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THE COMPASS

SERVING ALL POINTS OF NEBRASKA AND THE GREAT PLAINS

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Bankruptcy Basics: A Primer

by Rick D. Lange

Bankruptcy protection is provided to individuals and businesses pursuant to the federal law commonly known as the Bankruptcy Code. Bankruptcies can be generally categorized as either liquidation or reorganization. In a liquidation, a trustee is appointed to convert the debtor's non-exempt assets into cash and distribute the proceeds to creditors. In a reorganization, the debtor submits a plan to the bankruptcy court and attempts to pay the creditors all or a portion of the debts owing to them over time. Some of the more common terms and concepts include the following:

• THE AUTOMATIC STAY. Immediately upon the filing of a bankruptcy, a stay automatically goes into place that prohibits any creditor from taking any action against the debtor to collect any amounts that were owing to the creditor. All persons are bound by the stay regardless of whether they had notice of the bankruptcy filing. Under appropriate circumstances, the bankruptcy court may lift the stay to permit the creditor to continue collection efforts. Thus, once a bankruptcy is filed, unless the bankruptcy court grants permission, a creditor may not repossess a debtor's car, may not continue foreclosure proceedings, may not continue lawsuits, etc.

• DEBTOR. The "debtor" is the person or entity that owes money and files bankruptcy.

• CREDITOR. The "creditor" is the person or entity that is owed money by the debtor. A creditor may be "secured," which means that the creditor has a lien on the debtor's property. Generally, secured creditors retain their liens on property in bankruptcy. Thus, for example, if a bank has a lien on a debtor's home and the debtor files bankruptcy, the bank lien on the house remains and is not eliminated by the bankruptcy filing. The bank is a secured creditor. Alternatively, a creditor may be "unsecured," which means that the creditor has no lien on any of the debtor's property.

• CHAPTER 7. A chapter 7 case is a liquidation bankruptcy. The vast majority of chapter 7 matters are "no assets" cases. A "no asset" case means that the debtor does not have material non-exempt assets which exceed the liens against those assets, and, therefore, there are no assets to be

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liquidated and distributed to creditors. In those chapter 7 cases where there are non-exempt assets with value in excess of the liens against those assets, the assets are liquidated, expenses are paid, and the remaining funds are distributed to creditors in accordance with the priorities set forth in the Bankruptcy Code. Generally, in distributing funds, secured creditors are paid first, then costs of liquidation and case administration, then priority claims (such as certain tax obligations or amounts due to employees in certain business bankruptcies), and, finally, unsecured creditors.

• CHAPTER 11. A chapter 11 proceeding is a reorganization, typically involving a business. For example, many of the airlines have been debtors in chapter 11 bankruptcy proceedings. In a chapter 11 case, the debtor continues to operate and proposes a plan to the bankruptcy court to restructure its obligations to its creditors and pay them back all or a portion of their debt over time.

• CHAPTER 12. A chapter 12 proceeding is a reorganization for "family farmers".

• CHAPTER 13. A chapter 13 proceeding is a reorganization for "wage earners". Like a chapter 11, in a chapter 13 the debtor submits a plan to the bankruptcy court to pay creditors all or a portion of their debt over time.

• PREFERENCE. Generally, a "preference" is a late payment made by a debtor to a creditor within 90 days prior to the bankruptcy filing. Subject to certain exceptions, any creditor that receives a "preference" payment must return it to the trustee in the bankruptcy proceedings. One exception is for payments made in the "ordinary course" of the activities of the creditor and debtor. The theory of a "preference" is that a debtor should not be allowed to prefer one creditor over another within a short time before filing bankruptcy. For example, assume a debtor had $10,000 cash and $100,000 of debt. Of the debt, $10,000 was owed to his neighbor for a loan made two years ago which the debtor never paid back, and $90,000 was owed to the credit card company and to various medical providers. Assume further that the debtor decided that before he filed bankruptcy he would repay his neighbor the $10,000 that he owed him. That payment would be considered a "preference" because one creditor (the neighbor who received $10,000) received more than the other creditors (who received $0). As a consequence, the creditor receiving the preference (the neighbor) is required to return the preference payment to the trustee, and then the funds are used to pay expenses in the bankruptcy and the net remaining is re-distributed to the creditors based on their claims.

• EXEMPT PROPERTY. In individual bankruptcy cases, debtors are permitted to keep certain property and are not required to turn it over to the trustee or otherwise have it liquidated or have its value paid out to creditors. In Nebraska, this can include $60,000 of equity in a "homestead," $2,400 of equity in an automobile that is used to drive to and from work, certain values in life insurance or annuity contracts, most retirement plan assets, social security benefits, certain household goods, $2,500 of any property the debtor chooses, and various other values as set forth in the Nebraska statutes.

Bankruptcy proceedings can be complex, time consuming, and expensive. They are many times frustrating for both debtors and

creditors. If you believe you may be involved in a bankruptcy proceeding as either a debtor or a creditor, it is wise to seek legal advice as far in advance of the potential bankruptcy filing as possible, as there may be certain planning opportunities and decisions that could impact how matters are handled in the bankruptcy proceedings if one is ultimately filed. Similarly, if you are involved in a bankruptcy that is filed, you should promptly obtain legal counsel.

Rick D. Lange has practiced with Rembolt Ludtke since 1984. Rick is one of two Lincoln attorneys who is appointed to serve as a panel chapter 7 Bankruptcy Trustee for the United States Bankruptcy Court for the District of Nebraska. Rick was named in 2008 in Best Lawyers in America for Bankruptcy and Creditor-Debtor Rights Law, and is currently Chair of the Bank Attorneys' Section of the Nebraska State Bar Association.

When Convenience Turns to Inconvenience

by Ramzi J. Hynek and Timothy L. Moll

It is not uncommon for individuals, especially older persons, to grant a family member authority to sign checks on his or her behalf. These arrangements are commonly referred to as "for-convenience-only accounts" since the family member is not intended to have any ownership in the account – just to help write checks for the convenience of the account owner. While this type of arrangement can be a convenient way to handle day-to-day financial matters, it can have unintended consequences upon the account owner's death if the account is not set up properly.

If a family member is named only as an authorized signer and not an owner of the account, things generally work out fine. Upon the account owner's death, the account is administered as part of the account owner's general estate. Sometimes, however, the family member is named as a joint owner of the bank account. In this event, upon the death of the primary account owner, the remaining funds may become the property of the surviving joint owner rather than administered as part of the account owner's general estate. This may or may not be what the account owner intended.

The solution is to be careful in how these accounts are set up. If the family member is only to be designated as a *signer* and not an owner, then the account should be set up to clearly designate that the signer is not an owner. Some banks do not recognize the concept of an authorized signer who is not an owner. What then? Luckily, this problem is easily remedied. Generally, a family member can be added to an account as the account owner's agent under a Power of Attorney thereby allowing the agent to sign checks. This agent will not become an owner of the account and upon the death of the account owner the account balance will pass as part of the account owner's estate.

To learn more about "for-convenience-only accounts" or the many other beneficial uses of Powers of Attorney, please contact one of Rembolt Ludtke's estate planning attorneys.

The Death Tax Isn't Dead

by Timothy L. Moll

Since 1916, the federal government has imposed some form of tax upon estates. As a general rule, the estate of a deceased individual is liable for federal estate tax to the extent the value of all the decedent's assets (the "gross estate"), net of debt and other deductions, is more than the applicable exemption amount. For a long time, the exemption amount was around $600,000. Then, in 2001, Congress enacted legislation heralded as the death of the estate tax. A schedule was put in place to increase the exemption amount to $1.5 million, then $2 million, then $3.5 million, and then repeal the estate tax entirely.

As of today, the estate tax exemption is $3.5 million per individual and the estate tax is scheduled to be repealed in 2010. However, the legislation enacted in 2001 "sunsets" after 2010. This means that if Congress does nothing, there will be no estate tax for persons dying in 2010, but then the estate tax system will be resurrected in 2011 with only a $1 million available exemption. The portion of the estate that exceeds the exemption amount would be taxed at rates of up to 55%.

Will that really happen? Probably not. Congress will consider legislation later this year that would continue the federal estate tax in 2010, but with a $3.5 million exemption. President Obama has indicated support for the change and it appears to have broad support in Congress. What will happen in 2011 and later years is less certain. There is some support for making the $3.5 million exemption permanent (in 2011 and beyond) but the budget implications of that change are somewhat harder for Congress to address. There are still those in Congress advocating permanent repeal of the estate tax, but there does not appear to be any reasonable likelihood that the estate tax will be permanently repealed.

What does this mean for you? If you have a gross estate (including life insurance) of $1 million or more, keep an eye on the news this summer. It may be necessary to make some updates to your estate plan to take into account changes in the estate tax law. If you have questions or need to review your estate plan (or do one in the first place), estate planning attorneys at Rembolt Ludtke are ready to assist you.

Corporate Reporting

Biennial reports and any related fees for all limited liability companies and nonprofit corporations, whether foreign or domestic, are due with the Nebraska Secretary of State's office between January 1 and April 1 of each odd-numbered year. Likewise, an annual report is due for all limited liability partnerships between January 1st and April 1st of each year. If your company is registered to do business in other states, please check to see whether a similar filing is due in that state.

If you have not received a report, or wish our assistance in obtaining and preparing the report, please give us a call. **PLEASE NOTE THAT FAILURE TO FILE A REPORT OR PAY THE RELATED FEES BY THE DEADLINE COULD RESULT IN ADMINISTRATIVE DISSOLUTION.**

Municipal Issues At Heart of Recent AG Opinion

by David J. A. Bargen

On January 14, 2009, the Attorney General's Office, in response to a request for an opinion from Senator Mark Christensen of Imperial, concluded in the face of different state statutes on the matter that municipalities and counties may not ban the carrying of concealed handguns everywhere within their jurisdictions.

Since the passage of the Concealed Handgun Permit Act (the "Act") in 2006, some question has remained in how to harmonize other provisions of state law that permit municipalities of all classes to regulate the carrying of concealed weapons. For instance, Neb. Rev. Stat. § 17-556 provides that cities of the second class and villages "shall have power to regulate, prevent and punish the carrying of concealed weapons." Similar authority is given to cities of the metropolitan, primary, first, and village classes. Those statutes were not changed or repealed with the passage of the Act in 2006.

The Act provides at Neb. Rev. Stat. § 69-2441 (1)(a) that a person who has obtained a permit for a concealed handgun pursuant to the Act and its regulations:

> may carry a concealed handgun ***anywhere in Nebraska, except*** any: Police, sheriff, or Nebraska State Patrol station or office; detention facility, prison, or jail; courtroom or building which contains a courtroom; polling place during a bona fide election; meeting of the governing body of a county, public school district, municipality, or other political subdivision; meeting of the Legislature or a committee of the Legislature; financial institution; professional or semiprofessional athletic event; building, grounds, vehicle, or sponsored activity or athletic event of any public, private, denominational, or parochial school or private or public university, college, or community college; place of worship; hospital, emergency room, or trauma center; political rally or fundraiser; establishment having a license issued under the Nebraska Liquor Control Act that derives over one-half of its total income from the sale of alcoholic liquor; place where the possession or carrying of a firearm is prohibited by state or federal law; ***a place or premises where the person, persons, entity, or entities in control of the property or employer in control of the property has prohibited permitholders from carrying concealed handguns into or onto the place or premises***; or ***into or onto any other place or premises where handguns are prohibited by law or rule or regulation***.

The Attorney General Opinion (the "Opinion") relies in part on a theory of "preemption" of state law over local ordinances. This theory is discussed at length in *State ex rel. City of Alma v. Furnas County Farms*, 266 Neb. 558 (2003), wherein the authority granted by statute to municipalities to regulate some aspects of environmental quality close to their jurisdictions was analyzed alongside a general authority granted by statute to the

Upcoming Event

Spring Game Seminar
April 17, 2009
Lincoln, Nebraska

The firm is hosting a **Spring Game Seminar** on Friday, April 17, 2009, in Lincoln, Nebraska. This two-hour afternoon event will focus on the Nebraska Advantage Act, including qualifying investments and tax incentives for businesses under the Act, and will provide essential planning guidance for today's changing market. To receive a formal announcement of this event, email us at springseminar@rembolt ludtke.com. Please include your name, business affiliation (if applicable), and mailing information.

state to regulate environmental quality state-wide. In *City of Alma*, the Court used a theory of "preemption" to consider the different statutory authorities and harmonize them where possible, striking down the authority of the City of Alma only in a narrow instance where the local ordinance directly conflicted with state law.

"while a municipality may prohibit concealed handguns from city-owned parks, buildings, recreation facilities, and arenas, it may not do so on just any public property, such as streets and sidewalks"

The Opinion construed the language of the Act permitting concealed handguns "anywhere in Nebraska" to mean that the Legislature had set forth the "overall policy" of the state, and thus had "occupied the entire field" of concealed weapon regulation, keeping municipalities from legislating in the area where the effect is to prohibit the carrying of concealed handguns by permitholders everywhere in their jurisdictions. The Opinion also concludes that because the Act and those statutes granting municipalities authority to regulate concealed weapons are in conflict, any ordinances passed pursuant to those pre-existing statutes are not valid. The Opinion concludes that municipalities may not prohibit the carrying of concealed handguns everywhere within their jurisdictions.

The Opinion also rejects the notion that municipalities may regulate concealed handguns under the Act's exception regarding "any other place or premises where handguns are prohibited by law or rule or regulation." The Opinion concluded that because the exception does not say "where *concealed* handguns are prohibited by law," and the statutes at issue granting municipalities the authority to regulate weapons grant such authority with regard only to *concealed* weapons, that the exception does not allow municipalities to ban concealed weapons. The Opinion notes that because no statute allows a municipality to ban handguns altogether, this exception in the Act does not apply. The Opinion also states that the phrase "place or premises" refers not to the entire jurisdiction of a municipality, but to discrete places similar to those listed previously in the Act.

The Opinion also takes a narrow view of the Act's exception regarding "a place or premises where the person, persons, entity, or entities in control of the property or employer in control of the property has prohibited permitholders from carrying concealed handguns into or onto the place or premises." The Opinion states that while a municipality may prohibit concealed handguns from city-owned parks, buildings, recreation facilities, and arenas, it may not do so on just any public property, such as streets and sidewalks, citing the Act's broad "anywhere in Nebraska" language, and construing the language of the exception to refer to "distinct properties".

It is important to note that this issue has not been reviewed by the Nebraska Supreme Court or Court of Appeals, and the Opinion is only advisory, and is not legal precedent. No doubt questions remain about the interpretation of the Act and its interplay with pre-existing statutes wherein the Legislature granted municipalities the authority to "regulate, prevent and punish the carrying of concealed weapons." Municipalities should seek careful legal advice regarding how they proceed in matters of concealed weapon regulation.

No RMDs for 2009!

by Timothy L. Moll

Individuals who have tax-deferred retirement accounts get a break from required minimum distributions ("RMDs") in 2009. The RMD rules generally require persons over age 70½ and persons with an inherited retirement plan to withdraw an amount from the account each year and claim that amount as taxable income. The amount that must be withdrawn is based on the account owner's life expectancy.

Recently, Congress enacted new legislation which suspends RMDs for 2009 only. The idea behind the one-year hiatus is to allow investors to conserve the amounts left in their retirement plans after the downturn in the stock market. If you need to withdraw funds from a retirement account, you are free to do so (and include the amount in taxable income), but you also have the option to leave the entire balance in the account in hopes of a market recovery.

The suspension applies to all types of qualified retirement plans, such as 401(k)s, IRAs, and 403(b)s. If you have any questions about the law change, please contact us.

Legislative Bills Impacting Municipalities

by David J. A. Bargen

A number of bills have been introduced throughout the first two weeks of the current Legislative session that will impact municipalities. Below is a short synopsis of those bills:

LB 104, introduced by Senator Cornett, would remove provisions for annexation that are unique to cities of the first class, making annexation by such cities similar to that of cities of the second class and villages. The bill would remove the requirement that prior to considering annexation, the city council of a city of the first class must first adopt a resolution regarding the annexation and a plan for extending city services to the proposed area.

LB 278, introduced by Senator Mello, would amend current state statute that does not allow a person to stand in a roadway for the purpose of soliciting a ride, employment, contributions, or business from occupants of vehicles. The bill would allow any municipality to pass an ordinance allowing pedestrians over 18 years old to enter roadways, except state highways, at specified times and locations and approach vehicles stopped by a traffic control signal to solicit contributions devoted to charitable or community betterment purposes.

LB 336, introduced by Senator Friend, seeks to exempt water supplied by a municipal water supplier from state sales tax.

LB 338, also introduced by Senator Friend, would lower the grass height at which unmowed grass on private property may be declared a public nuisance by a municipality, from twelve inches to six inches.

LB 349, introduced by Senator Lautenbaugh, seeks to limit the grounds for recall of elected officials of, among others, municipalities to malfeasance in office (defined as the knowing and intentional

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commission by a public official of an unlawful or wrongful act in the performance of the duties of the official which infringes on the rights of a person or entity), misfeasance in office (defined as the negligent performance by a public official of the duties of the official or the negligent failure by the official to perform a specific act required of the official), nonfeasance in office (defined as the knowing and intentional failure by a public official to perform a specific act required to be performed by the official), or conviction of a crime involving an act of dishonesty or a false statement. In addition, once a petition for recall has been filed, the official whose recall is sought could seek a determination from the district court regarding whether the petition states sufficient grounds for recall.

LB 430, introduced by Senator Christensen, would provide that municipalities may not regulate the ownership, possession, or transportation of firearms, except as provided by state law, and would declare null and void any such existing ordinances, permits, or regulations.

LB 467, introduced by Senator McCoy, would limit the authority of cities of the metropolitan class to annex adjoining cities of the first class under 10,000 residents and cities of the second class or villages. Such annexations would have to be approved first by a majority of the registered voters of the adjoining city or village.

LB 494, also introduced by Senator McCoy, seeks to amend state statutes regarding dangerous dogs such that an owner of a dog declared dangerous that inflicts injury on a human that includes mutilation or loss of a body part would be guilty of a Class IV felony.

LB 526, introduced by Senator Friend, would allow cities of the first or second class and villages located entirely in the boundaries of a county located immediately adjacent to a county containing a city of the metropolitan class to annex lands that fall entirely within such municipalities' extraterritorial jurisdiction, even if such lands are not contiguous or adjacent to the municipal boundaries. If such annexation would increase the population of the municipality by more than 25 persons, the annexation must first be approved by a majority of the area proposed to be annexed. Attachment of the lands could be accomplished by an existing street or right-of-way.

LB 532, introduced by Senator Price, would grant counties authority to pass ordinances with the same authority that the largest city in such county possesses for passing ordinances. Such "county ordinances" would not be imposed within the boundaries of an incorporated municipality, but would extend into the extraterritorial jurisdiction of such municipalities, for which a municipality could request from the county a waiver of county enforcement authority.

LB 536, introduced by Senator Stuthman, would give cities and counties the authority to create transportation development districts to improve or construct roads, streets, bridges, and related structures, and use a portion of sales tax to fund such projects.

LB 611, introduced by Senator Karpisek, seeks to give municipalities the authority to enact smoking regulations, or put regulations to the vote of the people, that are as stringent as or more stringent than the provisions of the Nebraska Clean Indoor Air Act, or less stringent than the Act as it existed before January 1, 2009.

LB 647, introduced by Senator Christensen, would require cities of the first or second class or villages to provide written notice of a proposed annexation to the owners of property in the area proposed for annexation at least 10 days prior to any consideration by the city's planning commission of such annexation proposal, and again 10 days prior to a city council's public hearing on the matter.

LB 678, introduced by Senator Haar, would amend the Open Meetings Act to provide that minutes of a public meeting may be in written form or may consist of an audio or video recording of the meeting.