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New bankruptcy legislation changes creditors' rights

by Megan G. Heeg

The Bankruptcy Abuse Prevention and Consumer Protection Act, generally effective Oct. 17, 2005, primarily impacts consumer debtors and their attorneys, adding paperwork and increasing their costs. However, the Act also affects creditors in many ways. Changes for consumer creditors include the following:

Automatic stay not always automatic. Depending upon the facts, the bankruptcy court's automatic stay is no longer automatic. For example, there are limits on the automatic stay for serial filers, for debtors who fail to timely file and perform their statement of intention concerning secured consumer debt, for landlords who obtain a judgment for possession of residential real estate before the bankruptcy filing and for creditors possessing a security interest in real estate that obtained relief from a stay in a prior bankruptcy case under certain grounds.

Reaffirmation agreements require additional disclosures. The creditor must include specific additional information in any reaffirmation agreement, including the total amount reaffirmed (including fees and costs accruing up to the date of disclosure), the annual percentage rate and the identity of the property subject to the reaffirmation agreement. The agreement also must disclose the debtor's income and other monthly expenses and, if this disclosure establishes that the remaining income is insufficient to make the required payments, the agreement will be presumed to pose an undue hardship on the debtor, a presumption that must be overcome to the satisfaction of the court before the agreement can be effective.

Certain creditors subject to claim reduction. A debtor can ask a court to reduce a creditor's unsecured claim by not more than 20% if the creditor unreasonably refused to negotiate a reasonable alternative repayment schedule proposed by an approved nonprofit budget and credit counseling agency if the offer was made at least 60 days before the bankruptcy filing and if the offer provided for

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Inside

Supreme Court clarifies rules for donning, doffing required protective gear

by Douglas E. Lee

The U.S. Supreme Court on Nov. 8, 2005, clarified when an employee's workday - and thus the employer's obligation to pay wages - begins and ends.

In *Tum v. Barber Foods* and *IBP, Inc. v. Alvarez,* the Court attempted to better define when employees must be compensated for donning and doffing required protective gear and for wait and walking time associated with the beginning and end of the workday.

In *Tum,* the Court held that time spent waiting before donning and after doffing required protective gear is not compensable, as it "always comfortably qualif[ies] as a 'preliminary' activity" excluded from coverage under the Fair Labor Standards Act. In *Alvarez,* however, the Court held that time spent actually donning and doffing required protective gear is compensable under the FLSA because the donning and doffing is "integral and indispensable" to the employees' jobs and therefore a "principal activity" compensable under the FLSA.

In both cases, the Court held that the time spent walking between the production floor and the locker rooms in which the gear is stored is compensable, on the grounds that such time also is integral to the employees' jobs.

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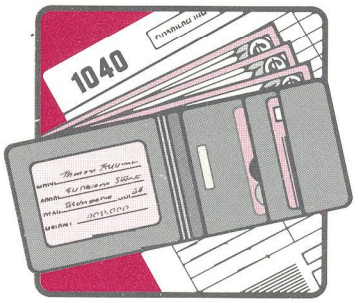
Tax changes highlight year-end roundup

by Gary R. Gehlbach

As we approach a new year, we look forward to reports from the Internal Revenue Service about changes in the standard mileage rate, the annual gift tax exclusion, the special use valuation rate (which, incidentally, plays a role in farmland assessed valuations) and other minutiae. In this issue we have some early answers and projections. We also feature some statistics on land prices in Illinois and other miscellany.

Standard mileage rates. You may not have noticed, but fuel prices have risen a little of late. The IRS noticed and, in a move that surprised many, adjusted the standard mileage rates for September through December 2005. The business use rate for these months was $0.485, an increase from $0.405, and the rate for medical or moving use was $0.22, an increase from $0.15. However, for 2006 these rates have been redeced to $0.445 and $0.18, respectively. The rate for charitable use, $0.14, is unchanged.

Gift tax annual exclusion. The gift tax annual exclusion will rise to $12,000 in 2006. This exclusion has been $11,000 since 2002. Note that this exclusion only applies to gifts of present interests. Note also that a retained interest likely will prevent a gift from being completed for purposes of applying the annual exclusion.



Special use valuation. For persons dying in 2005, the special use valuation rate is 6.44% for residents of Illinois. This rate, which is a five-year average, is the denominator or capitalization rate in calculating the special use value of qualifying real property (the numerator being the five-year average of cash rents of comparable farmland less the five-year average real estate taxes for such comparable land).

Farmland assessments. Interestingly, the assessed value of farmland in Illinois is based on a generic formula that equates value with the net income divided by a rate of return, or the income capitalization formula. Of course, it's a little more complicated. The formula is actually applied to each of the approximately 800 soil types identified in Illinois. The numerator is the gross income per acre for the particular soil type, less the non-land cost per acre for that soil type. The data used to generate the agricultural economic value for each soil type are compiled, and the actual generation of the data is calculated, by the University of Illinois Department of Agriculture under a contract with the State of Illinois Department of Revenue.

This formula lags behind current data. For example, for real estate taxes payable in 2006, data from 1999-2003 are used to derive the agricultural economic values. Calculations thus were made in 2004 to determine the 2005 assessed values for taxes payable in 2006.

Perhaps surprising for many of us is the fact that farmland accounts for less than 4% of all assessed values in Illinois. Note that the rather favorable assessed value formula for farmland should apply regardless of how the farmland is zoned. The key criterion is how the land is used.

Farmland values. The Illinois Society of Professional Farm Managers and Rural Appraisers, in its "2005 Illinois Farmland Values and Lease Trends" publication, states that "Illinois farmland values in general rose 20 percent last year." In Northeast Illinois the figure was 18%, due in significant part to tax-deferred exchanges. In Northwest Illinois the increase was 15-20%, again fueled by §1031 exchanges. Perhaps most surprisingly, the increase in Western Illinois was 22-29%, with local farmers being the "successful buyers," according to this report.

The Kelo case. On June 23, a divided U.S. Supreme Court decided *Kelo v. City of New London,* which involves the scope of the Fifth Amendment to the U.S. Constitution. The Fifth Amendment states in part that private property shall not "be taken for public use, without just compensation" (the "takings" clause).

The City of New London, Conn., suffering from "decades of economic decline," was designated by a state agency as a "distressed municipality." The future of the city looked promising, however, when, in February 1998, a pharmaceutical company announced plans to build a $300 million research facility in the area. The New London Development Corporation, which had been created by the city earlier to aid in economic revitalization, began acquiring real estate for the project. When some owners refused to sell their property, the Development Corporation initiated condemnation proceedings.

The owners resisted, arguing that the taking of their property - which was for a private company - was not for a public use and therefore violated the takings clause.

The Court, however, held that "[t]he disposition of this case turns on the question of whether the City's development plan serves a 'public purpose,'" thus equating "public purpose" with "public use." After a detailed analysis of the facts and with the question framed this way, the Court found the existence of a public purpose and therefore found in favor of the City.

In contrast to this case is a fairly recent decision of the Illinois Supreme Court. In its decision, the Illinois Supreme Court held that the condemnation of private property that was then conveyed to a private company for use as a parking lot violated the Illinois and U.S. Constitutions. "Public use," according to the Illinois Supreme Court, requires that the use for which the property is taken must be public, not private.

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payment of at least 60% of the amount of the debt over the loan period or a reasonable extension.

Creditors can obtain a debtor's tax returns or payment advices. Creditors can request a copy of a debtor's most recent federal income tax return or transcript of the return (at the debtor's option), and if the debtor fails to provide the document, the case can be dismissed. Creditors also can request a copy of a debtor's pay stubs and other income statements received within 60 days before the bankruptcy.

Although the main purpose of the Act's amendments is to reduce bankruptcy abuse and to protect consumers, the Act's revisions require consumer creditors to be cognizant of their new rights and duties in order to minimize their losses resulting from a consumer bankruptcy.

Increased exemption will allow many to simplify estate plans

by Gary R. Gehlbach

Beginning Jan. 1, 2006, the federal and Illinois exemption from estate tax increases to $2 million. Thus, even fewer people will require estate tax planning. The vast majority of estate plans that were prepared several years ago that included estate tax planning therefore probably should be revised. The complexity involved with estate tax planning that is no longer needed can, in most instances, be significantly simplified.

Estate tax planning today focuses on two distinct requirements. The first is whether federal and Illinois estate tax returns are even required to be filed upon a person's death. For persons dying in 2006, the gross taxable estate generally must exceed $2 million before returns are required to be filed. The second test is whether any estate tax is payable.

The gross taxable estate, perhaps surprisingly to many, is quite comprehensive and literally includes the value of all assets owned by the decedent or in which the decedent had an interest at the time of his or her death, and even the value of some assets in which the decedent had an interest within three years prior to his or her death. This includes, for example, the death value of all life insurance on the decedent's life if the decedent had an interest in the life insurance policy or transferred an interest in the life insurance policy within three years of death.

Moreover, it is possible to have used some of the estate tax exemption during one's lifetime. For example, making a gift during one's lifetime in excess of the annual gift tax exclusion results in the use of a portion of the estate tax exclusion. In addition, any gift during a donor's lifetime that is characterized as a gift of a future interest also uses some of the estate tax exclusion.

For married couples, the threshold analysis is whether the gross taxable estate of both spouses exceeds the estate tax exclusion amount. The reason for this is simple. In a typical estate plan without any estate tax planning, upon the death of the first spouse all assets in which that spouse had an interest pass to the surviving spouse. The surviving spouse's estate must then be measured to determine whether there is any estate tax implication.

Even if a determination is made that federal and Illinois estate tax returns are required to be filed, this does not mean an estate tax will be owed. Estate tax is generally paid on the net taxable estate, which is the gross taxable estate less eligible deductions. The most significant deduction for married couples upon the death of the first spouse is the marital deduction, which is unlimited. This is a deduction for the value of assets left to the surviving spouse.

Another significant change in estate tax planning is looming. Although there have been differences between the Illinois and the federal estate tax, the exemption amount is and has always been the same. Therefore, historical estate tax planning did not distinguish between the Illinois estate tax and the federal estate tax, at least for Illinois residents.

This is likely to change quickly. Under the current federal estate tax law, the federal exemption is slated to increase to $3.5 million on Jan. 1, 2009, while the Illinois exemption would remain $2 million. In addition, it is certainly possible that Congress will increase the federal estate tax exemption even prior to 2009.

For those estates with potential federal or Illinois estate tax consequences, the distinction between the Illinois and federal estate tax exemptions may be significant. A new type of planning is warranted, and all estate plans with potential estate tax consequences should be reviewed and modified accordingly.

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Employers who in the past have asserted that the time their employees spend donning and doffing protective gear is *de minimis* and therefore not compensable still might be able to successfully make that argument. Employers relying on the *de minimis* exception, however, should consult with counsel to ensure the Court's decisions do not render the exception inapplicable in their circumstances.

Litigation threats require e-mail retention policy

by Rolfe Ehrmann

At home, many of us follow a simple clean-up policy: "When in doubt, throw it out." At the office, however, the law requires us to follow the opposite policy: "If you throw it out, it will be used against you as legal doubt."

Everything in business requires current documentation, but legal processes often don't arise until long after the business at hand has been concluded. Therefore, a document retention policy is legally essential. From a trial lawyer's perspective, documents must be retained in order to comply with state and federal laws and regulations, support the client's position and reduce the costs of litigation.

E-mails also are documents and must be treated as such in a company's document retention policy.

E-mail is subject to discovery in litigation, and the failure of a business to produce e-mails can result in court-imposed sanctions, including an instruction that jurors should assume a missing e-mail would have established the company's liability.

E-mails have obvious relevance in establishing compliance with federal and state rules and regulations and often will contain critical evidence establishing compliance with or breach of contract or other business duty. In one of our cases, a corporation that had brought a lawsuit against one of our clients was unable to establish its case because of gaps in the thread of its e-mail. These missing e-mails created legal doubt against the corporation.

An important part of a meaningful e-mail retention policy is the ease with which e-mails can be stored, searched and retrieved. A company choosing an e-mail program therefore should ensure the program is capable of searching stored e-mails by subject, date, text or other relevant information. A company also should remember to back up e-mails when it back ups its other data.

Any company adopting and following a comprehensive document and e-mail retention policy will find it can both reduce litigation costs and sue or defend with high confidence that no gaps will be found in the thread of its e-mail.

In Print and At the Podium

Mr. Lee was quoted in a National Public Radio broadcast about reporters' use of confidential sources. **Mr. Lee** also was interviewed by reporters from *USA Today* and the *Hollywood Reporter* for stories about potential nominees to the U.S. Supreme Court . . . **Mrs. Heeg** will continue her service as a member of the Legislative Committee of the Illinois Association of Mutual Insurance Companies, which reviews and determines the Association's position on legislation affecting mutual insurance companies . . . The Illinois State Bar Association's *Real Property* newsletter recently included an article by **Mr. Gehlbach** on the U.S. Supreme Court's 2005 decision on the power of governments to take private property, *Kelo v. City of New London, Conn.* . . . In his most recent commentary for the web site of the First Amendment Center, www.firstamendmentcenter.org, **Mr. Lee** discussed the decisions of two foreign courts hearing libel claims brought against U.S. media companies and reporters . . . **Mr. Gehlbach**, a member of the National Academy of Elder Law Attorneys, and **Mr. Badger** recently attended the Illinois Institute of Continuing Legal Education's two-day Elder Law Seminar . . . **Mr. Ehrmann** was a featured speaker at a meeting of Grandparents as Parents, a support group for grandparents raising their grandchildren that is co-sponsored by Dixon Public Schools and Open Sesame Child Care Center . . . **Mrs. Considine** was volunteer in charge of collecting donations from attorneys for the United Way of Lee County and helped that division reach its fundraising goal.

Deals and Decisions

In a transaction so complex that the City of Rockford retained counsel from outside Illinois, **Mr. Gehlbach** represented clients selling real estate to the City of Rockford for the development of a Lowe's distribution center . . . **Mr. Badger** is representing a number of clients considering options and leases being offered by the developers of local wind farms . . . In separate bankruptcy cases, **Mrs. Heeg** assisted bankruptcy estates in collecting and liquidating assets for the benefit of creditors, with creditors receiving a 79% distribution in one case and a 52% distribution in the other . . . **Mr. Lee** represented a person injured in a slip-and-fall accident that resulted in the only personal injury jury trial this year in Lee County. The case, however, was not decided by the jury, as the parties reached a settlement during the trial . . . **Mr. Badger** recently has worked with several clients in developing innovative farm leases that address the needs of both farmers and landlords in the current farming environment . . . On behalf of a client injured at work, **Mrs. Heeg** successfully resisted an employer's efforts to dismiss a worker's compensation claim . . . **Mr. Lee** represented a local company in a merger that resulted in a significant increase in the size and geographic reach of the client's business.