensation dollar limit under IRC §401(a)(17) is $220,000 for 2006, with cost-of-living increases in $5,000 multiples thereafter.

4. The deductible contribution under IRC §404(a)(3) is 25% of aggregated participant compensation.

5. Deferrals for 401(k) plans are separately deductible with regard to the 25% limit and do not count toward the 25% limit applicable to other employer contributions (e.g., matching contributions, non-elective contributions).

6. Participant compensation used to calculate the 25% limit under IRC §404(a)(3) is based on IRC §415 compensation, which means it is "grossed up" for elective deferrals made by participants under 401(k) plans, cafeteria plans, etc.

7. Catch Up Contributions for Individuals Age 50 and Older. Starting in the year in which an individual reaches age 50 and subsequent years, a plan may allow the individual to make a "Catch Up Contribution." The maximum Catch Up Contribution for qualified plans is $5,000 in 2006. The 2006 limit is subject to cost-of-living adjustments in $500 multiples starting in 2007. The Catch Up Contribution does not count against the IRC §402(g) limits pertaining to the maximum elective deferrals under 401(k) plans, the IRC §415 limits, IRC §457(b) limits, and IRC §401(k)(11), nor deduction limits under IRC §404. The right under a qualified plan to make Catch Up Contributions must be available on a nondiscriminatory basis to eligible participants. Catch Up Contributions will not cause a plan to fail the ADP and ACP tests under 401(k) plans, the 401(a)(4) non-discrimination test of the

amount of contributions or benefits provided by the employer, or the coverage test under IRC §410(b).

8. Elimination of 25% Annual Addition Limits. In certain circumstances, the annual addition limit under IRC §415(c)(1)(A) is increased from 25% to 100% of compensation for certain middle and low income participants. The annual addition limit is 100% of compensation for participants who earn less than $44,000; and the limit is $44,000 for participants who earn $44,000 or more. The purpose of this section is to eliminate violations of the IRC §415 limits for participants who defer significant percentages of their income through 401(k) plans.

   EXAMPLE: A participant under a 401(k) plan earns $35,000 a year and is married to an individual whose employer does not offer a 401(k) arrangement. The couple decides to have the 401(k) plan participant defer $15,000 for 2006. The annual addition limit for the employer is $35,000 (i.e., 100% of compensation, determined prior to the 401(k)), so an additional $20,000 could still be allocated to the participant (e.g., matching contributions, employer non-elective contributions).

II. <u>SAFE HARBOR 401(K)</u>

A. In the past every 401(k) plan that had an HCE making deferrals was required to run the actual deferral percentage test ("ADP Test"). If the HCE received a matching contribution (or after tax voluntary contribution), then the plan was required to run the actual contribution percentage test ("ACP Test").

B. If either of the tests was failed, the plan sponsor was required to either return money to the HCEs or contribute additional moneys for the NHCEs.

C. The safe harbor rules eliminate the need for the ADP and ACP Tests if certain notice and funding requirements are satisfied. The safe harbor rules do not eliminate the ACP Test for after tax voluntary contributions.

D. The funding requirement is satisfied if either of the following contributions is made:

1. Matching contributions on behalf of each NHCE equal to 100% of the employee's elective contributions up to 3% of compensation, and 50% of the employee's elective contributions between 3% and 5% of compensation. The matching contribution requirements are also satisfied by other matching formulas, so long as the rate of match does not increase as the employee's level of elective contributions increases, and the aggregate matching contribution at each level of elective contributions is at least equal to the aggregate matching contributions that would be made under the preceding sentence.

2. Non-elective contributions on behalf of each NHCE equal to at least 3% of the employee's compensation, without regard to whether the employee makes elective contributions. IRS Notice 98-52 provides that the safe harbor non-elective contributions may be counted toward the minimum contribution requirement for top-heavy plans and counted for cross-tested calculations.

E. To satisfy the designed base safe harbor, each employee eligible to participate in the 401(k) plan must be given a written notice each year of the employee's rights and obligations at least 30 days and no more than 90 days before the beginning of each Plan Year. The notice must indicate whether the employer will use a matching contribution and/or a non-elective contribution to satisfy the safe harbor requirements.

III. NEW COMPARABILITY

A. History. The concept of what is called "new comparability" or "cross-testing" originated back in 1981 with the issuance of Revenue Ruling 81-202. The Ruling allowed plan sponsors to demonstrate that a defined contribution plan was comparable to a defined benefit plan. However, the concept did not gain widespread acceptability in the pension community until the late 90s as the result of the Internal Revenue Service constantly changing its position on the subject.

B. Underlying Concept.

1. A defined contribution plan defines the amount that will be contributed currently with no guaranty as to the amount of the benefit at the time of retirement. A defined benefit plan specifies the benefit at retirement without a predetermined annual contribution.

2. The underlying principal determining the funding of a defined benefit plan is the time value of money. For example, a participant who is age 60 needs to have a larger contribution made to a retirement plan today in order to have that amount grow to $100 at retirement, compared to the contribution required for a participant who is age 20 to have their benefit grow to $100 at retirement.

3. Each year a defined benefit plan is required to have an actuary calculate the required contribution by projecting the retirement benefit to be funded.

4. In simple terms, cross-testing works by looking at the contribution made to each participant currently and demonstrating that although each participant may receive a different contribution percentage compared to the other participants, the amount received is projected to be the same benefit at retirement.

5. The advantage of cross-testing is that it allows the grouping of participants so that members of each group may receive the same allocation percentage.

C. Technical Requirements. Key technical requirements must be satisfied to demonstrate that the cross-tested plan does not discriminate in favor of HCEs. This is done by demonstrating that a cross-tested plan is non-discriminatory under the general test of Treasury Regulation §1.401(a)(4)-2(c) by comparing equivalent amounts of benefits instead of contributions. A plan satisfies the general test if each "rate group" satisfies the requirements of IRC §410(b). A "rate group" is established for each HCE and consists of:

1. The HCE; and

2. All other employees (both HCEs and HNCEs) who have an equivalent accrual rate greater than or equal to the equivalent accrual rate of the HCE.

Each rate group then must either pass the ratio percentage test of Treasury Regulation §1.410(b)-2(b)(2) or the average benefit test under Treasury Regulation §1.410(b)-5.

D. New Guidance. Beginning with plan years on or after January 1, 2002, cross-tested plans must also satisfy one of two minimum contribution requirements, in addition to the technical requirements described above:

1. A minimum 5% allocation rate to each non-highly compensated employee ("NHCE"); or

2. A minimum allocation rate to the NHCEs equal to 1/3 of the highest allocation rate for any highly compensated employee ("HCE").

E. Show me the numbers! In this example a cross-tested plan is designed to allow the owner of the company to receive an allocation equal to 42% of

her compensation while only providing a contribution of 6.25% to each of the other participants.

NAME	BIRTHDATE	AGE	COMPENSATION	CONTRIBUTION	% OF PAY
HCE #1	01/30/46	60	100,000	42,000.00	42.00%
NHCE#2	05/01/81	25	20,000	1,250.00	6.25%
NHCE #3	05/02/79	27	20,000	1,250.00	6.25%
NHCE #4	07/21/73	33	20,000	1,250.00	6.25%
NHCE #5	04/15/59	47	24,000	1,500.00	6.25%
TOTALS			184,000	47,250.00	25.68%

IV. PUTTING IT ALL TOGETHER

A. The goal of most owners of a business is to provide themselves with the maximum possible benefit at the least overall cost. The issue the owners may face is if a benefit is already being provided to their employees, the owners do not want the employees to feel that a change in the retirement is harming them.

B. By combining cross-testing, 401(k) and safe harbor, all the objectives may be accomplished.

C. An example will demonstrate how this works. The owners will be able to receive an allocation totaling $44,000. The participants can defer pre-tax dollars and receive a 5% contribution from the employer (3% as a safe harbor contribution that satisfies the top heavy funding and 2% subject to a vesting schedule). The ADP Test is not required. The plan shown is designed to break all the participants into two groups. Group One is comprised of each participant that is an HCE. Group Two is comprised of all participants that are not members of Group One. The plan also provides for a minimum contribution to each participant of $500.

NAME	AGE	CURRENT COMPENSATION	CONTRIBUTION	PERCENT OF PAY	401(K) DEFERRAL	ADP 12.00% 2.14%	TOTAL CONTRIBUTION
HCE #1	46	$100,000.00	$29,000.00	29.000%	$15,000.00	15.00%	$44,000.00
HCE #2	59	$100,000.00	$29,000.00	29.000%	$15,000.00	15.00%	$44,000.00
HCE #3	57	$100,000.00	$29,000.00	29.000%	$15,000.00	15.00%	$44,000.00
	38	$ 18,552.35	$927.62	5.000%	0.00	0.00	$927.62
	53	$24,957.81	$1,247.89	5.000%	$1,686.73	6.76%	$2,934.62
	25	$2,621.21	$500.00*	19.075%	0.00	0.00	$500.00
	36	$25,768.85	$1,288.44	5.000%	$1,091.68	4.24%	$2,380.12
	39	$18,664.57	$933.23	5.000%	$355.16	1.90%	$1,288.39
	53	$1,529.69	$500.00	32.686%	0.00	0.00	$500.00
	60	$30,371.95	$1,518.60	5.000%	$2,278.35	7.50%	$3,796.95
	43	$32,923.10	$1,646.16	5.000%	$1,658.97	5.04%	$3,305.13
	53	$27,134.22	$1,356.71	5.000%	$1,379.00	5.08%	$2,735.71
	34	$22,266.51	$1,13.33	5.000%	$373.98	1.68%	$1,487.31
	41	$72,129.91	$3,606.50	5.000%	0.00	0.00	$3,606.50
	31	$1,886.26	$500.00	26.507%	0.00	0.00	$500.00
	53	$11,540.66	$577.03	5.000%	0.00	0.00	$577.03
	47	$22,776.31	$1,138.82	5.000%	$1,300.17	5.71%	$2,438.99
	58	$22,465.87	$1,123.29	5.000%	$1,188.17	5.29%	$2,311.46
	42	$22,854.03	$1,142.70	5.000%	0.00	0.00	$1,142.70
	50	$20,869.62	$1,043.48	5.000%	$991.87	4.75%	$2,035.35
	34	$9,582.81	$500.00	5.218%	0.00	0.00	$500.00
	28	$3,971.93	$500.00	12.588%	0.00	0.00	$500.00
	42	$8,006.97	$500.00	6.245%	0.00	0.00	$500.00
	32	$12,054.47	$602.72	5.000%	0.00	0.00	$602.72
	35	$21,841.91	$1,092.10	5.000%	$1,193.42	5.46%	$2,285.52
	35	$16,415.02	$820.75	5.000%	0.00	0.00	$820.75
	35	$19,233.44	$961.67	5.000%	0.00	0.00	$961.67
	73	$28,869.60	$1,443.48	5.000%	0.00	0.00	$1,443.48
		Totals	$104,584.52		$58,497.50		$163,082.02
		Owners	$87,000.00	29.000%	$45,000.00		$132,000.00
		Non-Owners	$26,584.52	5.324%	$13,497.50		$40,082.02

V. DEFINED BENEFIT PLANS

A. Background.

1. A defined benefit plan specifies the benefit that a participant will receive at retirement.

2. The risk associated with the growth of the retirement funds is borne by the employer. If the market declines, the employer must fund the shortfall in the retirement plan.

3. This is different from a defined contribution plan where if there is a decline in the market, the participants suffer the loss.

B. Large Contributions.

1. A defined benefit plan allows for contributions that are significantly greater than what is allowed in a defined contribution plan.

2. This may allow business owners to quickly regain retirement benefits that were lost over the last several years.

C. Two Major Plan Options.

1. The traditional defined benefit plan provides a participant with a retirement benefit that is often defined as an average percentage of their compensation. For example, the benefit formula may be 60% of a participant's average annual compensation for the last three years. This would mean that if the participant's average annual compensation for the last three years was $100,000, then he/she would receive an <u>annual</u> benefit at retirement of $60,000.

2. A new form of defined benefit plan is called a cash balance plan. Under this arrangement each participant has a hypothetical account established. The participant's statement shows the contribution each year credited to this account and any hypothetical growth. The difference between a cash balance plan and a defined contribution plan is the growth that is guaranteed by the plan.

3. An example may help to explain how a cash balance plan works. The plan provides that each year the participants' accounts will be credited with 15% of their compensation for the year. If the participant made $100,000 for the year their hypothetical account would be credited with $15,000. The account is hypothetical because all funds are pooled to together to pay all retirement benefits. The cash balance plan will also provide for interest to be credited to the hypothetical account. At the end of the second year

the $15,000 contribution will be credited with hypothetical interest (earnings). Many times it is tied to the 30 Year Treasury Rate.

4. The actual earning of the trust will influence the amount of the required contribution by the employer. If the rate of return exceeds the hypothetical interest rate, a smaller contribution will be required.

5. With many of these defined benefit arrangements, the benefit formulas can be modified to provide higher benefits for the key executives.

D. With any retirement arrangement, the key is discovering what the end goal is and determining a way to make it happen. Then we have a happy ending.

NAME	AGE	PLAN COMP.	ASSUMED DEFERRALS	NEW COMPARABILITY	CASH BALANCE	TOTAL CONT.	PERCENT OF TOTAL	PERCENT OF COMP.
HCE #1	55	205,000.00	16,000.00	12,607.50	61,500.00	90,107.50	30.19%	43.95%
HCE #2	41	205,000.00	13,000.00	12,607.50	61,500.00	87,107.50	29.19%	42.49%
HCE #3	63	205,000.00	16,000.00	12,607.50	61,500.00	90,107.50	30.19%	43.95%
NHCE #1	36	71,918.00	0.00	4,135.29	1,438.36	5,573.65	1.87%	7.75%
NHCE #2	31	66,421.04	0.00	3,819.21	1,328.42	5,147.63	1.72%	7.75%
NHCE #3	52	38,957.60	0.00	2,240.06	779.15	3,019.21	1.01%	7.75%
NHCE #4	39	36,476.96	0.00	2,097.43	729.54	2,826.96	0.95%	7.75%
NHCE #5	50	35,091.04	0.00	2,017.73	701.82	2,719.56	0.91%	7.75%
NHCE #6	43	34,577.60	0.00	1,988.21	691.55	2,679.76	0.90%	7.75%
NHCE #7	25	33,966.44	0.00	1,953.07	679.33	2,632.40	0.88%	7.75%
NHCE #8	25	29,934.64	0.00	1,721.24	598.69	2,319.93	0.78%	7.75%
NHCE #9	49	28,559.36	0.00	1,642.16	571.19	2,213.35	0.74%	7.75%
NHCE #10	27	25,583.36	0.00	1,471.04	511.67	1,982.71	0.66%	7.75%
HCE'S	=	$615,000.00	$45,000.00	$37,822.50	$184,500.00	$267,322.50	89.57%	
NHCE'S	=	$401,486.04	0.00	$23,085.45	$8,029.72	$31,115.17	10.43%	
TOTAL	=	$1,016,486.04	$45,000.00	$60,907.95	$192,529.72	$298,437.67	100.00%	

Census			401(k) Plan			Cash Balance		Employer Contributions			Combo Plan	
Name	Age	PLAN COMP	Salary Deferrals	Empl. P/S	% of Pay	Empl. Cont.	% of Pay	Total Cont.	% of Total	% of Comp.	Total Cont.	Class
Owner	53	220,000	20,000	16,500	7.50%	110,00 0	50.00%	126,500	77.72%	57.50%	146,500	A
Salesman	49	127,000	0	6,350	5.00%	3,493	2.75%	9,843	6.05%	7.75%	9,843	B
EE	24	30,000	0	1,500	5.00%	825	2.75%	2,325	1.43%	7.75%	2,325	C
EE	53	40,000	0	2,000	5.00%	1,100	2.75%	3,100	1.90%	7.75%	3,100	C
EE	44	44,000	0	2,200	5.00%	1,210	2.75%	3,410	2.09%	7.75%	3,410	C
EE	39	35,000	0	1,750	5.00%	963	2.75%	2,713	1.67%	7.75%	2,713	C
EE	60	49,000	0	2,450	5.00%	1,348	2.75%	3,798	2.33%	7.75%	3,798	C
EE	64	30,000	0	1,500	5.00%	825	2.75%	2,325	1.43%	7.75%	2,325	C
EE	46	48,000	0	2,400	5.00%	1,320	2.75%	3,720	2.29%	7.75%	3,720	C
EE	47	40,000	0	2,000	5.00%	1,100	2.75%	3,100	1.90%	7.75%	3,100	C
EE	25	25,000	0	1,250	5.00%	688	2.75%	1,938	1.19%	7.75%	1,938	C
HCE'S=		$347,00 0	$20,000	$22,85 0	6.59%	$113,4 93	32.71%	$136,34 3	83.76%		$156,343	
NHCE'S=		$341,00 0	$0	$17,05 0	5.00%	$9,378	2.75%	$26,428	16.24%		$26,428	
TOTAL=		$688,00 0	$20,000	$39,90 0	5.80%	$122,8 70	17.86%	$162,77 0	100.00%		$182,770	

THE BOOMER'S DILEMMA: SOCIAL SECURITY AT 62, 66 OR 70

By: Charles M. Lax, Esq.

I. OVERVIEW OF ISSUE

A. According to United States Census estimates, over 15 million people will reach the Social Security minimum age of 62 in the next five years.

B. Generally these people have the following options:

1. Begin reduced benefits at age 62 or between 62 and their full or normal retirement age ("NRA").

2. Wait until NRA and receive a full Social Security benefit.

3. Wait even longer for an increased benefit; however, benefits do not increase after age 70.

C. Approximately 72% of all current Social Security benefit recipients ("Recipients") have opted for early, reduced benefits.

1. Many of these people had no choice due to economic circumstances.

2. We'll explore these situations where there is a choice.

D. Other demographic information.

1. While approximately 50% of the baby boomers expect to work past 65, only 13% of the current year retirees made it past 65.

2. The average age of people leaving the workforce today is only 59.

3. Today 60% of the 60 year olds, 32% of the 65 year olds and 19% of the 70 year olds are employed.

II. CALCULATING THE BENEFITS

A. Determine the Primary Insurance Amount ("PIA").

1. The starting point for all Social Security benefits is the Recipient's PIA.

2. Generally:

   a. Determine the taxed Social Security earnings (earnings up to Social Security wage base for the year) each year after age 21.

   b. Apply an inflation adjustment for each year to make each year comparable.

   c. Select the 35 highest years and determine a monthly average ("Average Indexed Monthly Earnings" or "AIME").

   d. A formula is then used to convert AIME to a monthly benefit which generally replaces about 45% of AIME for workers with the lowest wages and about 25% of AIME for workers with the highest covered wages.

3. Social Security Administration's ("SSA") website has a benefit calculator.

B. Determining a Recipient's full or normal retirement age ("NRA").

1. The NRA is the age at which the Recipient can begin to receive a full retirement benefit.

2. NRA had been institutionalized at 65 until Congress adopted a schedule of increased ages.

   a. Recognized longer life expectancies.

   b. Designed to improve solvency of the fund.

   c. Schedule:

EXHIBIT 1

Full or Normal Retirement Age

Year of Birth	Age
1937 and Prior	65
1938	65 and 2 Months
1939	65 and 4 Months
1940	65 and 6 Months
1941	65 and 8 Months
1942	65 and 10 Months
1943 – 1954	66
1955	66 and 2 Months
1956	66 and 4 Months
1957	66 and 6 Months
1958	66 and 8 Months
1959	66 and 10 Months
1960 and Later	67

C. Social Security reductions for early start.

1. Recipients can begin to receive Social Security benefits during the month after 62 or any time thereafter.

2. The reduction amount is 5/9 of 1% (.0055) for every month up to 36 prior to NRA and 5/12 of 1% (.004167) for each additional month.

3. Schedule:

EXHIBIT 2

Social Security Reductions for Early Start

Number of Months By Which Benefits Precede NRA	Benefit Percentage
6	96.67
12	93.33
18	90.00
24	86.67
30	83.33
36	80.00
42	77.50
48	75.00
54	72.50
60	70.00

4. Example #1:

A Recipient's PIA amount is $1,500 per month and he elects to start his benefits 10 months before his NRA. His monthly benefit would be calculated as follows:

(1 – (.0055 x 10)) x $1,500

.945 x $1,500 = $1,417.50/month

D. Social Security benefits for postponed starts.

1. Recipients can postpone the receipt of their Social Security benefits after their NRA.

2. The increased amount is determined based upon the year the Recipient turns age 62.

3. Schedule:

EXHIBIT 3

Social Security Increases for Postponing Start Date

Age 62 In	Increased Benefit Per Month After NRA	Annualized Increase
1995-1996	11/24 of 1%	5.5%
1997-1998	1/2 of 1%	6.0%
1999-2000	13/24 of 1%	6.5%
2001-2002	7/12 of 1%	7.0%
2003-2004	5/8 of 1%	7.5%
2005 and after	2/3 of 1%	8.0%

4. Example #2:

The Recipient in Example #1 above turned age 62 in 2002. He now decides to postpone the date he starts his benefits by 10 months after his NRA. His monthly benefit would be calculated as follows:

(1 + (.005833 x 10)) x $1,500

1.05833 x $1,500 - $1,587.50/month

E. Earnings test for early retirees.

1. Determining earnings.

a. Wages (including bonuses, commissions, etc.) count in the year earned, not paid.

b. Self employment income is included if the individual performs "substantial services."

c. No limit on other types of income.

2. If you receive Social Security benefits for the entire year of 2006 and you are below the NRA for the full year, the maximum that can be earned without reduction is $12,480.

   a. Amounts earned in excess of limit reduce benefits by $1 for every $2 over the limit.

   b. If benefits commence in a month other than January, the test is applied on a monthly basis.

3. The annual limit for the year the Recipient reaches NRA is increased to $33,240 and the reduction in benefits is $1 for every $3 over the limit.

4. Beginning with the month the Recipient reaches NRA, there is no further reduction for earnings.

F. Benefits for family members.

1. Spouses.

   a. Spouses receive a benefit equal to half of the Recipient's full retirement benefit at their NRA.

   b. Spouses can receive a reduced benefit at or after 62.

   c. Spouses are entitled to a larger benefit based upon their own earnings record.

2. Divorced spouses.

   a. To qualify the divorced spouse must:

      i. Have been married to the Recipient for at least ten (10) years.

      ii. Be at least age 62.

iii. Be unmarried.

iv. Not be eligible for a higher benefit in their own right.

b. The Recipient must be at least 62. It makes no difference if the Recipient is:

i. Remarried.

ii. Collecting their own benefits.

3. Children's benefits.

a. To qualify the child must:

i. Be unmarried.

ii. Be under 18, or 18 or 19 and still be in a secondary school; or be 18 and older and be disabled from a disability that started prior to age 22.

b. A child may receive up to half of the Recipient's full retirement benefit, subject to the overall family limit, of generally 150%-180% of the Recipient's full retirement benefit.

G. EXHIBIT 4

Estimated Social Security Benefits*

Age	Recipients Monthly Benefit
62 in 2008	1558
66 in 2012	2391
70 in 2016	3684

*based upon the assumption that the Recipient has received and will continue to receive earnings above the Social Security Wage Base until benefits commence.

III. FACTORS TO CONSIDER

A. Life expectancy.

1. Probably the single biggest factor to consider.

2. Life expectancies under the Social Security Administration's actuarial tables:

EXHIBIT 5

Age	Male Life Expectancy	Female Life Expectancy
62	18.21	21.43
63	17.48	20.63
64	16.76	19.84
65	16.05	19.06
66	15.36	18.30
67	14.68	17.54
68	14.02	16.80
69	13.38	16.07
70	12.75	15.35

3. Break-even determination.

a. The "break-even" determination is the age you must live in order to receive a greater amount of cumulative benefits by postponing benefits after age 62.

b. For example, assume the Recipient would be eligible for the following benefits:

Age 62	$ 960
Age 66 (NRA)	$1,281
Age 70	$1,690

i. The break-even point between age 62 and age 65 starting dates is at age 77 and 11 months.

ii. The break-even point between age 62 and age 70 starting dates is at age 80 years and 6 months.

iii. The break-even point between age 66 and age 70 starting dates is at 82 years and 6 months.

c. SSA website provides a break-even calculator for this simple determination.

4. Life expectancies are based upon averages, but is "the deck stacked?"

a. Health of Recipient.

b. Heredity – consider parents and grandparents.

5. The simple analysis.

a. Since most people will live beyond 77 years 11 months, wait at least until NRA to start.

b. At age 66, the male life expectancy doesn't make it to the break-even point, while the female life expectancy makes it past the break-even point. The retired males should start and the females should wait.

B. Investment return on early benefits.

1. If the Recipient isn't living on their Social Security benefits then their investment return on the early paid benefits must also be factored.

2. Investments that outperform cost of living indexes increase the break-even point.

   a. By outperforming the cost of living by 1% after tax, the break-even point increases to 78.

   b. By outperforming the cost of living by 7% after tax, the break-even point increases to more than 100.

C. Surviving spouse's benefits.

   1. After death, surviving spouse's benefit at NRA may be increased to 100% of Recipient's PIA.

   2. If early retirement benefits are selected, however, then spouses increased benefit is limited to the lower early retirement benefit (but never less than 82.5% of the Recipient's PIA).

   3. Therefore, the longevity of not just the working spouse but also the non-working spouse must be considered.

   4. Of course, if the spouse worked and earned a greater benefit that would always be paid.

D. Taxability of the Social Security benefits.

   1. Generally, Social Security benefits are not taxed if modified adjusted gross income, plus half of the Social Security benefits are $32,000 or less for a joint return and $25,000 for a single return.

   2. If the limit is exceeded, up to 85% of the Social Security benefits could be taxed.

   3. Therefore, other income must be considered. For example, working between 65 and 70 could cause the Social Security

benefits to be taxed at a level that suggests postponing the start date to the date employment ends or age 70.

E. Affect on retirement savings.

1. In some instances, Recipients must choose between electing to receive early retirement benefits from Social Security, or distributions from IRAs or retirement plans.

2. Generally, drawing early Social Security benefits and deferring the taxable distribution of retirement benefits will be preferable, except where the retirement benefits are growing at very low rates of return.

F. Increasing the Recipients AIME.

1. Benefits are based on Recipients 35 years of highest earnings.

2. A Recipient's benefits could be increased if they had little or no earnings in one or more of those 35 years and while waiting to begin benefits earned enough to replace a lower year of earnings in the calculation.

3. This factor might be very important to women who leave the workforce to raise a family and then return.

IV. THE MUNNELL AND SOTO ANALYSIS

A. Analysis taken from an article published by the Center for Retirement Research at Boston College written by Alicia Munnell and Mauricio Soto entitled "Why Do Women Claim Social Security Benefits Early?"

B. Analysis concludes:

1. Married women should start social security benefits early.

2. Married men and single women should start social security benefits late.

C. Analysis notes:

1. More than 50% of all men and women start their benefits at 62.

2. By age 66, well over 90% of all women are taking benefits.

3. Only 3.3% of all men start their benefits at age 66 or later.

D. In reaching their conclusions they rely upon the following:

1. For those turning 62 between 2005 and 2016, benefits at 62 are 75% of the benefits at 66, and benefits at 70 are 132% of benefits at 66. This equates to a compound annual growth rate of 7.3%.

2. That the break even age is 80 to 81 by waiting until a later age to start benefits.

3. Women on average live beyond the break-even age, and that one-third live into their nineties.

E. Special analysis for married couples.

1. The joint life expectancy of the couple should be considered.

2. The life expectancy of a 65 year old in 18.2 years, but the joint life expectancy is 26.2 years.

3. If wife starts benefits before her husband, she gets her own calculated benefits.

a. Benefits increase to 50% of husband's benefits when he begins receiving retirement benefits.

b. Increase to 100% of husband's benefits when he dies.

4. Because of the increases that the wife will receive, there is little risk when she starts her benefits at 62.

5. Furthermore, even if the husband's own break-even point does not justify a late starting date itself, when the joint life expectancy factor is considered, he should wait.

6. The study additionally concludes for most couples the wife should start at 62 and the husband at 69.

7. The study even provides a table suggesting optimal benefit starting dates considering ages and earnings.

EXHIBIT 6

Best Ages for Married People to Claim Benefits

Age Difference	Wife's Earnings as a % of Husband's	30-40%	40-100%
0 Years	66 Husband, 66 Wife	67 Husband 66 Wife	69 Husband 62 Wife
3 Years	68 Husband 65 Wife	69 Husband 62 Wife	69 Husband 62 Wife
6 Years	68 Husband 62 Wife	69 Husband 62 Wife	69 Husband 62 Wife

8. This analysis only considers life expectancy and earnings, but ignores the factors considered above.

EQUITY-BASED COMPENSATION ALTERNATIVES FOR CLOSELY HELD BUSINESSES

By: Marc S. Wise, Esq.

I. BASIC FORMS OF EQUITY-BASED COMPENSATION

A. Issuance of stock subject to various restrictions.

B. Granting of stock options (nonqualified and incentive stock options).

C. Employee Stock Purchase Plans.

D. Synthetic equity, such as phantom stock and stock appreciation rights.

II. STOCK-BASED COMPENSATION

Stock in an employer is a commonly used form of compensation for executive employees and may also be provided as compensation for service providers who are not employees, such as outside directors.

A. Similar to non-qualified deferred compensation arrangements, an employer may have a formal plan that provides stock-based compensation to executive employees on a regular basis. For example, the employer may have a plan under which stock options are granted to employees annually. An individual's employment contract may also provide for stock-based compensation for that individual.

B. Stock-Based Compensation is often used in connection with incentive compensation. For example, bonuses may be paid in the form of stock; grants of stock or stock options may depend on corporate performance; or the rate at which restrictions on stock lapse or the rate at which the stock options become exercisable may be accelerated by higher than expected corporate earnings.

C. 409A Application. In some cases, stock-based plans are a means of providing non-qualified deferred compensation and may be subject to the rules under Section 409A of the Internal Revenue Code. For example, discounted stock options are non-qualified deferred compensation and subject to the rules under Code Section 409A.

III. COMPENSATORY STOCK

A. General. Stock may be granted to an employee (or the service provider) without restrictions and in which the stock is fully vested and transferable. In most cases, the employee is granted "restricted" stock in that the stock must be forfeited or sold back to the company in certain circumstances.

1. Restricted Stock Examples. An employee may receive stock that is subject to a substantial risk of forfeiture because of a requirement that the stock be forfeited if the employee terminates employment within five years.

2. Tax Treatment. Stock that is granted to an employee (or other service provider) is subject to the rules that apply under Code Section 83 relating to transfers of property in connection with performance of services. Therefore, if vested stock (stock no longer subject to a substantial risk of forfeiture) is transferred to an employee, the excess of the fair market value of the stock over the amount, if any, the employee pays for the stock is includable in the employee's income for the year in which the transfer occurs.

In the case of non-vested stock (stock subject to a substantial risk of forfeiture) which is transferred to an employee, no amount is includable in income as a result of the transfer unless the employee elects to apply Code Section 83 at that time.

Otherwise, the excess of the fair market value of the stock at a time of vesting over the amount, if any, the employee pays for the stock is includable in the employee's income for the year in which vesting occurs.

In the case of an employee, the amount includable in income under Code Section 83 is also subject to income tax withholding and social security tax (subject to the social security wage base) and Medicare tax and must be reported on Form W-2. In the case of an individual who is not an employee, the amount includable on income under Code Section 83 must be reported on Form 1099.

The amount includable in the income of the employee (or other service provider) is generally deductible by the employer for the taxable year of the employer in which the recipient's taxable year of inclusion ends.

IV. RESTRICTED STOCK

A. Restricted Stock "Defined." Restricted Stock is stock given to an employee that is both non-transferable and that is subject to a substantial risk of forfeiture. Generally, these restrictions lapse (the stock becomes vested) upon the employee's completion of a period of employment and/or the achievement of certain performance goals.

Stock is considered non-transferable, even though it may be sold, assigned or pledged, as long as the transferee is required to return the stock if forfeiture ever materializes.

Note: The stock certificate should have a legend setting forth the restrictions on the stock and any other conditions of ownership. Furthermore, the stock certificate can also refer the reader to a

restricted stock agreement setting forth additional terms of the restrictions.

B. A substantial risk of forfeiture occurs when the employee is required to return the stock to the company under certain circumstances that may reasonably be expected to occur. In such case, the price the company would pay for the stock upon the happening of the event is less than the fair market value at the time of the forfeiture.

C. Common Restrictions. Most stock issued by a closely held business is subject to restrictions that limit the transfer of the shares to third parties. Such restrictions may also include repurchase and call rights or rights of first refusal.

D. Drag-along rights may also be attached to the stock. Drag-along rights allow certain stockholders, usually the founders or principal investors, who decide to sell their shares, to require the employee to sell his or her shares at the same time at the same price per share. The stock may also be issued with tag-along rights. The tag-along right is a right provided to the employee to sell his or her shares at the same time and price with any significant shareholders, such as when the significant shareholders decide to sell their shares.

E. Perpetual Restrictions. Restrictions that never lapse reduce the value of the stock, but do not prevent the stock from having to be taken into income at the time the stock is issued. To the extent non-lapse restriction is removed in the future, the removal of such restriction will not cause the employee to recognize additional income at that time.

F. Income tax consequences of restricted stock. The general rule is that the receipt of restricted stock by an employee is not taxable at the time of receipt. Under the general rule, the employee must include the value of any stock received in income when the risk of forfeiture

lapses and the stock becomes fully vested. The income the employee will be subject to is treated as ordinary compensation income. Any subsequent loss on the sale of the stock will be treated as a capital loss.

Example: Employee A receives 100,000 shares of the stock of the employer that is worth $1.00 per share. The stock is subject to forfeiture if the employee leaves the company within five years. Further, the stock is worth $10 per share at the end of five years.

There is no income to the employee upon the receipt of the shares and no corresponding deduction to the employer. If, at the end of the 5-year period, the employee is still employed and the restrictions lapse, the employee will have $1,000,000 of ordinary compensation income upon vesting. This taxation occurs even if the shares have not been sold by the employee.

1. Holding Period. The holding period will begin at the time the restriction lapses.

2. Consequences to the Employer. The employer gets a deduction in the year the employee includes the value of stock and income. The flat-rate method of withholding is available for supplemental wages only if the employer has withheld income tax from the employee's regular wages. To the extent the supplemental wages that occur upon the lapse of the restriction do not exceed $1,000,000, a flat rate withholding of 25%, without any allowance for exemptions and without reference to any regular payment of wages will apply. Treas. Reg. 31.3402(q)-1(a).

   If a supplemental wage payment that an employer makes to an employee, when added to all supplemental wage payments

previously made by the employer to the employee during the calendar year exceeds $1,000,000, the rate used with respect to the withholding on the excess is the maximum rate of tax in affect under Code Section 1 for tax years beginning in that calendar year. Under this provision, once the supplemental wage payments during a calendar year exceed $1,000,000, any additional supplemental wage payments to the employee in that year are subject to withholding at the highest income tax rate (35% for 2006).

3. Stock Satisfying the Employer Withholding Obligations. Generally, the employer will satisfy the withholding obligations by holding back the required amount from other cash compensation that is payable to the employee. The employer can also require the employee to make a cash payment to the company equal to the amount of the company's withholding obligation. As an additional alternative, the employer can pay the withholding amounts from its own funds. This amount will represent additional income to the employee.

   Note: The terms of any restricted stock plan or employment agreement should clearly specify the methods and alternatives that the employer has with respect to the withholding obligations.

V. INCENTIVE STOCK OPTIONS

A. An incentive stock option is an option to acquire stock in the employer and if certain requirements are met, the employee never has to report any ordinary compensation income. Under an incentive stock option, the employee does not recognize any taxable income until the employee sells the stock received upon exercise of the option.

Furthermore, the entire difference between the option exercise price and the selling price of the stock is capital gains.

B. The term "Incentive Stock Option" ("ISO") refers to an option that is:

1. Granted to an individual, for any reason connected with this employment.

2. By the employer corporation or by a parent or subsidiary of the employer corporation.

3. To buy stock in the employer corporation or in the employer's parent or subsidiary corporation.

4. That satisfies the ISO qualification requirements under Code Section 422(b).

C. Requirements in order for an option to qualify as an ISO.

1. Code Section 422(b) provides that an option will be treated as an incentive stock option only if the following requirements are met:

a. Granted pursuant to a plan which includes the aggregate numbers of shares which may be issued under the options and the employees (or class of employees) eligible to receive options, and which is approved by the stockholders of the granting corporation within 12 months before or after the date such plan is adopted.

b. Such option is granted within 10 years from the date the plan is adopted, or the date the plan is approved by the stockholders, whichever is earlier.

c. The option by its terms is not exercisable after the expiration of 10 years from the date such option is granted.

d. The option price is not less than the fair market value of the stock at the time the option is granted.

e. The option by its terms is not transferable by the individual other than by will or the laws of the decent and distribution, and is exercisable during the individual's lifetime only by him. And

f. The individual, at the time the option is granted, does not own stock possessing more than 10% of the total combined voting power of all classes of stock of the employer corporation or of its parent or subsidiary corporation.

2. Entities eligible to adopt an ISO Plan. A corporation that is eligible to adopt includes:

   a. A C corporation;

   b. An S corporation;

   c. A foreign corporation; and

   d. A limited liability company that is treated as a corporation for all federal tax purposes.

3. Limitations on the number and value of ISOs that can be exercised. The value of the shares (determined as of the date the ISO was granted) as to which an ISO (and any other ISOs granted to the same employee) first becomes exercisable in any year, cannot exceed $100,000. To the extent that the

aggregate fair market value of stock with respect to which ISOs are exercisable for the first time by any individual during any calendar year (under all plans of the individual's employer corporation and its parent and subsidiary corporations) exceeds $100,000, such option shall be treated as options which are not incentive stock options.

4. Tax consequences of a grant of an ISO. To the extent the option meets the requirements of an ISO, the employee does not recognize any compensation income on the grant nor on the exercise of the option. The exercise of the option by the employee can, however, lead to alternative minimum tax consequences. The company receives no deduction for the ISO.

5. Alternative minimum tax and the exercise of an ISO. For purposes of the alternative minimum tax, upon exercise of an option by an employee, the difference between the exercise price and the stock value is included in alternative minimum taxable income. Thus, an employee may have to pay alternative minimum tax on the exercise even though no regular income tax is due.

6. Exercise of the ISO and capital gains treatment. The employee must hold the shares received upon the exercise of the option until the later of two years after the option grant date or one year after the option to exercise date. Any sale of the option stock before the holding period requirements are satisfied is treated as a "disqualifying disposition."

7. Tax consequences of a disqualifying disposition. Upon the occurrence of a disqualifying disposition, ordinary income to the employee and a deduction for the company will occur. The

amount included as ordinary income is the difference between the exercise price and the value of the shares on the exercise date. The amount includible in income is added to the employee's basis in the stock for purposes of determining gain or loss on the sale. If the sale price of the stock is less then the fair market value at the time of exercise, the compensation income will be limited to the calculated gain.

8. Impact of a modification to the terms of an ISO. If the terms of an ISO are modified, extended or renewed, then the change is considered to be the granting of a new option.

   For purposes of the modification rules, a "modification" is any change in the terms of:

   a. An option;

   b. The plan under which the option was granted; or

   c. Any other agreement governing the arrangement;

   That gives the employee additional benefits under the option, regardless of whether the employee in fact benefits from the change in terms.

VI. NON-QUALIFIED STOCK OPTIONS

A. A non-qualified stock option is an option that does not meet the requirements of a incentive stock option.

B. Granting of non-qualified stock options. Non-qualified stock options are normally granted to employees at no cost. The non-qualified stock option permits the employee to share in the appreciation of the value of the company as its stock goes up. Except for publicly traded stock, a non-qualified stock option is not taxable at the time of the grant.

Upon exercise of the option, the employee is taxed on the value of the stock received unless the stock is restricted stock, and no Code Section 83(b) election has been made.

C. Use of the non-qualified stock options in the employment setting.

1. Many types of stock options are subject to a vesting schedule. This vesting can occur over the passage of time or upon certain events occurring. The stock option grant can provide for a forfeiture of any unexercised vested options. In addition, most stock option grants provide that any non-vested options terminate when the employee leaves the employment of the employer.

2. Income taxation of non-qualified options. The income taxation is determined under Code Section 83 and depends on whether the option has a readily ascertainable fair market value when granted. A non-qualified option as a readily ascertainable fair market value if:

a. The option is actively traded on an established market; or

b. The option is:

i. Transferable,

ii. Immediately exercisable,

iii. The underlying stock is not subject to any significant restrictions or conditions, and

iv. The fair market value of the option privilege is readily ascertainable.

If an individual receives a non-qualified option that has a readily ascertainable fair market value at the time the option is granted (which is generally not the case), the excess of the fair market value of the option over the amount, if any, paid for the option is includible in the recipient's gross income as ordinary income in the first taxable year in which the option is either transferable or is not subject to a substantial risk of forfeiture. No amount is includible in the individual's gross income due to the exercise of the option in this case.

If the non-qualified option does not have a readily ascertainable fair market value at the time of grant (which is generally the case), no amount is includible in the income of the individual with respect to the option, until the option is exercised. The transfer of the stock on exercise of the option is subject to the general rules of Code Section 83. Thus, if vested stock is received on exercise of the option, the excess of the fair market value of the stock over the option price is includible in the employee's gross income as ordinary income in the taxable year in which the option is exercised. If the stock received on exercise of the option is not vested, the excess of the fair market value of the stock, at the time of vesting, over the option price is included in the individual's income for the year in which the vesting occurs, unless the employee elects to apply Code Section 83(b) at the time of exercise.

Unlike an incentive stock option, a non-qualified option is not restricted to only employees of the employer. A non-qualified stock option may be provided to independent contractors, consultants and advisors.

D. Withholding Issues Relating to Non-Qualified Stock Options.

1. With respect to a non-qualified option with respect to an employee, the amount includible in income under Code Section 83 with respect to such option is also subject to income tax withholding, social security and Medicare tax and is reported on Form W-2. For an individual who is not an employee of the employer, the amount includible in income under Code Section 83 must be reported on a Form 1099.

2. Upon exercise of the options, the employer must withhold employment taxes. The flat rate withholding of 25% is available for the supplemental wage payment. Amounts over $1,000,000 are subject to a 35% withholding rate. In order to pay the withholding tax, the employee can pay over such amounts to the employer, the number of shares the employer delivers to the employee upon exercise of the option can be reduced, any otherwise payable cash compensation can be reduced to pay the withholding tax, or the employer can pay the tax on behalf of the employee and treat such payment as additional compensation.

VII. EMPLOYEE STOCK PURCHASE PLANS

A. An Employee Stock Purchase Plan is a plan which permits employees to purchase stock of the employer, generally through payroll deductions. The most important feature of this type of plan is that it can offer purchase rights as low as the lesser of 85% of the fair market value of the stock at the time of the grant or 85% of the fair market value of the stock at the time of the purchase. In contrast, stock under an Incentive Stock Option Plan must be purchased at a price that is at least 100% of the fair market value on the date of the grant of the option.

B. Under this type of plan, employees are not taxed at the option's grant or exercise, and the employer is generally not entitled to a deduction. If, however, certain holding period requirements are not met, the employee will be subject to ordinary income tax from the disposition of the option, and the employer will be entitled to a compensation deduction. This type of plan is generally provided as an employee benefit in order to give the employees an opportunity to purchase stock at a discount.

C. Certain qualification requirements under Code Section 423 must be met in order for the benefits of this plan to arise. These requirements are as follows:

1. The purchase rights may be granted only to employees of the employer corporation or its affiliates.

2. The plan must be approved by stockholders of the granting corporation within 12 months before or after the adoption of the plan.

3. 5% owners must be excluded from participation in the plan.

4. All employees of the designated participating corporation must be eligible to participate with the exception of four categories of employees:

    a. Persons employed less than 2 years;

    b. Part-time employees (20 hours or less per week);

    c. Seasonal employees, and

    d. Highly-compensated employees.

5. Same rights and privileges must be available to all participants.

6. The purchase price of the stock must be no less than the lesser of the 85% of the stock's fair market value on the grant date of such purchase rights or 85% of the stock's fair market value on the exercise date of the purchase rights.

7. The offering period may not extend beyond five years (if the purchase price is not less than 85% of the stock's fair market value on the exercise date) or 27 months (if the purchase price is determined in any other manner).

8. A $25,000 annual accrual limit must apply to grants under the plan.

9. The purchase rights must be non-transferable other than by will or the laws of decent and distribution and exercisable only by the participant during the participant's lifetime.

D. Tax consequences upon exercise.

1. Similar to incentive stock options, as long as the requirements under Code Section 423 are met, the employee will not recognize any income on exercise of the options, even if the options were issued at a strike price less than the fair market value of the grant date. The employees' basis in the stock is the option exercise price.

2. Holding and employment requirements. An option issued under a plan will not be treated as granted under an employee stock purchase plan and will not receive statutory stock option treatment, unless the following are satisfied:

   a. Holding requirement. Special tax treatment will apply only if no disposition of the stock is made by the employee within two years after the date of the granting

of the option or within one year after the transfer of the stock.

b. In order for the option under the plan to qualify for treatment as astatutory stock option, the optionee must be, at all times from the date of the grant of the option to the date that is three months before exercise of the option, an employee of the employer or related entity.

If the holdings and employment requirements are not met, the sale of the stock is treated as a disqualifying disposition. This will result in compensation income to the employee equal to the lesser of (i) the difference between the value of the shares on the exercise date and the exercise price or (ii) the gain on the sale. Any additional gain on the sale will be treated as capital gains.

VIII. SYNTHETIC EQUITY – SARs AND PHANTOM STOCK

A. Stock Appreciation Rights (SARs). An SAR is a contractual right that a company grants to an employee to receive the appreciation in value of a share of company stock from the time of grant to the date the employee is deemed to have exercised the SAR. The company may pay the amount of the appreciation in value in the stock pursuant to the terms of the grant.

1. Application of Code Section 409A. SARs are generally subject to the requirements of Code Section 409A unless the exercise price may never be less than the fair market value of the underlying stock on the date of the grant, the right does not contain a compensation deferral feature, and the SAR includes a deemed exercise time.

2. Tax consequences of SARs. The employee is not taxed at the time of the grant nor on the appreciation of the underlying stock until there is a deemed exercise of the SAR. Upon the deemed exercise, the employee has ordinary compensation income. At the time the employee has compensation income, the employer will receive a deduction for compensation paid. Since the payments of the deemed exercise of the SAR constitutes wages subject to withholding and recording, the same withholding options are applicable as previously discussed.

B. Phantom Stock Plans. A Phantom Stock Plan is a plan whereby an account is set up on the company's books for the benefit of the employee. The account is credited with a specified number of hypothetical company shares. Some phantom stock plans are designed so that employees can elect to cash out after a period of time and receive any appreciation in the value in cash. Depending on the plan features and the employees eligible for participation in the plan, the plan may be subject to the provision of ERISA. A phantom stock plan is a useful mechanism to permit employees to participate in the growth of the company when the company does not want to issue true equity. It is also useful in the case of a partnership or an LLC to minimize tax and other legal issues.

Tax consequences of Phantom Stock Plans. The Phantom Stock Plan is a form of deferred compensation and is subject to requirements of Code Section 409A. If structured properly, the employee will not be taxed until payment is actually made and the employer will get a deduction at that time.

IX. EQUITY PARTICIPATION AND LIMITED LIABILITY COMPANIES AND PARTNERSHIPS

A. An LLC/Partnership can issue most of the equity interest that a corporation can issue as a form of compensation, except for ISOs or employee stock purchase plans. The tax treatment of these equity interests are unclear and additional IRS guidance is needed.

B. Types of equity interest that an LLC/Partnership can provide. Either a capital interest or a profits interest can be provided under this arrangement. A capital interest is viewed as an interest that entitles the owner to receive a share of the proceeds of the sale of the business assets, if the business were to sell all of its property, pay all of its debt and liquidate on the date of receipt of the interest. Capital interest provides a right to a share of the assets on the date the interest is received. A profit interest entitles the holder to the capital appreciation and profits arising only after the interest is received.

C. Capital interest and exchange for services. If an employee receives a capital interest in an LLC/Partnership for services, the employee has compensation income equal to the value of the interest received. As with the treatment of restricted stock previously discussed, if the receipt of the interest is subject to a substantial risk of forfeiture and the interest is non-transferable, the taxable event is delayed until the restriction lapses, unless a Code Section 83(b) election is made.

D. If a capital interest that is received for services is subject to a substantial risk of forfeiture and no Code Section 83(b) election is made, the employee will generally not be treated as a partner for tax purposes until the restriction lapses. Rather, the LCC/Partnership would be treated as not having issued the interest until vesting.

E. Impact of making a Code Section 83(b) election. If an employee makes a Code Section 83(b) election, the employee will be taxed immediately upon receipt of the capital interest, rather than when it vests. By making this election, the employee will be treated as a partner for tax purposes, even though the interest has not vested.

F. Tax consequences to the LLC/Partnership. The LLC/Partnership would be entitled to a deduction for the value of the capital interest that the service provider reports as income at vesting or upon making the Code Section 83(b) election. The LLC/Partnership may also have to recognize gain based on an assumed sale of a portion of its assets. The tax consequences to the LLC/Partnership are not completely clear on this issue. Any resulting gain or loss from this deemed sale would be taxable to the other members/partners, but would then be offset in part by the deduction generated by the payment of compensation to the employee.

G. Taxation of a non-vested profits interest. In the cases of a profits interest that is not vested, the employee will not be treated as the owner of the interest until the vesting occurs, assuming no Code Section 83(b) election has been made. Thus, the employee will not be allocated any profits or losses until the interest vests.

X. CODE SECTION 83(b) ELECTIONS

A. Rather than waiting until vesting occurs on an interest, the employee can elect to accelerate the taxable event to the time he receives the restricted interest in the employer.

1. Tax consequences of making the election. An employee who makes the Code Section 83(b) election will include the value of the stock or other interest received, reduced by the amount paid for such interest, in income as compensation as of the

transfer date. Under this election, all future appreciation on the equity interest would be eligible for capital gain treatment. The holding period for capital gain treatment will begin when the employer receives the equity interest. This should be contrasted to the case where the election is not made and the capital gain holding period will not begin until the vesting date.

2. Tax consequences to the employer. The employer will receive the same amount as the compensation included in the employee's income. The normal reporting and withholding obligations will also apply at that time. If the equity interest is ultimately forfeited by the employee, the employee will have paid the tax at ordinary income rates on the excess of the value of the equity interest over the amount, if any, that he paid for the equity interest.

3. Forfeiture of the equity interest. The employee's basis in the interest will not include income recognized in connection with the Code Section 83(b) election. The employee will be entitled to the capital loss deduction only if the price actually paid for the interest exceeds the repurchase price (if any).

4. Making the election. The employee makes the election by submission in writing, to the IRS within 30 days of receipt of the equity interest. This election is filed with the IRS office where the employee files his tax return for the year in which the equity interest is received. The employee is also required to send a copy to the company at the same time. Once the election is made, the election is generally irrevocable. Treas. Reg. 1.83-2 lists the required information that must be included in the election.

WITH THIS PRENUP, I THEE WED

By: George V. Cassar, Jr., Esq.

We've all heard the statistics: one out of every two new marriages is destined to end in a divorce. The numbers are even higher for second and third marriages. And nearly three quarters of divorced and widowed persons remarry within five years of the end of their last marriage. If that wasn't enough, the U.S. Census Bureau indicates that the number of persons seeking a divorce after reaching the age of 55 has increased dramatically over the past 20 years. Chalk it up to the empty nest syndrome or to the fact that it is more socially acceptable in today's day and age to be divorced after 50. You can also factor in that people are living longer, becoming healthier and even starting new careers after retirement. We are way beyond a life destined to being a candy striper volunteer or a door greeter at Wal-Mart. (Not that there is anything wrong with that. Insert your favorite legal disclaimer here). Living longer and more prosperous lives has spawned a whole new genre of marketing, living and planning as our clients may now be even more independent in the second 50 years of life.

Each of these marriages, whether new, seasoned or otherwise, is not only a ceremonial showing of love and affection, but is the formation of a legal relationship that gives rise to enforceable rights and imposes enforceable burdens. Generally, marriage joins together not only individuals but also their finances. Sometimes, such as in the case of a domestic partner relationship or where two people even of opposite sex decide to live together without the institution of marriage, their finances are actually joined together without ever getting married at all. They both contribute to the primary residence, the payments, the taxes, the car, the assets, the check book, etc. What happens when they are no longer friendly and they've both invested and intertwined their finances? We are way beyond college roommates dividing the TV, couch and milk crates used for a table here.

Regardless of the situation though, as any attorney worth his or her salt will tell you, discussing and more importantly, resolving a potential dispute regarding a division of finances and obligations at some point in the future is always easier and less controversial, not to mention less costly. Marriages or worse yet, financial arrangements without the marriage aspect, are no different than any other contractual relationship between two parties. Think of it as a business venture of sorts but with a few extra perks. By discussing financial matters before marriage and making full disclosure of what each party owns or controls, the couple builds a solid foundation of trust for their future relationship. A marital agreement does not bind a couple to arrangements that they later may wish to change, but it does help them consider how they regard tough issues like the possibility of dissolution of the marriage or death.

I. PRENUPS – NOT JUST FOR TRUMP ANYMORE

Marriage creates rights in property for both spouses. Every married couple has a marital agreement, not just the Trumps or their counterpart rich and famous Hollywood types. Some have formal written marital agreements that they themselves negotiated, but everyone else has an agreement too. They just don't realize that it is the plan put together for them by the state legislature and court system where they live.

A. A very many property issues arise on both divorce and upon death that a marital agreement must cover. Written marital agreements can be done before marriage and are known as prenuptial or antenuptial agreements or after marriage, which are post marital or post nuptial agreements. For our unmarried clients of the same or opposite sex, it may be referred to as a Domestic Partnership Agreement or something similar. The title is not important, but instead the terms of the agreement.

B. Marital agreements are more common in second and third marriages, and with couples who own substantial assets prior to the marriage.

They are also used more frequently as more and more persons are marrying later in life, having accumulated more assets by the time they have decided to tie the knot, having separate children or even grandchildren, family owned business, large inheritances, etc. The persons and their agreements are motivated by a variety of factors:

1. Concern for the inheritance rights of children from a previous marriage;
2. Protection of separate assets;
3. Avoidance of spousal support issues;
4. Limiting costly and lengthy divorce proceedings;
5. Concern over an expected inheritance; and
6. Having control over the disposition of property.

And obviously, all types of property can be the subject of agreements:

1. Present and future interests;
2. Income and earnings;
3. Retirement assets;
4. Life insurance;
5. Family businesses; and
6. Future inheritances.

C. The courts have recognized that a desire to protect assets is not necessarily a desire to avoid responsibility to a spouse. It is more likely an effort to protect children from a previous marriage, a product of the marriage and remarriage rates later in life and a realistic

acknowledgement of the high incidence of divorce. But, like anytime you have too much of a good thing, marital agreements are increasingly the focus of divorce litigation and each set of circumstances proposes its own issues that need to be addressed. Thus it is helpful to bear this in mind when discussing and drafting the agreements in the first place.

D. While you may not be doing the actual drafting as an accountant, you are most certainly involved in the process as the client's trusted advisor and you will be contributing to many different aspects of the process, including perhaps being the first person the client mentions the notion of a marital agreement too. Some of you should probably be the person to mention it to your clients first as well.

II. THIS IS **NOT** YOUR FATHER'S PRENUP

A. Absent other mitigating factors, a divorce will typically result in a fifty-fifty division of all assets and debts acquired during the marriage. And contrary to popular belief, even though Michigan is often referred to as a "No Fault" divorce State, "fault" does play a factor in how courts view marital property settlements upon divorce. The "no fault" status in Michigan refers to whether fault must be demonstrated in order to file for divorce. That is true in the sense that no fault must be demonstrated, only irreconcilable differences. But when it comes to the property settlement, fault is very much an issue. Regardless of fault though, because a court must divide a marital estate equitably, not equally, a fifty-fifty division is not always the result. The court must look at various factors, including:

1. Age and health of the parties;

2. The past relations and conduct of the parties;

3. The length of the marriage;

4. The ability of the parties to work;

5. The ability of the parties to pay alimony;

6. The needs of the parties;

7. Contribution of the parties;

8. Ages of the children;

9. Value of the marital estate;

10. Education of the parties;

11. And yes, fault.

B. The area of property division most often disputed is the inclusion or exclusion of separate property.

1. Property owned prior to the marriage;

2. Gifted and inherited property before and during the marriage; and

3. Any increase in the value of separate property during the marriage. Note, however, that the increase in value on separate assets that occurs during the marriage can be treated in a different manner than the initial value of the property. This may depend on whether the increase in value is attributable to passive or active appreciation of the asset.

C. Typically, assets owned prior to a marriage often remain the separate property of one spouse. Similarly, gifted and inherited property will be considered the separate property of one spouse if it is held separately during the marriage and not commingled with other joint marital assets. However, there are two important exceptions to this doctrine:

1. First, if the remaining marital property is insufficient for the suitable maintenance and support of the other spouse, all or a portion of the separate property may be divided. Think of the young penniless accountant that marries a wealthy millionaire (presumably not a client) and lives the millionaire lifestyle for 20 years. When the marriage ends, is it fair for the court to abide by an agreement that renders the accountant spouse back to a lifestyle enjoyed below the poverty level 20 years ago?

2. Second, if the non-inheriting spouse has contributed to the acquisition, improvement or accumulation of the asset in question, the asset may be included in the marital estate. In this case, think of the dutiful spouse that forwent a career of their own, waited tables and raised the kids so that the other spouse could earn a professional degree or give that other spouse the ability to spend the necessary countless hours to build a business or earn the promotions and bonuses that led to the CEO position they will be able to keep after the divorce.

Of course the outcome of either or any similar situation will depend on a myriad of factors, most of which have already been touched upon above, such as length of the marriage, title to property, nature and character of the asset, etc. But leaving the decision entirely up to the court and the ability of your divorce lawyer to convince the court of why your position is better is an unnecessary and very risky risk.

D. Agreements made between spouses in contemplation of death have long been recognized throughout the country, including Michigan. But it was not until 1991 that Michigan truly recognized the enforceability of an agreement that determines property rights upon divorce of married persons.

Relying on precedent from Alaska, Michigan courts began enforcing prenuptial agreements in the event of a divorce in 1991. Rinvelt v. Rinvelt, 190 Mich App 372 (1991). Prior to Rinvelt, courts regarded prenuptial agreements made in contemplation of divorce as not supportive of the institution of marriage, and, accordingly as contrary to public policy. Rinvelt held that prenuptial agreements that contemplate divorce are not void ab initio, but may be enforced if certain standards of fairness are met. Specifically, Rinvelt held that the following criteria were required in order for the enforceability of the agreement to be upheld:

1. Was the agreement obtained through fraud, duress or mistake, misrepresentation or nondisclosure of material fact?

2. Was the agreement unconscionable when executed?

3. Have the facts and circumstances changed since the agreement was executed, so as to make its enforcement unfair and unreasonable?

** A fourth requirement that really wasn't a requirement per se but has been interpreted as such in most of the legal community is the fact that both parties have separate legal representation.

Many of our "fathers" prenuptial agreements from the days of old were drafted and entered into without regard to some or any of these factors, especially when it came to disclosure, duress, pressure to sign in order to get married and lack of separate legal representation . Often the case was that the wealthier spouse had his lawyer prepare a prenuptial agreement, it was put in front of the other spouse and explained in not so certain terms that they should sign it if they wanted to get married or else. These types of "abuses" played a big part in

the reason for the long history of Michigan courts refusing to enforce the provisions of those antiquated and quite often, unfair agreements.

Fairness, of course, is one of those notions that really are measured "in the eye of the beholder." That includes the "eyes" of the court and with Rinvelt and the cases that followed, we now have some sort of measuring stick, as flexible as it may be, by which we can draft our agreements so as to withstand a challenge upon enforcement.

The requirements of Rinvelt also apply to postnuptial agreements, but as one can imagine, the satisfaction of each requirement becomes even more crucial to withstand a challenge upon a divorce given the then marital history between the parties and the obvious change in circumstances that predicated the postnuptial agreement in the first place where no prenuptial agreement at the outset, whether that be the large inheritance one spouse may have received, the success of a business, a division among the "Brady Bunch" children, etc.

E. So what do we know from Rinvelt and the cases that followed which we apply when drafting the agreements?

1. Again, we know that disclosure of all material facts regarding assets will be required for enforceability. It is fairly easy to ascertain whether this requirement was complied with upon challenge. The role of the accountant in making full disclosure will be invaluable.

2. Further, we know that the agreement must not be obtained through fraud, duress or mistake. The law on fraud, duress and coercion in other contract cases is applicable to prenuptial agreements and again, should be fairly easy to determine compliance with upon challenge, but maybe not as easy as one might think.

3. And although not a formal requirement, it should be pretty easy to ascertain whether both parties had separate legal representation. But again, there are always varying factors that could play a part here to show that the representation wasn't exactly separate or objective. For instance, if the less wealthy spouse never had an attorney relationship before and the wealthier spouse not only recommended an attorney (who by the way, that spouse's attorney recommended to them as being a "friendly" ally) and the recommending spouse paid for the legal fees associated with the "review and consultation," was there really separate legal representation?

4. The other two criteria from Rinvelt, however, are more difficult to quantify with certainty. It is important to note that the "fairness" test which is applied more often than not by a court to determine if the agreement was fair at time of execution is "unconscionability." At the time of enforcement, the agreement must appear fair and reasonable, and if the facts and circumstances have changed since the time of execution, as they often do, then the result of the agreement must be again looked at to see if it renders the situation "unfair" and "unreasonable."

Certainly the standard of unconscionability at time of execution leaves parties room to divide property differently than a divorce court might do. Otherwise the agreement would be all but meaningless. The very nature of the agreements is to reduce or limit the rights of a spouse upon divorce. But how do we plan for the unknown?

F. Let's look at each of the requirements outlined in Rinvelt more closely, and more importantly, what role(s) you play as the accountant:

1. Full Disclosure

Disclosure of assets starts off as a relatively simple notion. Identify all of the assets and liabilities of each party, list them on a page and exchange. If one party fails to disclose the Swiss Bank Account that the other party later discovers upon divorce, we have a problem. But "full" disclosure, however, indicates that something more is necessary than just identifying all of the assets and accounts. That something more typically is in the detail of the disclosure and the identifying of accurate values and worth.

a. At the heart of full disclosure is the Financial Statement. And at the heart of every Financial Statement is the accountant.

b. A Financial Statement of each party needs to be provided to the other and should be included as an attachment to the agreement. Each asset needs to be valued, and the date of valuation should be noted as well. All property owned at the time prior to the marriage, all debt, any interest in retirement plans, any obligations such as child support and alimony from a previous marriage, and any interest in a trust or a family business or an investment.....everything must be set forth.

c. Typically tax returns are exchanged, both for the individual persons and for all entities in which a party has an interest.

d. As mentioned before, most of these assets have an easily ascertainable value. For example bank accounts, brokerage accounts, some retirement accounts such as IRAs and 401Ks can be valued by simply obtaining the account statements. Other assets, however, typically require further analysis and valuation reports or studies, whether at the time of the creation of the agreement, upon enforcement of the agreement, or both.

As the accountant and trusted advisor, you may be called upon to prepare the details of the financial statement for your client or more importantly, to review the financial statement from the other party. In doing so, keep the following in mind:

i. Marital and Vacation Homes: Unless the parties can agree on a value, the home must be appraised. Like with any valuation challenge, a certified appraisal will later hold more weight than a simple market analysis. It is also an issue when both parties come into the marriage with separate houses and one is sold but the other becomes the marital home. Who is entitled to what share of the value and is it just of the appreciated value from the date of the marriage forward or some other analysis?

(a) Also, it is important to figure out who is going to pay the ongoing expenses for the house if the agreement provides that one spouse gets to reside in the house for a period of time after the divorce or upon

death if the resident spouse is not receiving the home outright.

(b) It would make little to no sense for a surviving spouse to be able to live in the marital home for the rest of her life if the agreement provides that she is responsible for the taxes, utilities, upkeep and maintenance costs of over $25,000 a year on a million dollar home when her separate assets leave her with less than $2,000 a month income.

ii. Other Real Estate: Commercial and income producing real estate is more complex to value and when coupled with a partnership or other business venture, the valuation becomes critical. But in these situations, the real issue may become the difference between the valuation prepared for a bank when asking for a loan on the property, a valuation prepared for a tax return when trying to take a discount on the same interest in that property and what the real fair market value of that property would be on the open market at the time of the valuation. We all know there are differences and a crafty lawyer will know there are differences too when it comes time to enforce the agreement.

iv. Complex Retirement Benefits: While a recent account statement may be sufficient for simpler Defined Contribution type plans, Defined Benefit

plans and other retirement vehicles are more complex and each typically has its own special features and tax aspects. Determining not only the value of each of these retirement plans as well as the tax consequences of splitting the interests in that plan or some other liquidation of the same is a crucial role that the accountant need be involved in.

v. Stock Options: By their very nature, stock options are often difficult to value. Any valuation is speculative at best given the fact that one never knows when the option will be exercised, hence the price is unknown. Often, the fairest result is to divide the options or value them at the exercise price at that time, if that is even possible since the options may not have "vested" yet.

vi. Stock in Closely Held Companies: The valuation issues here are directly in the accountant's wheelhouse and should be conducted in the ordinary course. But as referenced above with the real estate appraisals and valuations, this is likely one of the most popularly contested interest in a marital estate upon divorce. This family business that has provided an unbelievable income and lifestyle for all the years of the marriage, suddenly has little to no value in the eyes of the business owner spouse and is invaluable in the eyes of the other spouse. The dollars spent on valuations and experts dealing

with this very topic upon divorce can and has reached far into the 6 figures and beyond.

vii. Life Insurance Policies: Typically the cash value of the policy is at the heart of the valuation of these policies. In doing so, one must look at any outstanding loans or other restrictions on that value. If there is no cash value or if it is tied to an annuity, it may be more difficult to determine from the face of the policy what the value is and an insurance expert should be consulted. Typically, most financial or life insurance companies have programs in place to determine such values.

viii. Still other issues to value and consider, which may or may not require appraisals by the accountant or some other professional, include vacation and sick time, lifetime health benefits, household items, jewelry, tools, advanced and professional degrees, etc. But just because there may not be much monetary value tied to these items, don't overlook the importance of valuing and prioritizing these assets in the agreement. Just as siblings often fight over the worthless clock that sat on the mantle in their parents' home, spouses will fight over personal property that has some special meaning to them more than they will fight over the alimony or overall property settlement itself. Factor in a second or third marriage and an interest that the children of one spouse may have against the interest of the

surviving spouse and you have the makings of an epic war saga on your hands.

Clearly, having or not having the credible and fully disclosed Financial Statement can be the glue that holds the agreement together or the thread that allows the whole agreement to unravel. And whether you are assisting in the valuation at the time of preparing the agreement, reviewing the Financial Statement provided by the other party or are revaluing the assets at the time of enforcement, the accountant's role is critical.

2. Unconscionability/Change in Circumstances: What is Fair?

As stated numerous times before, marital agreements must not be unconscionable when executed. While it cannot be definitively stated what a court in the future may find unconscionable, agreements that provide little or no assets to a non-propertied spouse after a lengthy marriage are more likely to be viewed as unconscionable when the propertied spouse has significant wealth. Further, if the facts and circumstances of the parties have changed significantly enough since the agreement was executed, a court may invalidate the agreement if it makes the determination that enforcing the agreement is unfair and unreasonable.

a. So what is the fairest way to fall within the fairness criterion? The general consensus is to incorporate self-adjusting provisions into the agreement designed to compensate for changes in facts and circumstances, whatever they may be. For example: "Not withstanding the other provisions of this Agreement, in the event of a

divorce between the parties, Bob shall pay to Susan an amount as provided below:

i. In the event Bob and Susan have been married less than five (5) years, Susan shall receive $30,000 for each full year of marriage through the end of the fifth (5th) year. The amount of the payment shall only be adjusted for inflation if the parties have been married for at least five (5) years.

ii. In the event Bob and Susan have been married for more than five (5) but less than ten (10) years, Susan shall receive $50,000 for each full year of marriage from their fifth (5th) anniversary through the end of their tenth (10th) year of marriage, as adjusted for inflation to reflect the increase in the cost of living based upon the Consumer Price Index. Notwithstanding the foregoing, if the parties are married at least five (5) years, but less than ten (10) years, in no event shall the monetary amount that Susan is entitled to receive in the aggregate of Paragraphs i and ii ever exceed twenty (20%) percent of the value of Bob's net worth as of the date a Complaint for Divorce is filed.

iii. In the event Bob and Susan have been married ten (10) years, but less than fifteen (15) years, Susan shall receive $80,000 for each full year of marriage from their tenth (10th) anniversary through the end of their fifteenth (15th) year of

marriage, as adjusted for inflation to reflect the increase in the cost of living based upon the Consumer Price Index. Notwithstanding the foregoing, if the parties are married at least ten (10) years, but less than fifteen (15) years, in no event shall the monetary amount that Susan is entitled to receive in the aggregate of Paragraphs i, ii and iii ever exceed twenty (20%) percent of the value of Bob's net worth as of the date a Complaint for Divorce is filed.

iv. In the event Bob and Susan have been married for at least fifteen (15) years, Bob shall pay Susan $1,500,000 in lieu of the payments referred to in Paragraphs i, ii and iii, as adjusted for inflation to reflect the increase in the cost of living based upon the Consumer Price Index. Notwithstanding the foregoing, in no event shall the monetary amount that Susan is entitled to receive in the aggregate of Paragraphs i, ii, iii and iv ever exceed twenty-five (25%) percent of the value of Bob's net worth as of the date a Complaint for Divorce is filed. In other words, Susan would be entitled to $1,500,000 or twenty-five (25%) percent of the value of Bob's net worth, whichever is less.

b. Often times there may be a clause provided that after a certain number of years of marriage, the agreement itself is automatically voided. Or instead of reference to years of marriage alone like outlined above, the calculating

factors may be the birth of children or some other event of significance to the parties.

G. Other Considerations:

1. Gift Taxes: Although not frequently, gift tax considerations may come into play in connection with marital agreements. Typically this is not the case because in most cases:

a. The objective of both parties is to retain their assets, not to make transfers to one another;

b. Clients with estates under the applicable exclusion amount are not affected by the tax; and

c. Even in larger estates, because of the unlimited marital deduction, gift taxes are not a concern as long as the transfers take place after the wedding.

But, as we all know, gift tax is imposed on any transfer that is for less than adequate and full consideration. Prior to the enactment of the unlimited marital deduction for U.S. citizens, the U.S. Supreme Court had decided several cases holding that transfers pursuant to a premarital agreement were taxable gifts because the relinquishment of marital rights did not constitute adequate and full consideration. Other cases held that the relinquishment of dower, curtesy, or other marital rights in a spouse's property were also not consideration in money or money's worth, but that the relinquishment of support rights, on the other hand, were adequate consideration.

Regardless, with the unlimited marital deduction now for transfers between spouses, the gift tax aspects of such an

agreement are often disregarded. Beware, however, that traps for the unwary may still exist:

d. If transfers are made between the parties <u>before</u> the wedding takes place, a taxable gift may need to be reported and accounted for on a Gift Tax Return.

e. If both spouses are not U.S. citizens, be sure to check with the transfer restrictions as the unlimited marital deduction rules are different.

f. And just for fun, but with some seriousness, remember that if your Trump-esque client gives his fiancée a house, a condo and a $300,000 engagement ring all in anticipation of marriage but then never goes through with it <u>and</u> she keeps the assets, there is a gift tax issue.

2. <u>Estate Taxes</u>: While often not thought of when planning the pre or postnuptial marital agreement, they can be of significance not only because of the size of the estate, but due to planning options, which sound like a good idea at the outset but don't factor in any tax consequences as a result. In a proper situation, use of the marital deduction can actually preserve more for the children of one spouse than the children would inherit if nothing was left to the other spouse. For example:

a. If the wife to be (W) has assets valued at $2,800,000 and the husband to be (H) has assets valued at $200,000 and W dies shortly after the wedding leaving her entire $2,800,000 to her children from a prior marriage, there will be federal estate tax on the amount in excess of the applicable exclusion amount (currently $2,000,000). If, instead, W gives $2,000,000 to her

children and puts $800,000 in a QTIP trust for H., there will be no federal estate tax at her death because of the applicable exclusion amount and the remainder will be sheltered by the unlimited marital deduction assuming H is a U.S. citizen. At H's death, assuming no increase in H's assets, there is also no federal estate tax so long as the applicable exclusion amount is over $1,000,000 and thus W's children actually receive the entire $2,800,000, or approximately $400,000 more than they would have if W and H simply agreed to leave all of W's assets to her children upon her death.

b. Of course, the children in the above example need to await H's death before they receive the remainder of the QTIP trust assets and depending on the age differences (or lack thereof) between the kids and H, the time can be an issue . If that is the case though, another alternative to cover the "gap" may be life insurance (see below), which if handled properly can be outside of the estate and likely significantly cheaper than the estate tax burden.

III. PRENUPS FOR LIFE – INSURANCE

When most people think of prenuptial agreements, they think of the stereotypical situation where the super wealthy 70 year old is marrying the virtually penniless 35 year old and the fear is the younger is only marrying the elder for their money. But as we've already identified, while that may have been true in our father's day, today's marital agreements can be used to achieve far more, especially for those taking a trip down the aisle for the second or third time and for those where "life" has led even their current marriage in a different direction.

But so as to not give the impression that every marriage is doomed for divorce eventually, or certainly not every marriage that involves a marital agreement, let's look at the importance that marital agreements serve in providing for the division of assets upon death, yet in a more permanent and obligatory fashion than the traditional revocable estate plan documents might.

A. Marital agreements have become one of the basic core documents in many an estate plan. These agreements permit couples to modify and waive legal property rights that each would have at the death of the other spouse, including:

1. The homestead allowance;

2. The family allowance of up to $18,000 (subject to inflation) without court order;

3. The right to $11,000 (subject to inflation) of exempt household furniture, automobiles, furnishings, appliances and personal effects;

4. Dower rights; and

5. The right to elect against the other spouse's will.

But these are just the traditional items provided in Michigan statutes. We all know that if the only financial things in the estate worth fighting over are the aforementioned, there probably isn't going to be much of a fight, let alone any marital agreement in the first place.

And often times, protecting these property and other rights isn't so much because one spouse simply doesn't want the other spouse to have them. Start talking about the need for the children of one spouse to have to wait until the surviving spouse dies or decides they are no longer "enjoying" the summer cottage, the art collection or even the

kitchen table and new fangled plasma TV, and the real daggers might come out. Here, the marital agreement can ensure that the property each spouse brings to the marriage ultimately goes to that spouse's children or other beneficiaries, or more likely, sooner instead of "ultimately," especially where the children of the 70 year old deceased spouse are the same age or older than the surviving spouse.

B. In striking a balance between the surviving spouse and the surviving children, a commonly used vehicle is life insurance. And by providing in the marital agreement that one spouse will maintain life insurance throughout the marriage for the benefit of the other spouse, both parties can move forward with a secure feeling that all of their loved ones will be taken care of as opposed to pegging one against the other.

C. And as referenced above, while spouses can agree to provide these terms in their traditional estate plan documents, there is no obligation for a spouse to never change their documents in the future, even during the marriage, and to not advise the other spouse that he or she has done so. Nor is there any real way to enforce a spouse's promise to "share" or "leave" items to the children of the deceased spouse when the other spouse dies or finishes "enjoying" them.

By utilizing a marital agreement, however, in conjunction with the estate plan, all of the obligations and duties that parties to a contract enjoy with regard to the inability of the other party to change the terms of the contract are brought to life in the estate plan itself. The marital agreement often contains language, although not entirely necessary, that the terms and conditions of the marital agreement will override any estate plan documents of either party and that both parties agree that they will draft and maintain their estate plan documents in accordance to the terms of the agreement.

D. Lastly, in a new up and coming trend, the requirement of a marital agreement is being utilized in many an estate plan for our wealthier or maybe even not so wealthy but more concerned clients, who fear the influence of a future out-law that may marry their children after the client's demise. We all know of second and third generation businesses that were run into the ground or other sizeable inheritances that were wasted or otherwise lead to some no good. Not all of those cases were a result of a spouse or other outside influence, but in the estate planning world of trying to offer your clients control over as many things as they can have control over, this is an impressively functional but specialized tool for the right job.

I LOVE INSURANCE TRUSTS – THE USE OF IRREVOCABLE LIFE INSURANCE TRUSTS (ILIT)

By: Robert D. Kaplow, Esq.

I. WHAT IS AN IRREVOCABLE LIFE INSURANCE TRUST AND WHY DOES MY CLIENT WANT ONE

A. The Irrevocable Life Insurance Trust "ILIT" is:

1. An Irrevocable Trust that

2. Owns a life insurance policy.

B. The purpose is to own life insurance which would otherwise be included in the Grantor's Estate. By having this owned by a properly structured Irrevocable Trust, the insurance proceeds are excluded from the Grantor's Estate upon the Grantor's death since the Grantor has no "incidents of ownership" in the policy.

C. The proceeds can then be used as a source of liquidity for the Grantor's Estate. However, the ILIT must not require the funds to be used to pay the estate taxes or other debts of the Grantor, or otherwise require the assets to be used for the estate as such a provision would include the proceeds in the Grantor's Estate. Instead, the Trustee should have the power at the Trustee's discretion to purchase assets from the estate or to loan funds to the estate.

EXAMPLE: Mr. Woodward owns a valuable office building in downtown Detroit. Mr. Woodward also owns other real estate projects. Mr. Woodward has substantial assets, but very liquidity. Upon Mr. Woodward's death, assume that he owes an estate tax of five million dollars. Because of the real estate market in Detroit, it would be very difficult to sell the real estate properties in order to

generate cash to pay the Federal Estate Tax. However, if Mr. Woodward's Irrevocable Life Insurance Trust owns a five million dollar policy on his life, the Trustee can use the five million dollars of proceeds to either loan cash to the estate and take a security interest in some real estate, or can purchase a five million dollar interest in the real estate from the estate. In either way, the estate would now have liquidity to pay the estate tax and would not have to go through a forced sale of the real estate. The real estate will now be owned by the ILIT for the benefit of Mr. Woodward's beneficiaries.

II. OTHER ADVANTAGES AND DISADVANTAGES OF THE ILIT

A. Advantages.

1. As a Trust, the proceeds will be used in the manner as desired by the Grantor. Thus, the Grantor can provide for the Trustee to hold the funds in Trust and provide for distributions at certain ages or times. The Grantor can also choose the Trustees and beneficiaries. The Grantor's spouse and descendants are the typical beneficiaries.

2. The life insurance proceeds and other assets in the Trust will not be subject to claims of creditors of the beneficiaries and may also be free from any claims from a spouse in the event of a divorce of the beneficiary.

3. Assets in the ILIT avoid probate and remain private with no public access to the information in the ILIT.

B. Disadvantages.

1. Irrevocability. The fact that the Trust is irrevocable is a disadvantage to many people. However, there are ways to provide additional flexibility in the operation of the Trust and to

even allow a Trustee to make certain amendments to the Trust which do not affect the dispositive provisions.

2. The Grantor does lose the ability to control the Trust assets. Typically the ILIT is only funded in an amount necessary to pay the insurance premiums and will not have assets that need to be managed during the Grantor's lifetime. However, the cash value build up of the policy or other assets in the Trust will not be available to the Grantor.

3. Administrative Difficulties. It is necessary to meet certain requirements in order to maintain the ILIT, including the providing of "Crummey" letters as described below.

III. TRUSTEES

A. The Grantor may not be a Trustee of a policy on his life.

B. It is best to have an Independent Trustee if possible.

C. It is possible to have different Trustees. For example, there can be an Independent Trustee and a Managing Trustee. The Independent Trustee would be in charge of the decision to purchase the life insurance policy and would make decisions regarding distributions. The Managing Trustee could manage other assets that are owned by the Trust.

IV. FUNDING

A. Once it has been decided to form an ILIT, it is necessary to obtain a life insurance policy. This can be done either by a transfer of an existing policy to the ILIT, or by the ILIT purchasing a new policy. There are advantages to having the ILIT purchase the policy directly. The main advantage is to avoid Section 2035 of the Internal Revenue Code which provides that if an insured is an owner of a policy on his

life and transfers it (by gift) within three (3) years of his death, then the insurance proceeds will be included in his estate even though the proceeds are paid to the ILIT.

B. One way to avoid the estate taxation if the insured dies within 3 years is to have the Trust provide that the proceeds will be paid to the surviving spouse so that the proceeds qualify for the marital deduction. This would require the proceeds to be included in the estate of the surviving spouse, but would postpone the time when any estate tax would be due.

C. An exception to the three year rule is a "bona fide sale" for adequate and full consideration (Section 2035(b)(1)). Thus, a transfer of an insurance policy by a bona fide sale, even within three years of the insured's death, is not subject to Section 2035. However, this raises another problem since a transfer for value under Code Section 101 can result in the insurance proceeds being taxed for income tax purposes to the extent they exceed the premiums paid by the transferee of the policy. There are numerous exceptions to the transfer for value rule under Section 101(a)(2). One exception that can be used in this type of circumstance is to create the ILIT as an "intentionally defective grantor trust." In this case, the sale will be deemed to be a sale to the grantor, which will qualify as an exception to the transfer for value and avoid taxation of the insurance proceeds.

D. A much easier way of avoiding this issue altogether is to have the ILIT purchase the insurance policy directly. Thus, the ILIT would be the owner on the initial application to the insurance company. Even if the funds for the insurance policy are received from the insured, as long as the policy was purchased directly by the ILIT, the three year rule will not apply.

V. PAYMENT

A. Once the ILIT owns the insurance policy, how is the ILIT going to pay for the policy? Payment is generally made through gifts received by the ILIT from the donor, or from loans received from the donor.

B. If the Grantor makes a gift of cash to the ILIT, the gift tax rules need to be reviewed to determine the gift tax consequences of such a contribution. Individuals are allowed to make annual exclusion gifts of $12,000 per year per donee, if the gift qualifies as a present interest. Since most ILIT's do not provide for the beneficiary to have access to the assets in the ILIT, the gift is not one of a present interest, and therefore does not qualify for the annual exclusion. This can be avoided through the use of a "Crummey power." This is based on the 1968 9th Circuit case of *D. Clifford Crummey v Commissioner*, 397 F2d 82 (9th Circuit, 1968). Under the *Crummey* case, a beneficiary will be treated as having a present interest in the trust (therefore qualifying the gift for the annual exclusion) if the beneficiary has the right to withdraw the contribution for a certain length of time. It is generally felt that having the right to withdraw the funds for 30 days is a sufficient period of time to qualify for the present interest exclusion. However, the IRS does require notice to the beneficiaries of the existence of the Crummey power. The IRS has also ruled that the notice cannot be waived by the beneficiary.

C. What if there are not enough beneficiaries to cover the annual gift?

For example, assume that the premiums on the insurance policy are $48,000 per year. However, the donor and spouse only have one child, although that child also has a child. If the Crummey power were limited to the child, then the parents would be entitled to an annual exclusion of $24,000 ($12,000 from the father and $12,000 from the mother), but would then have a taxable gift of $24,000. However, if

the grandchild were also given the Crummey withdrawal rights, then the donors (grandparents) would have another $24,000 of annual exclusion, thus not subjecting the gift to any use of the lifetime gift tax exemption of $1,000,000. The use of remote beneficiaries to be entitled to Crummey withdrawal rights has been approved by the Tax Court in the *Estate of Cristofani v Commissioner*, 97 T.C. 74 (1991). Under *Cristofani*, the Tax Court upheld a trust which was for the benefit of two children, but also gave Crummey withdrawal rights to five grandchildren, even though the grandchildren were only future contingent beneficiaries of the Trust. Thus, the *Cristofani's* were allowed 7 annual exclusions instead of 2 exclusions. The Internal Revenue Service has continued to dispute the rationale of the *Cristofani* case. While the Internal Revenue Service has continued to lose cases where "remote beneficiaries" have withdrawal rights, the cautious practitioner should still seek to give a Crummey power holder a current interest in the income and principal of the trust in order to prevent IRS attacks.

D. It is also advisable to allow the Trustee to assign an interest in the life insurance policy or provide a Promissory Note in case the withdrawal beneficiary does request his or her share of the contribution. The withdrawal of the funds from the trust would prevent the payment of the insurance premiums and put the insurance policy in jeopardy. This problem can be avoided if the Trustee can assign an interest in the policy to the beneficiary or give the beneficiary a Promissory Note.

E. While the various intricacies of Crummey notices are beyond the scope of this Article, you should be aware that this is an area that the IRS does review in connection with estate tax audits.

F. A better type of gift might be some type of asset that will generate income to the trust. Thus, the income would be able to be used to pay all or part of the premium and reduce the annual gifting requirement.

G. Another alternative would be to have the donor enter into a split dollar agreement with the ILIT in order to fund the insurance premiums. The use of split dollar agreements are still worthwhile notwithstanding recent changes in the split dollar rules.

H. It is extremely important to file a gift tax return each year to report any gifts of funds to the trust to pay insurance premiums. This is especially true in order to allocate some of the donor's generation skipping transfer tax exemption (GST) to the Trust, even if there would not otherwise be a requirement to file a gift tax return because the gifts were less than the annual exclusion amount.

I. By allocating the gift to the GST exemption (currently $2,000,000), the donor avoids a larger amount being applied against the GST exemption when the insurance proceeds are received.

EXAMPLE: Donor contributes $20,000 to pay the premium on a $3,000,000 life insurance policy. The donor should file a gift tax return allocating $20,000 to the donor's GST exemption. When the life insurance proceeds are received, there will not be any GST tax.

However, if the donor does not file a gift tax return, when the $3,000,000 is received and distributed to the donor's grandchildren per the terms of the trust, the donor's $2,000,000 GST exemption would be applied, leaving $1,000,000 subject to a GST tax of 46% ($460,000).

J. Certain trusts can qualify for an annual GST exclusion. However, this requires:

1. That no portion of the income or principal can be distributed to anyone other than the named beneficiary during the lifetime of the beneficiary; and

2. That if the trust does not terminate before the beneficiary dies, that the assets will be includible in the beneficiary's estate.

VI. DYNASTY TRUST

A. In a typical trust, the assets are distributed to the beneficiaries at certain ages or upon the occurrence of certain events. Assuming that there is still an estate tax, by transferring assets from the Trust to the beneficiary, the beneficiary's assets are being increased and would be subject to estate tax when the beneficiary dies.

B. An alternative would be to create the ILIT as a "Dynasty Trust." In a Dynasty Trust, it is intended that the Trust will continue in force for many generations. There is no specific time for the distribution of the principal. Thus, the principal can be used as a "family bank" for the benefit of the donor's descendants. While the assets are in the Dynasty Trust, they are not subject to any estate tax, and are also free from claims of any creditors. Therefore, a substantial amount of taxes can be saved through the use of the Dynasty Trust.

VII. INSURABLE INTEREST

A. In order to have a valid life insurance policy, the owner of the policy must have an insurable interest in the insured. It has generally been assumed that a life insurance trust, which is created by a donor, has an insurable interest in the donor-insured. However, this assumption was recently challenged in the case of *Chawla v Trans America*

Occidental Life Insurance Co, [***Chawla***, ex rel. *Geisinger v Transamerica Occidental Life Ins Co,* 2005 WL 405405 (ED Va. 2005), aff'd in part, vac'd in part, 440 F3d 639, 2006 WL 538993 (4th Cir. Mar. 7, 2006)] which was decided under Maryland law.

B. In *Chawla*, a life insurance policy was purchased by a trust on the life of Harald Geisinger with the proceeds being payable to the trust. The beneficiary of the trust was the wife of a friend of Mr. Geisinger's. The insurance company had refused to issue the policy originally when the friend was shown as the owner and beneficiary on the basis that the friend did not have an insurable interest in Mr. Geisinger. The parties then formed a trust to own the insurance policy. Mr. Geisinger also transferred a residence to the trust. When Mr. Geisinger died, the insurance company refused to pay and rescinded the policy. The District Court case showed that Mr. Geisinger had lied on his application to the insurance company. He conveniently failed to mention in the application that within the last five years he had (among other things) the following:

1. Undergone brain surgery in Austria for the partial removal of a tumor;

2. Suffered a series of neurological problems for which he had to be treated with several spinal taps;

3. Developed motor dysfunction in his right hand for which he had received radiation therapy;

4. Undergone additional surgery in the United States, including the insertion of a shunt in his head to drain excess fluid from his brain; and

5. Been hospitalized repeatedly for alcohol abuse and related problems.

C. The District Court for the Eastern District of Virginia held for the insurance company finding that Mr. Geisinger had breached the contract by lying on the application, but more importantly, that the Trust which provided for Harald's friend to be the beneficiary, had no insurable interest in his life.

D. This case created a number of concerns. The Court of Appeals held that the issue as to whether or not the trust had an insurable interest was irrelevant, since the fact that Mr. Geisinger had lied on his application was sufficient to deny the insurance proceeds. Thus, the 4th Circuit Court of Appeals vacated the portion of the District Court ruling relating to the insurable interest.

E. Most commentators believe that an insured should be able to create an Irrevocable Trust with an insurable interest, because the insured consents to the acquisition of the policy, and because the insured's family members are usually the current beneficiaries. It is unlikely that an insurance company would deny payment of the insurance proceeds in such a case.

F. There are no statutes in Michigan specifically dealing with this type of situation, although MCLA § 500.2207 does allow a married woman to purchase life insurance on her husband's life which proceeds would be payable to a trustee.

G. This problem does not exist for a life insurance policy already owned by someone with an insurable interest which is transferred to a trust. Insurable interest only needs to exist when the policy is issued. What if the policy is transferred five minutes after it is issued?

VIII. FLEXIBILITY

As noted above, the "Irrevocable" Insurance Trust is "Irrevocable." Thus, it cannot be changed. However, there are ways to provide for some flexibility in the ILIT.

A. Provide for the Trustee to have certain limited powers to amend the Trust.

B. Provide a Special Power of Appointment to a spouse or a child. The Special Power of Appointment would allow the individual to change the allocation of assets among family members, spouses, etc. This can be useful to take into account changed circumstances in the future.

C. Provide for a Trust Protector. The Trust Protector can be a third party who has the power to make more substantive changes in the Trust. The problem is choosing who that Trust Protector will be.

D. Provide for a Trustee Appointer. The Trustee Appointer can remove and appoint new Trustees. The beneficiaries could also become the Trustee Appointers. The concern is to make sure that the Trustee Appointers do not appoint themselves, and also that they cannot appoint their friends or subordinates to be the Trustees.

E. Have the trust sell the insurance policies to the beneficiaries, or to a new ILIT with better terms.

F. Have the trust sell the policies to a third party under a life settlement proposal.

IX. CONCLUSION

The ILIT can be a very useful tool in removing a substantial asset from the client's estate.

ESTATE PLANNING FOR SECOND MARRIAGES AND BLENDED FAMILIES

By: Geoffrey N. Taylor, Esq.

I. SECOND MARRIAGES

A. Introduction.

Spouses in second (or third, fourth, etc.) marriages have an infinite variety of goals and desires, depending on factors such as length of marriage, financial independence of each spouse, existence and number of children from prior marriage(s), and existence and number of children from current marriage. Most of the issues tend to be driven by concerns other than the imposition of federal gift and estate taxes. However, our job is to ensure that the tax issues are at least considered, even though they might not be determinative.

1. Length of marriage.

   The longer the marriage, the more likely the spouses are to provide for the surviving spouse to have, at a minimum, a lifetime interest in the assets of the predeceasing spouse or, at the extreme, unfettered access to the assets of the predeceasing spouse.

2. Financial independence.

   The greater the financial independence of each spouse, the less likely each spouse is concerned about supporting the survivor, and the more likely the spouses will maintain and distribute their assets as completely separate upon their deaths.

3. Children.

a. No children.

If there are no children, the approaches generally fall into three categories:

i. When I die all of my assets will belong to you and I don't care what you do with them.

ii. When I die all of my assets will go to someone other than you.

iii. When I die all of my assets will be held for your lifetime benefit and upon your death will go to beneficiaries I select.

b. Children only from prior marriages.

If there are children but only from prior marriages (i.e., no children from the current marriage), the approaches generally fall into four categories:

i. When I die all of my assets will belong to you and I don't care what you do with them. In comparison to the other three categories this is relatively rare. This generally would be the case only where the spouse's children are already financially independent and/or the spouse is not otherwise concerned about the financial well-being of the spouse's children (e.g. in the case of estranged children).

ii. When I die none of my assets will be available to you and all of my assets will go to my children.

This generally would be the case only where the other spouse is financially independent.

iii. When I die all of my assets will be held for your lifetime benefit but upon your death the remaining assets will go only to my children. This arrangement might be more common where the spouses have been married for a significant period of time and the children are older. If there is a large age discrepancy between spouses, children of predeceasing spouse may wait a long time to (or may never) receive their inheritance.

iv. When I die all of my assets will be held for your lifetime benefit and upon your death the remaining assets will go among our children equally. This arrangement might be more common where the spouses have been married for a significant period of time and the predeceasing spouse has a close relationship with the surviving spouse's children.

c. Children from prior marriages and from current marriage.

If there are children from prior marriages and from the current marriage, the approaches are almost infinite, but typically will focus on providing for the surviving spouse and the children from the current marriage.

B. How are assets owned.

The titling of assets and the designations of beneficiaries of assets (such as insurance policies, IRAs and retirement plan interests) are

critical because the absence of proper titling and designations can completely frustrate a spouse's goals and desires.

C. The ubiquitous QTIP trust.

Where any estate plan is designed to provide a lifetime benefit to a surviving spouse, without giving the spouse full control over and access to assets, a QTIP trust is the most common method of achieving the same.

1. Income.

All income must be distributed to the surviving spouse no less frequently than annually.

2. Principal.

Principal can be distributed to the surviving spouse but there is no requirement that principal be distributed. Frequently a surviving spouse will have the right to receive principal for health and support. Sometimes that right will terminate if the surviving spouse remarries.

3. Independent co-trustee or sole independent trustee.

a. If the surviving spouse is the sole trustee of the QTIP trust, the spouse will have the ability (albeit without the legal right) to remove all QTIP trust principal or otherwise contravene the provisions of the QTIP trust.

b. This can be solved by having an independent co-trustee serve with the spouse or by having a sole independent trustee.

c. This obviously can be a very delicate issue with other spouse.

d. A spouse may be inclined to have a family member of the spouse (such as an adult child or sibling) serve as co-trustee with the surviving spouse; however, this may create significant tension between the co-trustees. This is particularly true where the co-trustee is a child of the predeceasing spouse, because that child's inclination will be to preserve, to the extent possible, the child's remainder interest in the QTIP trust (e.g., by not agreeing to make principal distributions and investing for growth rather than income).

e. A corporate co-trustee may produce less tension, but there are attendant costs.

D. What to do with the marital residence.

1. If the issue is not addressed in the estate planning or ownership documents (i.e., the deed), the surviving spouse may be homeless at the first death. Quite often this is the one asset that is shared between the spouses.

2. There may be significant disagreement between a surviving spouse and the predeceasing spouse's children as to the ownership of items of tangible personal property, such as furniture and furnishings. Ideally the spouses will clearly identify these items as belonging to one of the spouses.

3. If the residence is owned by one spouse, it is common for that spouse to grant a life estate to the surviving spouse until the surviving spouse's death, remarriage, or vacating the residence. In this case an issue arises as to liability for

expenses of the residence, such as mortgage payments, property taxes, utilities, maintenance, and repairs.

E. Is it required or advisable to communicate the plan to the beneficiaries during the spouse's lifetime.

F. What if there is a problem child.

1. Disinherit the child. Most clients, understandably, are very reluctant to do this.

2. Pure discretion during lifetime.

3. Skip the child and go to the child's issue.

4. Put in incentives. This is typical where the child is more unmotivated to work than incapable of handling his own affairs.

II. NONTRADITIONAL FAMILIES

A. Intestacy.

1. Michigan intestacy laws often fail to distribute properly the estates of nontraditional families because the laws are geared to traditional families (i.e., heterosexual couples), rather than nontraditional families (e.g., unmarried heterosexual couples and same sex couples).

2. Without proper estate planning, this inevitably will result in (i) the surviving partner not being appointed as the person to handle the deceased partner's affairs upon death, and (ii) the deceased partner's family being responsible for the same. In this case, without appropriate documents being in place, it is likely the affairs of the deceased partner are not being attended

to by the person most important to the deceased partner, i.e., the surviving partner.

3. Michigan law regarding same-sex marriage.

   a. MCL 551.1 prevents same-sex marriages in Michigan.

   b. MCL 551.271 provides Michigan will not recognize same-sex marriages that took place in another state.

B. Sometimes a planner or advisor may have a personal problem with a nontraditional arrangement.

C. What to do with the residence

1. If the deceased partner was the sole owner of the home, the surviving partner now finds himself or herself homeless. To solve this problem, can't we simply add the nonowner partner as a joint tenant?

   a. Unlike with a tenancy by the entireties (which is only between a husband and a wife), making the partner a joint owner on an asset subjects that asset to the claims of that partner's creditors.

   b. When a partner adds the other partner's name as a co-owner on property, such as real estate, the addition of the name to the title is considered a gift by the IRS.

   c. With regard to assets such as bank or investment accounts, the gift does not occur until the other joint owner removes funds from the account.

2. One way to avoid the potential gift tax problem is to prove contribution by the donee partner. However, unless detailed

records are kept by the partners, it will be difficult to demonstrate how much each partner contributed to the asset.

3. If a partner is added as a tenant in common owner of the residence, there will be an uncapping of the taxable value of the residence as to the portion representing the interest given (i.e., if the partner is added as a 50% tenant in common owner, the taxable value of 50% of the residence is uncapped). If the partner is added as a joint tenant, there is no uncapping.

4. Because the adding of the partner will be a gift rather than a sale (i.e., will be made without consideration), the transfer will not be subject to real estate transfer taxes.

D. In the absence of estate plan documents, a number of questions and issues will arise for the partners and their families.

1. Who will be the personal representative of the deceased partner and who will receive the assets? A domestic partner of a decedent does not receive an intestate share and is not listed as a priority person for serving as personal representative. This may cause, among other things, the surviving partner to engage in a legal battle with the deceased partner's family. A last will and testament will clarify these issues.

2. Who will make medical decisions for a sick partner? Many hospitals will often limit visitation of a patient to the patient's "family members," which likely will not include the patient's partner. This is true even though it is likely the sick partner would want the other partner to have first say as to medical treatment or the withholding or withdrawal thereof. Without a medical durable power of attorney (and living will, if appropriate), this will not be the case, and the sick partner's

parents or siblings will be looked to as authority for making medical decisions, which again likely will be against the patient's desires. A medical durable power of attorney solves these problems.

3. What if a couple is raising a minor child? The couple typically will want the surviving partner to continue to raise the child in the event of the death of one of the partners. Where the adoptive or biological partner is the predeceasing partner, this creates a significant problem because the surviving partner will not automatically become the guardian of the minor child. Instead, it is likely that the adoptive or biological partner's parents or siblings will have priority as to the minor child's person and assets. The parents of the deceased partner may feel (possibly very strongly) that their grandchild should be raised in a traditional family setting.

E. A surviving spouse can roll over retirement accounts such as IRAs and 401(k) accounts into his or her own IRA and name a new beneficiary thereon. In this case, the surviving spouse can significantly defer the income tax on required minimum distributions. A spousal roll over is not available to a surviving partner.

F. There may be federal estate tax considerations for a nontraditional couple if the couple has significant assets. If the couple has a combined estate of $4,000,000 or more, and all the assets are held jointly, then the first partner to die would have a $4,000,000 estate. Based on current federal estate tax law, the decedent's estate would owe federal estate taxes of $920,000. If the $4,000,000 was owned one-half by each partner, there would be no estate tax (unless one partner had to make a taxable gift to the other partner to achieve the one-half ownership).

MADDIN, HAUSER, WARTELL, ROTH & HELLER, P.C.

ATTORNEY BIOGRAPHIES

Michael W. Maddin is the President and one of the Managing Directors of the firm. Mr. Maddin has been practicing law for over 40 years, primarily in the areas of real estate, corporate and business law, estate planning and probate. He is a member of the Southfield, Oakland, Michigan and American Bar Associations and the American Judicature Society. He was also a member of the Real Property Law Section Council of the State Bar of Michigan and for many years served as Chairman of the Commercial Leasing and Management Committee of the Real Property Law Section of the State Bar of Michigan. Mr. Maddin has been a speaker at numerous ICSC, ICLE, National Business Institute and State Bar of Michigan Real Property Law Section Seminars, and has authored numerous real estate related articles in professional journals. He has been repeatedly selected by his peers for inclusion in "the Best Lawyers in America," named among the top 100 Michigan Super Lawyers, and has been President or Chairman of numerous civic, charitable or fraternal organizations and major groups.

Mark R. Hauser is a Managing Director of the firm who specializes in the areas of real estate, partnerships, finance, corporate and business law, taxation and estate planning. A 1964 graduate of the University of Michigan, he obtained his Juris Doctor *magna cum laude* from Wayne State University in 1967 where he served as an Editor of the Wayne Law Review. A member of the Real Estate, Business Law & Taxation Sections of the State Bar of Michigan, Mr. Hauser has lectured at numerous professional seminars for attorneys and accountants on real estate and tax-related issues. He has been continuously selected by his peers to be listed in the "Best Lawyers in America," is the immediate past President of the United Jewish Foundation of Metropolitan Detroit, and is Trustee of United Jewish Communities having recently completed his term as National Vice President and member of the Executive Committee.

Richard J. Maddin is a firm shareholder who has practiced law for over 36 years. He is a graduate of Michigan State University and University of Detroit-Mercy Law School. His areas of practice include general business, commercial and residential real estate construction, corporate, land use planning, zoning and probate law. Mr. Maddin is an active litigator, representing both plaintiffs and defendants in the above-described areas of practice, including also the areas of real estate construction, zoning, alternative dispute resolution (ADR) practice, and is a certified mediator. He is a member of the Real Estate, Litigation, and ADR Sections of the State Bar of Michigan, the Southfield and Oakland Bar Associations, and the American Judicature Society.

Richard F. Roth is a shareholder in the firm. He attended the Wharton School at the University of Pennsylvania where he received a Bachelor of Science in Economics. He graduated from the University of Michigan Law School, *cum laude*,

in 1972. Mr. Roth has a business practice, with a concentration on corporate law, real estate, estate planning, and taxation, and he currently heads the firm's Alternative Dispute Resolution Department. With regard to the real estate side of his practice, Mr. Roth has handled legal work for the development, construction, and management of numerous shopping centers, including construction loans and end mortgages, as well as all of the leasing work. He has also handled the acquisition and sale of apartment complexes, shopping centers, industrial buildings, office buildings and unimproved real estate. He has also handled workouts for distressed properties. On the corporate side, he has facilitated mergers, acquisitions and financing for his corporate clients. He has handled many corporate and individual tax matters and Michigan sales, use and single business tax issues. He co-authored the statute which exempts from Michigan sales tax the purchase of hi-tech computers used in computer integrated manufacturing and CAD-CAM. Mr. Roth has lectured at numerous professional seminars. He is currently a member of the Board of Trustees of The Jewish Fund, which manages and distributes over $60 million for charitable purposes. He is also a member of the Board of Trustees of the Karmanos Cancer Institute. Mr. Roth previously served as President of the Michigan Jewish Sports Foundation and the Sinai Health Care Foundation. He was previously a member of the Board of Trustees of Sinai Hospital, Huron Valley-Sinai Hospital, the Anti-Defamation League, Temple Beth Jacob, and Knollwood Country Club.

Harvey R. Heller is the shareholder in charge of our Insurance Coverage and Defense Practice Group. He is an honors graduate of Michigan State University, as well as a *cum laude* graduate of Detroit College of Law. In addition to being an active litigator, Mr. Heller is a member of the Michigan State Bar Foundation Fellows and the Michigan Defense Trial Council. On a national level, Mr. Heller is a member of the American Bar Association Standing Committee on Lawyers' Professional Liability, the Defense Research Institute, as well as the International Association of Defense Counsel. He has authored articles on the subject of professional liability and has been a featured speaker at professional liability seminars. Mr. Heller has continually been selected by his peers to be listed in the "Best Lawyers in America."

Michael S. Leib is a shareholder in the firm. He is a trial lawyer practicing in the areas of business disputes, real estate litigation, creditor's rights law, including bankruptcy law and employment law. Mr. Leib is the Chairperson of the State Bar of Michigan Character and Fitness Committee. He is a graduate of Kalamazoo College, the University of Montana and Wayne State University Law School. He is a member of the State Bar of Michigan and is admitted to practice before several courts, including the United States District Court, Eastern District of Michigan and Western District of Michigan, 6th Circuit Court of Appeals and United States Supreme Court.

Robert D. Kaplow is a shareholder in the firm. His practice is concentrated in estate planning and personal and corporate income tax planning. He is a graduate of Cornell University, receiving his law degree from the University of Michigan. He

received a Masters in Tax Law from Wayne State University. He is a member of the State Bar of Michigan (Taxation and Probate and Estate Planning Sections), Oakland County Bar Association (Taxation Committee) and American Bar Association (Taxation, Real Property, Probate and Trust Law Sections). Mr. Kaplow is a frequent lecturer before professional groups pertaining to tax and corporate matters. He is listed in Who's Who in American Law and Who's Who of Emerging Leaders in America. Mr. Kaplow is a member of the Financial and Estate Planning Council of Metropolitan Detroit, and is also active in various charitable and Bar related activities.

William E. Sigler is a shareholder in the firm whose practice involves business law, real estate, internet and computer law, taxation, pension and employee benefits, and probate and estate planning. He graduated from Michigan State University and the University of Detroit-Mercy School of Law where he was an editor of the Law Review. He has lectured frequently on the topics of estate planning and employee benefits and taught federal income taxation at Lawrence Technological University. He has authored several articles, including "Supreme Court Declares Qualified Plan Benefits to be Exempt from Bankruptcy," Michigan Bar Journal, Volume 71, No. 10 (October 1992), "New Revenue Ruling Encourages Gifts of Stock in the Family Business, But Beware!," Michigan Bar Journal, Volume 72, No. 10 (October 1993), "Qualifying for the Annual GST Tax Exclusion," LACHES, No. 387 (April 1998), and Innovative Retirement Plan Designs for the Small-Business Employer," LACHES, No. 450 (July 2003). Mr. Sigler is a member of the Financial and Estate Planning Council of Metropolitan Detroit and is active in charitable and Bar related activities. He has served as Chairperson of the Oakland County Bar Association Employee Benefits Committee, and is a member of the Board of the Association for Corporate Growth.

Stewart C. W. Weiner is a shareholder of the firm who has concentrated his practice over the past 20 years in business, construction and securities matters with a particular focus on acquisitions and resolution of business, construction, partnership and shareholder disputes. He frequently counsels clients on construction contracts, employment, securities and computer related matters. He serves as an arbitrator for the National Association of Securities Dealers, as a private arbitrator and is a member of the American Bar Association (Construction Forum, Employment and Computer Law sections), State Bar of Michigan, Real Property Section, and Oakland County Bar Association.

Charles M. Lax is a shareholder and a member of the Executive Management Committee of the firm who has practiced primarily in the areas of employee benefits, taxation, corporate law and mergers and acquisitions. He has authored numerous articles appearing in legal and public accounting journals. He has lectured extensively on qualified retirement plans and other tax topics before the Michigan Institute of Continuing Legal Education, Michigan Association of Certified Public Accountants and other professional groups. Mr. Lax presently serves as a member of the IRS Advisory Committee on Tax Exempt and Government Entities, a member of the State Bar of Michigan - Tax Section Council, a member of the IRS

Great Lakes TE/GE Council, and as a member of the Steering Committee for the IRS-ASPA Great Lakes Conference. Mr. Lax has previously served as Chairman of the State Bar of Michigan – Tax Council, a member of the IRS Employee Plans, Ad Hoc Advisory Group for the Assistant Commissioner of Internal Revenue Service, EP, the IRS Regional Council Bar Advisory Group, Central Region, the Advisory Group to IRS Northeast Region's Chief of EP/EO division and the Chairman of the State Bar of Michigan - Section of Taxation/Employee Benefits Committee. Mr. Lax is also a Fellow at the American College of Employee Benefits Counsel and listed in the "Best Lawyers in America." He has extensive experience in representing clients in tax controversy matters before the Internal Revenue Service and Tax Court of the United States.

Stuart M. Bordman is a shareholder of the firm who is an attorney and a certified public accountant. He has extensive experience in general corporate matters, including business purchases and sales, franchise matters, health care law and representation before the Internal Revenue Service. Mr. Bordman was the 1997-98 Chairman of the Oakland County Bar Association Tax Committee. Mr. Bordman is a frequent lecturer before the Michigan Association of Certified Public Accountants and a regular contributor to LACHES, the Oakland County Bar Association publication. He has written on use tax, corporate finance under the Michigan Business Corporation Act and single business tax. He is a graduate of the Northwestern University School of Law.

Steven D. Sallen is a shareholder and member of the firm's Executive Management Committee. Mr. Sallen received his undergraduate degree from the University of Michigan and his law degree, *cum laude,* from the University of Detroit-Mercy School of Law where he served as Case and Comment Editor of the University of Detroit Law Review. Mr. Sallen concentrates his practice in the areas of real estate law, environmental law and corporate law, and his clients include real estate developers, general contractors, commercial real estate brokers and environmental consulting firms. Mr. Sallen publishes Real E-state, a Quarterly Electronic Newsletter for Real Estate Professionals.

John E. Jacobs is a shareholder of the firm who specializes in commercial transactions, real estate, litigation, and consumer law, including residential mortgage lending. He also engages in lobbying activities in state government. He is a member of the Michigan Mortgage Lenders Association and Michigan Mortgage Brokers Association. Mr. Jacobs has lectured at professional seminars on real estate, consumer law and residential mortgage lending. He also taught Consumer Credit Regulation at Wayne State University Law School. He has been the President of three nonprofit organizations.

Michael B. Perlman is a shareholder of the firm, who specializes in commercial transactions in the areas of real estate, partnerships, finance, with a sub-specialty in affordable housing using various government programs, including low income housing tax credits, tax-exempt bonds and FHA housing finance programs. He is a member of the Michigan Housing Council and the ABA Section on affordable

housing and community development. He obtained his Juris Doctor from Wayne State University in 1972 and was the chancellor of Moot Court. Mr. Perlman has been very active in the development and financing of several facilities for the elderly in the Jewish community, having acted as chairman of the building committees and attorney for the developments. He is a past President of Jewish Apartments & Services and was the initial Chairman of the Commission on Jewish Elder Care Services. Mr. Perlman was named again in the thirteenth edition of "The Best Lawyers in America – 2007."

Julie Chenot Mayer is a shareholder of the firm who received her undergraduate degree from the University of Michigan. She obtained her Juris Doctor, *cum laude*, from the Detroit College of Law in 1986 where she was a member of the Law Review. Ms. Mayer concentrates her practice in the area of litigation with an emphasis on insurance coverage and professional liability defense. Ms. Mayer is a member of the State Bar of Michigan and the American Bar Association.

Nathaniel H. Simpson is a shareholder of the firm. He graduated with honors from Wayne State University Law School in 1988 and was awarded the Order of the Coif. His practice focuses primarily on workouts, banking, creditor's rights, collection, and employment and property disputes. He is a 1985 graduate of Michigan State University, majoring in Financial Administration, where he was awarded high honors. Mr. Simpson is involved in a number of local community and charitable organizations.

Ronald A. Sollish is a shareholder in the firm who specializes in the areas of employment, real estate, partnership, finance, corporate and business law. Ron is a frequent speaker on legal topics and has spoken to such groups as the Michigan Chamber of Commerce, Michigan Association of Certified Public Accountants, and American Society for Industrial Security. He is licensed to practice law in both Michigan and Illinois. He graduated from the University of Detroit-Mercy School of Law where he was the managing editor of the Law Review. Ron received his undergraduate degree from the University of Michigan. Ron is a member of the State Bar of Michigan, Illinois Bar Association, American Bar Association and Oakland County Bar Association.

Lowell D. Salesin is a shareholder in the firm and a member of the firm's Executive Committee. He has been practicing with the firm since graduation from the George Washington University National Law Center in 1993, where he graduated with high honors and served as an Associate Editor of the George Washington Law Review. He received his undergraduate degree from Indiana University in 1990. Mr. Salesin is a member of the Real Property and Business Law Sections of the State Bar of Michigan and is a member of the American and Oakland County Bar Associations. He concentrates his practice in the areas of real estate development and finance, business planning, lending, commercial leasing, partnership and corporate law. Mr. Salesin's experience includes the acquisition, financing, construction, development, and leasing of all types of commercial real estate. He represents both owners and lenders in a wide variety of real estate transactions.

Mark H. Fink is a shareholder in the firm who graduated from Wayne State University, College of Business Administration and the Detroit College of Law with highest honors and is admitted to the practice of law in the states of Michigan and Arizona. Mr. Fink's practice areas include civil appeals and litigation, with concentration on commercial and real estate and insurance coverage matters. Mr. Fink is the author of several articles, which have appeared in publications such as the Michigan Bar Journal and the Detroit College of Law Review. He is a professional affiliate with the American Bar Association, Oakland County Bar Association and Defense Research Institute, and a member of the Appellate Section of the State Bar of Michigan.

Steven M. Wolock is a shareholder in the firm who received his law degree from the University of Michigan Law School in 1985 and obtained a Bachelor of Science in Economics from the University of California at Santa Cruz in 1977. Mr. Wolock specializes in general commercial litigation and professional liability litigation and has extensive experience in labor and employment law. Mr. Wolock is a member of the Labor and Employment and Negligence Sections of the State Bar of Michigan, American Bar Association and Oakland County Bar Association. He also serves as a panelist on the State Bar of Michigan Attorney Discipline Board.

David E. Hart is a shareholder of the firm. He earned his Bachelor degree in Philosophy and Political Science from the University of Michigan in 1988 and received his Juris Doctor Degree, *cum laude*, from the Detroit College of Law in 1991. While at the Detroit College of Law, Mr. Hart was a senior member of the Detroit College of Law Review and he participated in several national Moot Court competitions. He concentrates his practice in the areas of title insurance, business disputes, real estate litigation, creditor's rights law, including bankruptcy, and general civil litigation. Mr. Hart is a member of the State Bar of Michigan, the Oakland County and Federal Bar Associations, and The Michigan Land Title Association.

George A. Contis is a shareholder of the firm. He earned his Bachelor of Arts degree in Economics from the University of Pittsburgh in 1982 and received his Juris Doctor degree from the University of Detroit-Mercy School of Law in 1985. While at the University of Detroit, Mr. Contis participated in several local and national Moot Court competitions and was selected for membership to the Order of Barristers. He concentrates his practice in the areas of real estate development and finance, lending, transactional law, commercial leasing and business planning. His publications include: Tax Aspects of Divorce in Michigan, Michigan Tax Law Journal, 1984; Bring a Weapon to School, Get Expelled 370 LACHES 8, November 1996; and Year End Planning Considerations for 1031 Exchanges, Bar Briefs, December 2000.

Martin S. Frenkel is a shareholder of the firm. He graduated from the University of Michigan in 1991 and Wayne State University Law School in 1994. He was admitted to practice in Michigan in 1994 and has also been admitted to practice in the Federal District Court for both the Eastern and Western Districts of Michigan.

Mr. Frenkel was formerly employed by the Michigan Department of Attorney General and has been with Maddin Hauser since 1997 where he specializes in the areas of commercial and real estate litigation, including mortgage and construction litigation and title-related disputes. Mr. Frenkel is a member of the Real Property Section of the State Bar of Michigan and is also an affiliate member of the Associated General Contractors of America. Mr. Frenkel authored the article *"Navigating the Waters of Real Estate Arbitration"* published in Commercial, Inc. magazine, discussing the dynamics of the real estate arbitration process and co-authored the article "Arbitration Provisions and Occupational Code Amendments" published in LACHES magazine.

Gary M. Remer is a shareholder of the firm. He received his law degree from the Detroit College of Law at Michigan State University where he graduated *summa cum laude* in May 1997 and obtained a Bachelor of Arts in Accounting from Michigan State University in 1990. Mr. Remer was a Revenue Agent with the Internal Revenue Service, Employee Plans Division, from 1992 through 1996. He concentrates his practice in the areas of employee benefits, corporate law, taxation and estate planning. Mr. Remer has lectured extensively on qualified retirement plans and other tax topics. He is an adjunct professor at Walsh College. Mr. Remer co-authored the The Insider's Guide to IRS Plan Audits. He is a Certified Public Accountant and a past Chair of the MACPA Employee Benefits Committee.

George V. Cassar, Jr. is a shareholder in the firm who concentrates his practice in the areas of estate and business succession planning, taxation and probate. Mr. Cassar graduated from the University of Michigan with honors and received his law degree with honors from Drake University Law School. He also received his Masters in Tax Law from Wayne State University Law School. He is a member of the State Bar of Michigan, the State Bar of Iowa, the American Bar Association and the Federal Bar Association. Mr. Cassar frequently speaks before professional organizations, as well as to their clients regarding estate planning, tax and probate matters. Mr. Cassar has also been accepted as a Life Member of the National Registry of *Who's Who in American Law* and is active in several charitable and other community organizations.

David M. Saperstein is a shareholder of the firm. He graduated from the University of Michigan Law School in 1993, and University of California, Berkeley with High Honors in 1989. He clerked for the late Michigan Court of Appeals Chief Judge Pro Tem Myron H. Wahls. Mr. Saperstein's publications include: "Why There are No Common-Law Exceptions to a Municipality's Governmental Immunity: A Municipal Perspective," Public Corporation Law Quarterly, Spring 2001, No. 9, p.1, and "The Abominable Snowman, the Easter Bunny, and The Intentional Tort Exception to Governmental Immunity: Why Sudul v Hamtramack was Wrongly Decided," 16 Michigan Defense Quarterly, No. 2, p. 7 (2000). Mr. Saperstein is admitted to practice law in Michigan, Ohio and California (inactive). He concentrates his practice in the areas of professional liability defense, primarily defending lawyers, accountants, stockbrokers, real estate agents, and insurance agents. Mr.

Saperstein serves on the Board of Trustees for the Jewish Community Council and Congregation Shaary Zedek.

Richard M. Mitchell earned his Juris Doctor degree from Indiana University Law School, Bloomington, in 1991, where he served on the Indiana University Law Review. He earned his Bachelor of Arts degree from the University of Michigan in 1988. Mr. Mitchell focuses his practice on complex insurance coverage disputes and civil litigation. He has authored publications and spoken in these areas. He is also a member of the Society of Chartered Property Casualty Underwriters (CPCU), a designation granted by the American Institute for CPCU in Malvern, PA, upon the successful completion of a series of national examinations relating to insurance and business related topics. Mr. Mitchell is also on the Board of Directors of the Greater Detroit CPCU Chapter.

L. Jeffrey Zauberman is a shareholder in the firm. He has been a practicing attorney since 1984 in both the Province of Ontario and Michigan. He received his Bachelor of Laws from Osgoode Hall Law School in Toronto, Canada and his J.D. from the University of Detroit School of Law. Mr. Zauberman is a member of the Real Property Section of the State Bar of Michigan. He concentrates his practice in the areas of real estate development and finance, asset based secured financing and leasing of commercial real estate. Mr. Zauberman is also licensed in the Province of Ontario and able to advise upon matters of Ontario law.

John P. Gonway is a shareholder in the firm and specializes in secured financing, real estate, mergers and acquisitions and commercial transactions. He received his Juris Doctor, *cum laude*, from the Wayne State University School in 1996. Prior to attending law school, he received his undergraduate degree from James Madison College at Michigan State University. Mr. Gonway is a member of the Real Property, Business Law, and Taxation Sections of the State Bar of Michigan and is a member of the Oakland Bar Association. Mr. Gonway's expertise includes the acquisition, financing, construction, development and leasing of all types of commercial real estate, as well as the representation of clients in all aspects of corporate law, commercial law, mergers and acquisitions and commercial transactions.

Kathleen H. Klaus joined the firm's Defense Practice and Insurance Coverage Group in August 2004. Ms. Klaus graduated from the University of Michigan Law School in 1992 and received a Bachelor of Arts degree, with honors, from the University of Iowa in 1987. Prior to joining the firm, Ms. Klaus practiced commercial litigation and bankruptcy in Chicago, Illinois.

Lori E. Talsky joined the firm as an associate after graduating *summa cum laude* from the Detroit College of Law at Michigan State University in January, 1996. Ms. Talsky has an extensive working knowledge of the Canadian legal system. She is a member of the State Bar of Michigan and the American Bar Association.

Sheryl K. Silberstein joined the firm in September, 2000. She is a 1986 graduate of the Detroit College of Law and earned her Bachelor of Arts Degree from the University of Michigan. Her concentration of law is in the area of real estate and related matters. Ms. Silberstein has twenty years experience in the real estate industry in the corporate sector. She is a member of the State Bar of Michigan.

Kasturi Bagchi received a Bachelor of Arts in Political Science with honors from UCLA in 1992 and subsequently was awarded her Juris Doctor degree with honors from Tulane University School of Law in 1995. While at law school, Ms. Bagchi was a managing editor of the Tulane University School of Law Environmental Journal where she published an article entitled "Application of the Rule of Lenity: The Specter of the Midnight Dumper Returns." 8 TUL.ENVTL. L.J. 265 (1995). Upon her graduation from Tulane, she clerked for the Honorable William Albrecht and the Honorable Harry K. Seybolt of the Superior Court of New Jersey, Warren County. She concentrates her practice in the firm's commercial lending and real estate groups. Ms. Bagchi is admitted to the Bars of New Jersey, Pennsylvania (inactive), California and Michigan.

Danielle M. Spehar attended Central Michigan University and earned a Bachelor of Science in Business Administration, *summa cum laude*. She also earned a Master's Degree in Business Administration from Wayne State University. She acquired her Juris Doctor, *magna cum laude*, from University of Detroit-Mercy School of Law in 1998. Ms. Spehar concentrates her practice in the areas of real estate transactions and corporate and business law. She is a member of the State Bar of Michigan and the American Bar Association.

Geoffrey N. Taylor graduated *magna cum laude* from the University of Pittsburgh Law School in 1997. He obtained a Bachelor of Business Administration with distinction from the University of Michigan in 1992. Mr. Taylor concentrates his practice in the areas of estate planning, probate, and tax law.

Brian A. Nettleingham earned his Bachelor of Arts in Pre-Law from Cedarville University in 1993, where he also earned minors in Religion and Philosophy. Brian spent two years studying philosophy at Miami University's Graduate School before earning his Juris Doctorate from the University of Notre Dame School of Law. While at Notre Dame, Brian was a member of the Appellate Moot Court Team and worked extensively with clients of the law school's Legal Aid and Immigration Law Clinics. He also won the law school's Annual Client Counseling Competition. After graduating from Notre Dame, Mr. Nettleingham clerked for the Honorable Joel P. Hoekstra of the Michigan Court of Appeals. He currently practices in the firm's Commercial Litigation Department and is admitted to the State Bar of Michigan and the Western and Eastern District Federal Courts for Michigan.

Brandon Buck received his Bachelor of Science degree with honors from Wayne State University in 1998 and his Juris Doctor degree with honors from Wayne State University Law School in 2001. During law school, Mr. Buck received a Board of Governors Scholarship for Academic Excellence and placed first in the law school's

Moot Court brief writing competition. Mr. Buck is admitted to practice law in Michigan and California and concentrates his practice in the areas of business disputes, real estate, commercial and general litigation and creditor's rights law.

Rebecca M. Turner is an associate in the firm and concentrates her practice in the areas of corporate and business law and real estate transactions. Ms. Turner earned her Bachelor of Business Administration in Accounting from Western Michigan University Haworth College of Business in 1998 and earned her Juris Doctor, *cum laude*, from Syracuse University College of Law in 2001. While at Syracuse, Ms. Turner participated in a National Tax Moot Court Competition in which her team placed first in Oral Arguments and second with their Brief. Ms. Turner is a member of the American Bar Association, State Bar of Michigan and Oakland County Bar Association. Additionally, Ms. Turner is currently the President of the Women's Bar Association, Oakland Region of the Women Lawyers Association of Michigan, serving in the past as Treasurer and Recording Secretary. Michigan Lawyers Weekly has selected Ms. Turner as a 2006 Up and Coming Lawyer for an upcoming feature.

Alexander Stotland earned his Bachelor's degree from Hofstra University in 1994, with a dual major of international business and marketing. Mr. Stotland worked in the banking sector, before earning his Juris Doctor degree from Hofstra University School of Law in 1998. While in law school, Mr. Stotland participated in the prestigious Philip C. Jessup International Law Moot Court Competition. Mr. Stotland practiced law in New York City for approximately seven years, prior to joining the firm. Mr. Stotland is admitted to practice before the federal and state courts of Michigan and New York, is fluent in the Russian language and concentrates his practice in the areas of business disputes, employment law, commercial and civil litigation.

Martin B. Maddin received his Bachelor of Arts in Psychology, graduating Phi Beta Kappa and with high honors from The University of Michigan in 1999. Mr. Maddin subsequently was awarded his Juris Doctor degree from The University of Wisconsin Law School in 2003. While at law school, Mr. Maddin was selected to participate in a cross-cultural negotiation seminar in Beijing and Shanghai. He concentrates his practice in the firm's corporate law and transactions, employment and workforce management and real estate groups. Mr. Maddin is admitted to the Bars of Illinois, Michigan and Wisconsin.

Michael K. Hauser is an associate in the firm and concentrates his practice in the areas of federal taxation of real estate transactions, partnership and corporate tax, estate and gift taxes, and general business matters. He is an Adjunct Professor in the LLM program at Cooley Law School, teaching the "Taxation of Real Estate" course. He is also a certified public accountant and previously worked at the Kleiman, Carney and Greenbaum CPA firm. He is the author of "Avoiding Dealer Status to Obtain Capital Gains," published in the Journal of Real Estate Taxation (May, 2005). Mr. Hauser graduated *summa cum laude* from Wayne Law School in 2004, where he was named to the Order of the Coif. He received his B.A. *magna*

cum laude from Dartmouth College in 1994. During law school, he interned for the IRS Chief Counsel's Office and received the Deloitte & Touche Award for Taxation courses. He served as a Note and Comment Editor for the Wayne Law Review, authoring "The Tax Treatment of Intangibles in Acquisitions of Residential Rental Real Estate."

Lavinia S. Biasell received her Bachelor of Arts degree with High Honors from Michigan State University in 2000, and received her Juris Doctor degree, *magna cum laude*, from Michigan State University-Detroit College of Law in 2003. While in law school, Ms. Biasell was a member of American Inns of Court and earned the Carolyn Stell Award for outstanding achievements and public service from the Women Lawyers Association of Mid-Michigan. Ms. Biasell was admitted to practice by the State Bar of Michigan in 2003. She is also admitted to the Federal District Court for the Eastern and Western Districts of Michigan. Ms. Biasell concentrates her practice in the areas of commercial and real estate litigation. In addition, Ms. Biasell is the Women's Bar Association's representative to the Women Lawyer's Association of Michigan.

James M. Ried, IV received a Bachelor of Arts in Political Science-Prelaw with honors from Michigan State University in 2002 and his Juris Doctor degree with honors from Wayne State University Law School in 2005. While at law school, Mr. Reid was an associate editor of the Wayne Law Review. Mr. Reid is admitted to practice before the federal and state courts of Michigan and concentrates his practice in the areas of corporate law and transactions, real estate, defense practice, and commercial and civil litigation.

Stuart M. Dorf received his Bachelor of Arts in American History and Jewish Studies, graduating Magna Cum Laude, Phi Beta Kappa, as well as receiving the distinction of Tulane Senior Scholar and received the Ephraim Lizitsky Jewish Scholar Award from Tulane University in 1998. Mr. Dorf subsequently was awarded his Juris Doctor degree from the Chicago-Kent College of Law in 2001. While at law school, Mr. Dorf was selected to sit on the Dean's Advisory Panel for Electronic Voting Reformation and was a member of the corporate law society. He concentrates his practice in the Firm's Lending and Finance Group. Mr. Dorf is admitted to the Bars of Illinois and Michigan.

Of Counsel

Lawrence Pazol is of counsel to the firm. He received a Bachelor of Science degree in Business from Indiana University (Bloomington campus) in 1963 and subsequently was awarded his Juris Doctor degree from Indiana University School of Law in 1966. Mr. Pazol served as an attorney for the Michigan District Office of the U.S. Small Business Administration for 30 years from 1974 to 2004. During his tenure with the Small Business Administration, he was awarded Attorney of the Year for the Midwest Region of SBA. His practice with SBA covered the entire gambit from closing, servicing, liquidating and litigating loans. He also approved

Section 8(a) contracts for minority businesses and aided many lenders in interpreting SBA regulations.

Marc S. Wise is of counsel to the firm. Mr. Wise concentrates his practice in the areas of employee benefits, business planning and taxation. Mr. Wise has extensive experience in the design, financing, implementation and correction of pension and welfare benefit plans for large multi-state employers as well as smaller local employers. As part of his practice, he represents clients in Internal Revenue Service, U.S. Department of Labor and Pension Benefit Guarantee Corporation audits and investigations. He earned his Bachelor of Science degree from Western Michigan University with dual majors in Accounting and Economics. He was awarded his Juris Doctorate degree from Ohio Northern University and a Master of Laws degree in taxation from Wayne State University. Mr. Wise is admitted to practice before the state and federal courts in Michigan, the United States Court of Appeals for the Sixth Circuit and the United States Tax Court.

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