CECB Carnahan, Evans, Cantwell & Brown, P.C.

on the Subject

December 2010

Meet Our New Attorney: Richard B. Maltby

Carnahan, Evans, Cantwell & Brown is excited to announce Richard B. Maltby joined the firm in September of this year. Rich joins the firm as an associate in the Litigation Practice Group and concentrates his practice in the areas of construction, architectural, engineering and development law, civil and business litigation, real estate litigation, and alternative dispute resolution.

Rich has substantial experience handling all aspects of the construction, design and development process, including bidding, contract negotiation, project management, and claims resolution. His representation has included many major owners, developers, contractors, subcontractors, suppliers, design professionals, and lenders throughout Missouri, the Midwest, and the U.S. He has also represented clients in a variety of related real estate disputes such as mortgage and mechanic's lien foreclosures, leases, title insurance claims, quiet title, slander of title, and property risk cases such as mold exposure and building accessibility laws.

Rich's vast experience in business litigation includes cases involving fraud and fiduciary duty claims, brokerage commissions, U.C.C. warranties, insurance coverage, corporate restructuring issues, stock valuation, trade practices statutes, promissory notes, and personal guaranties. Rich is also experienced with the latest electronic discovery rules, which positions him well to counsel clients on records retention and related electronic data issues.

Rich has litigated in state and federal courts and argued at the appellate level. But he also has very unique experience in alternative dispute resolution, having successfully served as a lead lawyer in two of the largest arbitrations in the state of Missouri. These cases combined to consume more than 6 years of arbitration, including months of hearings and related judicial proceedings. He served vital roles in every aspect of these cases.

Mechanic's Liens: Missouri Gives New Meaning to Advance Notice

by Richard B. Maltby

Missouri has amended its mechanic's lien laws introducing unique pre-lien notice requirements for owners and lien claimants which are novel in Missouri. In fact, these pre-lien notice requirements are unlike any other state and therefore untested in their operation and effect on construction projects. The new statute applies to essentially all residential construction, except remodeling of owner-occupied property of four units or less, and impacts all residential closings on or after November 1, 2010.

Owners (usually the developer) must generally do the following under the new law:

- Record with the recorder of deeds a Notice of Intended Sale no less than 45 days prior to the earliest date the owner intends to close on the sale of the property.
- State in the Notice of Intended Sale the date on which the owner intends to close.
- Post the notice "at any jobsite office located at or near the subject property."
- If requested by the lien claimant, provide the claimant with a copy of the Notice of Intended Sale and a copy of the legal description within five days of receipt of the request.

Lien claimants have additional requirements which generally are as follows:

- Record a Notice of Rights in accordance with the form approved by the statute, which notice must be recorded not less than five days prior to the intended date of closing stated in the Notice of Intended Sale from the owner. This obligation is conditioned upon the owner's recordation of the Notice of Intended Sale.
- In its Notice of Rights, the lien claimant may identify others with whom it is contracting, but if the claimant does so, the claimant must identify them properly or risk waiving lien rights.

The most critical part of the new pre-lien notice requirements is its consequences for a claimant failing to follow it. A claimant who does not record a Notice of Rights when the duty exists will be deemed to have waived any right to assert a mechanic's lien against the property. The new law appears to be a response to the economic downturn and the flood of mechanic's liens on residential properties in recent years. While the Notice of Intended Sale and Notice of Rights increase responsibilities prior to lien filing, it appears that the statute is intended to act as a preventative measure. Conceptually, payment issues for all parties performing work on a project may be more fully addressed earlier in the funding process since those involved in the project financing will have a better understanding of what first, second and third tier contracting parties are involved in the project, rather than finding out about these parties at or near the time the lien is filed and often after funds have already been advanced by the lender.

However, there are many kinks to work out given some lack of clarity in the way it is drafted and given that it is so different from other states that Missouri will be unable to draw from other jurisdictions for guidance. While it is advisable to obtain and thoroughly review a complete copy of the new statute, the statute raises some of the following questions:

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Making Taxable Gifts in 2010

by Thomas D. Peebles, Jr.

As calendar year 2010 draws to a close, we again recommend that our high net worth clients consider making taxable gifts to children and grandchildren. Making gifts beyond the gift tax exemption and paying gift tax is often the lowest cost technique for transferring wealth to succeeding generations. This is particularly true for taxable gifts made in calendar year 2010.

Clients and their advisors are generally reluctant to trigger a taxable gift. After all, no one likes to pay taxes that they could postpone. But in calendar year 2010 – and only in 2010 – the federal gift tax rate has been reduced to 35%. Unless Congress acts before the end of the year, the scheduled sunset of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) will occur. As a result, beginning on January 1, 2011, taxable gifts will again be subject to a tax rate of as high as 55%. If clients are willing and able to do so, making a taxable gift to children in 2010 will remove the value of the gifted assets from their estates at a 35% tax rate and avoid a 55% tax rate when those assets pass to the children at the client's death (a 20% tax savings).

Taxable gifts to grandchildren in 2010 offer additional advantages. Generally, gifts to grandchildren are subject not only to a gift tax, but also to an additional layer of tax called the generation skipping transfer tax (GST tax). For transfers occurring in 2010, however, the GST tax has been repealed. If EGTRRA sunsets as scheduled, the GST tax will be reinstated on January 1, 2011, at a tax rate of 55% and a relatively low exemption amount ($1,060,000). The result is that gifts to grandchildren above the exemption amounts in 2010 will be taxed at a rate of "only" 35%, but gifts to grandchildren above the exemption amount in 2011 will be subject both to a 55% gift tax and a 55% GST tax.

At this writing, there is no clear indication of what Congress will do with federal estate, gift and GST taxes. If Congress extends the current tax provisions, there is no urgency in making gifts. If, however, Congress does not act and allows EGTRRA to sunset as scheduled, then now is the time to consummate taxable gifts to children and grandchildren.

Time is short. If you would like to discuss completing gifts to children and grandchildren in 2010, please contact any member of our Estate Planning Practice Group team. ■

Incorporating Charitable Lead Annuity Trusts Into Your Estate Plan

Thomas D. Peebles

Emily J. Kembell

by Thomas D. Peebles, Jr and Emily J. Kembell

In recent articles, we have identified the tax advantages to be obtained through the use of Grantor Retained Annuity Trusts, or "GRAT's". With interest rates at record lows, GRAT's are a very effective estate planning technique for transferring wealth to next generation beneficiaries without incurring any (or very little) transfer tax. For those clients who are charitably inclined, a Charitable Lead Annuity Trust, or "CLAT," is also an excellent estate planning technique to consider when interest rates are low and asset values have depreciated.

Similar to a GRAT, a CLAT requires annuity payments to be made for a certain period of time (usually a term of years); however, unlike a GRAT, the CLAT annuity payment is made to a charity or charities instead of to the Grantor. At the end of the annuity term, the assets remaining in the CLAT are distributed to non-charitable beneficiaries, usually the Grantor's children or grandchildren. The lead interest qualifies for the gift tax charitable deduction, but the remainder interest is a taxable gift whose value is determined at the time the CLAT is established.

To value the taxable remainder interest of a CLAT, the IRS assumed rate of growth (the "Section 7520 rate") is used. Currently, the Section 7520 rate is very low – 1.8%. This means that if the assets transferred to the CLAT appreciate at an annual rate greater than 1.8% over the annuity term, then the actual value of the remainder interest transferred to the children/grandchildren will be higher than the value of the remainder interest used for gift tax purposes. The difference between the actual value of the remainder interest transferred to descendants over the gift tax value is, in effect, a tax-free transfer. The currently low Section 7520 rate, coupled with the depressed value of assets, allows clients to utilize this technique with a greater chance of success now than in the past.

A second advantage associated with CLAT's is the ability to avoid paying income tax on assets transferred to the CLAT. Therefore, not only are clients able to avoid or minimize gift tax, but CLAT's allow clients to decrease their income tax liability as well.

When considering whether a CLAT is an appropriate estate planning technique, clients should be aware that, for the annuity term, a charity or charities will receive the distributions from the trust, and, if the assets do not appreciate as expected, there may be nothing left for descendants at the end of the annuity term. Additionally, the administration of a CLAT requires the Trustee to abide by many IRS rules, some of which are dependent upon the type of charity that is receiving the annuity payment. If these rules are not followed, an excise tax could be triggered.

If you would like to discuss the potential use of CLAT's in your particular circumstances, please contact a member of the CECB Estate Planning Practice Group. ■

Mechanic's Leins

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- What notice requirements must be met if the owner does not intend to sell the residential property?
- Will the claimant waive its lien rights if its Notice of Rights improperly identifies parties with whom it has contracted?
- What is meant by "at any jobsite at or near the subject property" for posting the Notice of Intended Sale and at what point in time must the owner post this notice?
- If the claimant's Notice of Rights provides inaccurate information that actually originated from the owner, will the claimant forfeit lien rights?
- What is meant by "commercially reasonable means" as it pertains to the owner's obligation to transmit information to the claimant?

All of these issues will likely be addressed by the courts in years to come.

In addition to the pre-lien notice requirements, the new statute introduces many other significant changes which should not be overlooked ranging from the definition of a just and true account, to slander of title, to bonding over liens, each of which deserves its own separate discussion. Now is the time to update lien forms and develop and implement protocols that will minimize confusion and frustration later. Please feel free to contact a member of the Carnahan, Evans, Cantwell & Brown, P.C. Litigation Practice Group to discuss any questions you may have about these new laws, which will have an immediate impact on residential projects in Missouri. ■

Ric Ashe Forces IRS to Return Seized Property to Rightful Owner

Ric Ashe of our office recently won an interesting and difficult case in federal court against the U.S. government. The case began when the Internal Revenue Service (IRS) wrongfully seized a rare and valuable 1969 Dodge Charger belonging to our client. As stated by the Court in its written judgment, the case had more than "its share of innuendo and intrigue."

The IRS seized the car from a classic car museum and consignment shop, where the car was for sale for nearly $850,000.00. The car was taken to the consignment shop by our client's son, who was the real target of the IRS' seizure efforts.

The IRS knew our client's son had a history of buying and selling classic cars, so when they got a tip that he delivered a 1969 Dodge Charger to the consignment shop, they quickly checked car title records at the Missouri DMV and confirmed that our client's son was the title owner of a 1969 Dodge Charger. The IRS then obtained an order from the Court allowing them to seize the son's car, loaded up several IRS agents into black SUV's and headed to the consignment shop to get the car.

Upon their arrival at the consignment shop, the IRS discovered the VIN number for the 1969 Dodge Charger located at the consignment shop did not match the VIN number of the 1969 Dodge Charger titled in the son's name. No matter. The IRS simply crossed out the "wrong" VIN number on their paperwork, hand-wrote in the "correct" VIN number, and left with the car.

At first, both our client and our firm believed the matter could be resolved without delay. After all, the IRS seized a car with a VIN number that did not match the VIN number of the car they intended to seize. Proving this fact, however, would be considerably more difficult.

No title was ever issued to our client for the car. We had no bill of sale, receipt or other documentation of the sale. Insurance had never been obtained for the car, and we could not show that sales taxes or property taxes had been paid in connection with the car. Worse yet, we did not have our most important witness available to testify. Our client's husband of 50-plus years- the man who purchased the car- passed away just six weeks prior to the seizure.

The only significant documentation we had concerning the purchase of the car was a withdrawal slip showing that our client's late husband withdrew a large amount of cash from the family bank account approximately one month before the purchase, and a deposit slip showing that he deposited a lesser amount into same bank account within a few days following his purchase of the car. The difference between the withdrawal slip and the deposit slip was the same amount that the parties agreed had been paid for the car, in cash, six years prior.

The person who sold the car to our client's husband did not agree to cooperate at trial and, thus, the only eyewitness to the transaction available to testify about the car purchase was our client's son, the alleged tax debtor.

On one hand, our client's son made a great witness because he had located the car on his parents' behalf, traveled with his father to Wisconsin to view the car, inspected the car, determined its value and negotiated the purchase price with the seller. He also transported the car to his home for storage, where he primarily kept the car for his parents from the day it arrived in Missouri until the day he took it to the consignment shop. In short, he knew the facts as well as anyone.

On the other hand, our client's son had an uneven history with the IRS that made him an easy target for opposing counsel, an experienced trial attorney with the U.S. Department of Justice in Washington, D.C. On cross-examination, the government's attorney relentlessly tried to paint the son as an anti-tax radical who had convinced his own mother to lie on his behalf to prevent the IRS from seizing his car. Further, from the perspective of the IRS, the son's extensive role in purchasing the car only confirmed its theory that the son was the real owner of the car.

In the end, however, the bank records proved irrefutable, our client's son withstood cross-examination, and our client did what she needed to do-she gave the Court a big picture view of the facts that tied the vague and mysterious details of her ownership of the car together.

The car has now been returned to our client. ■

CECB Strives to Move Toward Being Paperless

CECB is going "green" or "paperless" by using more electronic delivery and storage of documents. We know that for the near term this means "less paper", and we will not completely eliminate paper, but increased use of electronic documents offers many advantages for both us and our clients.

"Paperless" saves trees, avoids paper manufacturing, decreases required landfill space, and save fuel and other resources used for physical delivery, all resulting in a reduction in creation of greenhouse gases. It also helps us to operate more efficiently and serve clients better by speeding delivery, making it easier and quicker to track and locate documents and files, and reduces delivery and storage costs, saving money.

For example, if we have a document stored electronically rather than having to locate it in a paper file we can often e-mail it to you while we are talking on the phone rather than mailing a copy later. Or, we can send corporate annual report or annual meeting checklists to you in electronic format that you can complete on your computer and e-mail back without having to print them out and mail back.

If this works for you, let us know and we can begin minimizing the paper documents we send to you and deliver them electronically instead. Our checklists for annual reports and annual meeting minutes/actions include checkboxes for you to indicate you want future checklists sent electronically, and a blank for you to provide the e-mail address you want it sent to. To receive our newsletter sent electronically, just e-mail newsletter@cecb.com, or the current and prior newsletters are available on our web site, www.cecb.com.

For Your Convenience...

Please feel free to utilize our wireless high-speed internet capabilities when visiting our Springfield office. Using your own personal laptop, you can connect to the internet in any of our conference rooms or in our reception area.

8 CECB Attorneys Were Selected for Inclusion in 2010 Missouri-Kansas Super Lawyers® and Rising Stars Lists

Selected for Inclusion on the List of Super Lawyers®

Each year, *Law & Politics* Magazine invites lawyers in each state to nominate top Missouri and Kansas lawyers, they've personally observed in action. Research is then conducted on each candidate dividing them into practice areas. A panel of preeminent peers in each practice area then evaluates each candidate. From the original pool of candidates, only 5 percent of Missouri and Kansas attorneys are selected for inclusion in Super Lawyers.

The Rising Stars selection process is similar to that of the Super Lawyers but those eligible to be a Rising Stars must be either 40 years old or younger or in practice for ten years or less and they do not go through the peer evaluation by practice area. From the pool of candidates no more than 2.5 percent are named to the Rising Stars list.

While we feel all of our attorneys at CECB are *super lawyers and rising stars*, here are the six included by *Law & Politics* to the 2010 *Super Lawyers* list and the two included to the 2010 *Rising Stars* list.

John M. Carnahan III is a shareholder in the Transactional and Estate Planning Practice Groups of Carnahan, Evans, Cantwell & Brown, P.C. He concentrates his practice in the areas of tax planning, corporate transactions, estate planning, and business succession planning for family-owned businesses. Mr. Carnahan has been awarded an AV Rating by Martindale-Hubbell.

Mr. Carnahan has served as author and editor for the Missouri Law Review, The Journal of S Corporations and The Tax Lawyer.

Mr. Carnahan received his bachelor's degree from Southwest Missouri State University in 1971 and his law degree, cum laude, in 1974 from the University of Missouri where he was a Law Review Editor, member of the National Moot Court Team and Order of Coif and his LL.M. in Taxation from the University of Miami in 1975.

Mr. Carnahan is also a member of the Springfield Metropolitan and American (Member, Sections on: Taxation, Business Law, and Real Property, Probate and Trust Law) Bar Associations, as well as The Missouri Bar (Chairman, Taxation Committee, 1984-1985). He is a Fellow of the American College of Tax Counsel, the American Bar Foundation, the Missouri Bar Foundation, and has been active in Bar Association activities involving continuing legal education. He has server as a member of the Board of Curators of the University of Missouri System since 2005. Mr. Carnahan has been included on the Missouri Kansas "Super Lawyers" list published by *Law and Politics* magazine since 2006.

William E. Evans is a shareholder in the Transactional Practice Group of Carnahan, Evans, Cantwell & Brown, P.C. He concentrates his practice in the areas of taxation, corporations, real estate, business, and employer/employee law. He has been awarded an AV Rating by Martindale-Hubbell [highest rating possible].

Mr. Evans has significant experience in mergers and acquisitions, tax free like-kind exchanges of real estate, and the formation and planning of limited partnerships, limited liability companies, and corporations and has served for over 20 years as a CLE instructor in taxation for the Missouri Bar, Missouri Association of Tax Practitioners, and other CLE providers.

From July of 2003 to July of 2006, Mr. Evans was Legal Advisor to the International Brotherhood of Magicians, a not-for-profit organization consisting of over 12,000 amateur and professional magicians worldwide. Mr. Evans currently is a Member of the Board of Trustees and Chairman of the Grievance Committee.

Mr. Evans received his bachelor's degree from Southern Methodist University in 1974 and his law degree in 1977 from the University of Missouri where he was a member of the Law Review. In 1980, Mr. Evans received his LL.M. in Taxation from Southern Methodist University.

Mr. Evans is a fellow in the American College of Tax Counsel, an elite group of only 700 tax lawyers in private practice, in law school teaching positions and in government, who are recognized for their excellence in tax practice and for their substantial contributions and commitment to the profession.

Clifford S. Brown is a shareholder in the Estate Planning Practice Group of Carnahan, Evans, Cantwell & Brown, P.C. He concentrates his practice in the areas of estate planning, probate, and trust litigation, and related tax matters.

Mr. Brown earned his B.S., with honors, in Political Science and his J.D. from the University of Missouri - Columbia School of Law in 1965 and 1968, respectively. He has served as an educator and speaker on behalf of the Supreme Court of the State of Missouri, the Missouri Bar Association, the University of Missouri - Columbia School of Law, and other organizations in providing continuing legal education to members of the legal profession.

Mr. Brown is listed in Who's Who in American Law, as well as The Best Lawyers in America. Mr. Brown has also been selected to the Missouri Kansas "Super Lawyers" list since 2006. Mr. Brown served as the 84th President of the Springfield Metropolitan Bar Association in 2006. In September 2003, he was appointed to the Board of Law Examiners by the Supreme Court. In 1991, Mr. Brown was elected as a Fellow of the American College of Trust and Estate Counsel. Mr. Brown's community involvement includes serving on the Board of Directors of the Burrell Center and the Community Foundation of the Ozarks.

Chip Sheppard is a shareholder and Chairman of the Litigation Practice Group of Carnahan, Evans, Cantwell & Brown, P.C. He concentrates his practice in the areas of real estate, business, securities and intellectual property litigation, dispute resolution and transactions. Mr. Sheppard has tried a combined total of more than 50 business and financial dispute arbitrations, state and federal trials, both jury and non-jury. Other areas of concentration are various business transactions, acquisitions and real estate development.

Mr. Sheppard received his law degree, as an E. Eugene Mason Endowed Scholar, in 1983 from Southern Methodist University. He is a

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Super Lawyers

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board member of the Springfield Metropolitan Bar Association, Chairman of the Non-Partisan Court Plan Committee, member of the American Bar Association, the Missouri Bar, the Public Investors Arbitration Bar Association.

In 2005 he was elected as a Fellow of the American Bar Association, an honor bestowed upon less than .5 percent of the Bar and has been selected multiple times for inclusion on the "Super Lawyers" list by Law & Politics Magazine (top 5% according to peer review) in the areas of securities, litigation and business litigation and has been named to the "Best Lawyers in America" list by the publication of the same name. In 2008, he Co-Chaired the Greene Countians for Fair and Impartial Judges, was a finalist for Missouri Lawyer of the Year and received the Missouri Bar Association and Springfield Metropolitan Bar Association 2008 President's Awards in recognition of extraordinary service to those Associations and the legal profession.

Thomas D. Peebles, Jr. is a shareholder and member of the Estate Planning Practice Group of Carnahan, Evans, Cantwell & Brown, P.C. Mr. Peebles has concentrated his practice in estate planning and estate and trust administration matters since 1980.

Mr. Peebles has significant experience in the preparation of basic and sophisticated estate planning documents, and in wealth transfer planning for high net worth clients, closely held business owners and their families. He has been awarded an AV Rating from Martindale-Hubbell in recognition of his preeminent work in assisting his clients in achieving their estate planning goals and objectives. In 2004, Mr. Peebles was elected a Fellow of The American College of Trust and Estate Counsel in recognition of distinguished service in the practice of estate planning, probate and trust law.

Mr. Peebles was honored in 2010 and 2011 by being named to the "Best Lawyers in America" list and has also been named on multiple occasions to the Missouri-Kansas "Super Lawyer's" list by Law & Politics Magazine, honoring him as one of the top 5% of practicing attorneys in Missouri and Kansas. In 2007, Mr. Peebles was elected by his peers as a Fellow in the American Bar Foundation. Membership as a Fellow in the American Bar Foundation is limited to one-third of one percent of the lawyers in America and is in recognition of a lawyer whose professional, public and private career has demonstrated outstanding dedication to the welfare of the community and to the traditions of the profession.

Mr. Peebles has, over the years, devoted a substantial amount of his time towards civic and charitable activities including the Community Foundation of the Ozarks, the Foundation for the Springfield Public Schools and the Springfield-Greene County Library Foundation. Mr. Peebles was recognized as one of ten "Volunteers of the Year" as part of the 2004 Gift of Time Awards sponsored by the Council of Churches of the Ozarks.

John E. Price is a shareholder in the Litigation Practice Group of Carnahan, Evans, Cantwell & Brown, P.C., concentrating in civil and business litigation, environmental law, corporate and real estate law and appellate practice.

Mr. Price has wide experience in environmental law over the last 30 years. He has handled litigation under the Clean Air Act, Clean Water Act, Superfund and toxic torts. He regularly advises clients on environmental regulation, permitting and real estate transactions.

Mr. Price also has much experience with large, complex real estate and business transactions, and with commercial litigation involving leases, contracts and insurance disputes. He has argued over 75 appeals in federal and state appellate courts. Mr. Price has served on the Boards of the Wilson's Creek National Battlefield Foundation, the Visiting Nurse Association, and Project Parkway in Springfield. Additionally, Mr. Price is currently serving a two-year term as President of the Springfield Sister Cities Association Board of Directors.

Mr. Price received his B.A. from the University of Northern Iowa, with honors, in 1975 and his J.D. cum laude, in 1979 from the University of Missouri at Columbia (Member Order of the Coif; Note and Comment Editor, Missouri Law Review). Mr. Price has been selected for inclusion on the Missouri Kansas "Super Lawyers" list since 2007 and has an AV Rating by Martindale-Hubbell.

Selected for Inclusion on the List of Rising Stars

Emily J. Kembell is an associate in the Estate Planning Practice Group of Carnahan, Evans, Cantwell & Brown, P.C. She concentrates her practice in the areas of estate planning and administration, estate, gift and income taxation and probate. Ms. Kembell has experience in the preparation of Trust Agreements, Wills, Powers of Attorney and Health Care Directives and experience in the post-death administration of trusts and estates.

Ms. Kembell received her undergraduate degree from Texas A&M University where she graduated summa cum laude. Ms. Kembell received both her J.D. and LL.M. in Taxation from New York University School of Law.

Ms. Kembell is a member of the New York Bar, and the Missouri Bar, as well as a member of the Greene County Estate Planning Council. She is currently serving as the chairperson of the Probate and Trust Committee of the Springfield Metropolitan Bar Association.

Ms. Kembell's community involvement has included serving as a member of the Board of Directors of The Springfield Workshop Foundation, and Junior Achievement - Ozarks District Advisory Board. Ms. Kembell is also a member of Leadership Springfield Class 25. She currently serves as the Chairperson of the Probate and Trust Committee of the Springfield Metropolitan Bar Association.

Ric Ashe is an associate in the Litigation Practice Group of Carnahan Evans Cantwell & Brown, PC. He concentrates his practice on a wide variety of business litigation, including non-competition agreements, trade secrets, shareholder disputes, distribution agreements and construction contracts, as well as general business matters.

Prior to joining the firm, Ric practiced for five years at the respected Portland, Oregon, law firm of Dunn Carney Allen Higgins & Tongue, LLP. A Missouri native, he received his undergraduate degree from Missouri State University before attending Northwestern School of Law of Lewis and Clark College in Portland, where he graduated cum laude. As a student, he received the prestigious Law Review Excellence Award and served as a research assistant for Professor Janet Steverson.

Ric is a member of the Missouri Bar, the Springfield Metropolitan Bar Association and the American Bar Association. He is also a member of the Oregon State Bar and the U.S. District Court for the District of Oregon.

Borrowers Gone Bad

by John L. Waite III

What happens when your borrower, unbeknownst to you, begins liquidating the very assets that you relied upon when making the loan and that were represented by the borrower as evidence of their ability to repay your loan. And then uses the sale proceeds to pay other debt obligations or even to take that trip to Vegas? What about the borrower who begins transferring assets to family and friends before going bankrupt

Under most circumstances, it is only after the damage has been done that the creditor learns of the borrower's conduct. So what are the creditor's options?

Missouri's Uniform Fraudulent Transfer Act, found in Chapter 428 of Missouri statutes, provides legal remedies to certain creditors who find themselves the victims of such borrowers. Generally, once certain conditions are met and based upon the particular facts of the matter, the Act may allow a creditor to (i) set aside the improper transfer or sale, (ii) attach or levy the asset that was transferred or sold even though it is held by a third party (the "transferee"), (iii) prevent further transfers or sales by either the borrower or transferee, or (iv) have a receiver appointed to take charge of the asset. *See* R.S.Mo. § 428.039.

Another option, which has lost some of its prominence after the passage of the Uniform Fraudulent Transfer Act, is to assert a Creditor's Bill against the sold or transferred asset. A Creditor's Bill is normally limited to those creditors who, after obtaining a court judgment, learn that an asset was fraudulently transferred and is beyond the reach of the traditional legal process of garnishment/execution. *See Schockley v. Harry Sander Realty Co.*, 771 S.W.2d 922, 925 (Mo.App.E.D. 1989).

A third option is the use of an equitable lien, which is a remedial device that provides a method for the enforcement of an obligation. See *Dave Kolb Grading, Inc. v. Liberman Corp., et.al.*, 837 S.W.2d 924, 930 (Mo.App. E.D. 1992). "An equitable lien attaches to property for the purpose of securing payment of the existing obligation and is ancillary to and separate from the debt." *Id.* at 931. The *Dave Kolb* Appellate Court outlined three requirements to establish an equitable lien, they are: (1) a duty or an obligation owed by one person to another; (2) a res [or tangible asset] to which that obligation fastens and which can be identified or described with reasonable certainty; and (3) an intent, express or implied, that the property serve as security for the payment of the debt or obligation.

Finally, the last option that will be discussed in this article is a constructive trust. A constructive trust is appropriate where a party has been wrongfully deprived of some right, title, or interest in property as a result of fraud or in violation of confidence or faith reposed in another. See *Checkett v. McGehee, et.al. (In re McGehee)*, 342 B.R. 587, 591 (Bankr.W.D.Mo. 2006). Historically, a constructive trust required actual or constructive fraud. But in 1955, the Missouri Supreme Court recognized that a constructive trust might be appropriate "upon the theory of unjust enrichment or of an unfair or wrongful holding, without any proof of fraudulent intent." *See Swon, et.al. v. Huddleston*, 282 S.W.2d 18, 25-26 (Mo. 1955). A creditor is also entitled to impose a constructive trust upon property that is connected with, or traced from, the proceeds of the creditor's original property. See *U.S. Fidelity and Guaranty Co. v. Hiles*, 670 S.W.2d 134, 137 (Mo.App.E.D. 1984).

There may be other options available based upon the particular facts of the situation. In addition, it should be noted that a creditor's options may be impacted by whether they are secured or unsecured, in other words, does the creditor have a recognized security interest against the borrower's assets. Furthermore, the creditor's options can be drastically altered should the borrower file bankruptcy. For all of these reasons, it is strongly recommend that any creditor who finds themselves the victim of an unscrupulous borrower seek legal counsel immediately to ensure their rights and options are protected. ■

Rental Income Recipients Have to Report Payments Over $600 to the IRS in 2011

by Frank C. Carnahan

Persons engaged in a trade or business must report payments to another person of $600 or more in any tax year to the IRS. The 2010 Small Business Act provides that solely for purposes of Code §6041(a), and except as provided in §6041(h)(2), a person receiving real estate rental income is considered engaged in a trade or business of renting property, and consequently must report payments of $600 or more to a service provider, e.g., plumber, painter, or accountant, to the IRS and to the service provider (typically using Form 1099-MISC), effective in 2011. §6041(h)(2) exceptions include de minimus rental income under IRS regulations, active military or intelligence service members, and where "substantially all" the rental income results from renting the individual's principal residence on a "temporary" basis. The terms "substantially all" rental income and "temporary" basis are not defined and leave many situations open to question, e.g., renting while trying to sell a home for an extended period due to current market conditions. You must obtain the recipient's tax id number for the information return, because failure to provide the number results in a substantial penalty. ■

New Address/Phone Number?

Simply e-mail us at change@cecb.com

Meet Our Staff: Tammy Larimore

Tammy Larimore is a paralegal in the estate planning department of CECB. She began her tenure at Carnahan Carnahan & Evans on September 7, 1982, originally working with John M. Carnahan, Jr. and William E. Evans.

Tammy's work includes initial drafting of estate plan documents, including Trusts, Wills and Durable Powers of Attorney, and preparation of funding documents such as Deeds, Assignments and Beneficiary Designations. Beyond estate planning matters, duties also include Trust Administration and Tax Matters.

Tammy has a bachelor's degree in education from Drury University. She is married to Larry Larimore and they reside in Republic, Missouri. They have two children, Aubrey, a senior at MSU, and Collin, an 8th grader at Republic Middle School.

Tax Returns for Limited Liability Companies Owned By Husband and Wife

by Frank C. Carnahan

Single member limited liability companies ("LLC") are treated as a "disregarded entity", which do not have to file a separate tax return, and the LLC's income and expenses are included on the sole LLC member's return. Previously, the consensus was that where the only LLC members were a husband and wife, they were counted as "one" member and the LLC was treated as a "disregarded entity" for tax purposes. Recently, the Internal Revenue Service issued guidance on husband and wife partnerships and their ability to elect out of partnership status, including that the election is not available if the spouses own the business through an LLC.

While the IRS did not explicitly clarify that husband and wife LLCs must file a form 1065 partnership return, there is a substantial penalty for each required form K-1 for failure to file the return if required, so the safe advice at this time is that husband and wife owned LLCs should file a partnership tax return.

Alternatively, you can transfer 100% of the LLC member interest to one spouse, and can make a pay on death ("POD") designation so that the surviving spouse automatically inherits the interest, to qualify the LLC as a single member LLC/disregarded entity. We can set the LLC up so that both spouses are managers, which typically requires converting from a member managed to a manager managed LLC by amending the Articles of Organization and Operating Agreement.

I suggest that you contact your accountant or our office with any questions you may have regarding the correct filing status. ■

Firm News

Clifford S. Brown, a Shareholder in the Estate Planning practice group at CECB, was recently recognized in the Missouri Bar's ESQ., for his outstanding leadership and dedication to Missouri Bar Continuing Legal Education. Every year Cliff volunteers his knowledge and expertise of estate planning through CLE programs and publications offered by the Missouri Bar. Cliff is dedicated to providing quality CLE in Missouri and it is very much appreciated.

We are pleased to announce that Rodney H. Nichols was recently appointed as Vice Chairman of the Bank Counsel Section of the Missouri Bankers Association. Rodney is a Shareholder in the Transactional, Litigation and Banking practice groups at CECB. He concentrates his practice in the areas of banking, commercial, real estate and probate litigation as well as general corporate and business matters.

We are also pleased to announce that C. Bradford Cantwell, a Shareholder in the Transactional practice group at CECB, has been elected President of the Greene County Estate Planning Council. Brad concentrates his practice in the areas of employee benefits, taxation, and corporate law. Brad has over 20 years of experience in the area of employee benefits, including nonqualified plans, ESOPs, pension and 401(k) profit sharing plans, cafeteria plans, HIPAA and trouble-shooting complex ERISA issues.

CECB ranked in 2010 "Best Law Firms" Rankings and Three Attorneys Selected for Inclusion in *Best Lawyers in America*

Clifford S. Brown

Thomas D. Peebles, Jr.

Joseph Dow "Chip" Sheppard

CECB is excited to announce that three of our Shareholders were included in the 2011 edition of *The Best Lawyers in America* and the Firm was included in the inaugural 2010 U.S. News – *Best Lawyers* "Best Law Firms" first-tier ranking. *Best Lawyers* is regarded by both the legal profession and the public as the definitive guide to legal excellence in the U.S. *Best Lawyers* is based on a rigorous national survey involving more than 3.1 million evaluations of lawyers by other lawyers. (Copyright 2010 by Woodward/White, Inc., of Aiken, S.C.).

Clifford S. Brown and Thomas D. Peebles, Jr. were selected for inclusion in *Best Lawyers* 2011 in the practice area of Trusts and Estates and Joseph Dow "Chip" Sheppard was selected for inclusion in the practice area of Securities/ Capital Markets Law.

CECB is Proud to Support Developmental Center of the Ozarks (DCO) and Help Give Hope This Holiday Season

Developmental Center of the Ozark's mission statement clearly states their commitment to the community – *to make a positive difference in the community by providing services which enable individuals to reach and maintain their optimal level of development.* DCO promotes personal growth through teaching to help all individuals lead full and productive lives. DCO serves all ages groups of those who are developmentally disabled, developmentally delayed or physically disabled, as well as those who are not, through therapeutic, educational, habilitative and rehabilitative programs. Rodney Nichols, a shareholder at CECB, currently serves as President of the Board of Directors for DCO. For more information about services DCO provides or to make a donation, please visit www.dcoonline.com.

Help Give Hope is a charitable organization whose mission is to assist needy families in Southwest Missouri. Help Give Hope offers assistance in many different areas including rental assistance and utility assistance, gas and grocery vouchers and bus passes. Help Give Hope also provides food, clothing, toys, furniture, and appliances to needy families and they have a used car program which has given away 75 vehicles since 2007! For more information or to donate to Help Give Hope, visit their website at www.helpgivehope.org.

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