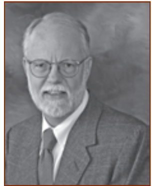
CECB Carnahan, Evans, Cantwell & Brown, P.C.

on the Subject

December 2008

The New First-Time Homebuyer – Tax Credit



By Frank C. Carnahan

The Housing and Economic Recovery Act of 2008 created a new first-time homebuyer tax credit. The credit is not designed to help homeowners who bought or owned a home in the last few years and lost it in foreclosure, but rather to boost home sales and reduce the unsold homes inventory resulting from foreclosure and otherwise stimulate the housing market.

A "first-time homebuyer" is an individual (their spouse, if married, or other co-owners) who has had no ownership interest in a principal residence during the prior three-year period. A principal residence for purposes of the credit includes a house, condominium, houseboat, mobile home, or stock held by a tenant-shareholder in a cooperative housing corporation, but not vacation or second homes.

The credit is structured as a temporary refundable tax credit equal to the lesser of: (i) $7,500 ($3,750 for married individuals filing separately); or (ii) 10 percent of the purchase price, of a home for purchases of a U.S. principal residence made after April 8, 2008 and before July 1, 2009. The credit phases out for individuals with modified adjusted gross income (AGI) in excess of $75,000 up to $95,000 ($150,000 up to $170,000) for joint filers). Half of any credit allowed on a joint return is allocated to each spouse. Eligible homeowners closing in 2008 take the credit on their 2008 returns, but those closing in 2009 can elect to treat the purchase as having been made on December 31, 2008, by amending their 2008 return.

The credit operates more like an interest-free loan repayable over 15 years. It must generally be recaptured (repaid) interest-free over a 15 year period, starting two years after the home purchase date, by increasing the taxpayer's federal income tax liability by 1/15th of the credit amount each year. Taxpayers should increase withholding or estimated tax payments.

Any remaining unpaid amount of the credit is due on the individual's return for the year in which the residence is sold or no longer used as a principal residence, but not exceeding the gain (if any) on sale of the residence to an unrelated person (determined by reducing the basis by the credit amount not recaptured). The taxpayer must file an income tax return even if not otherwise required to file because they do not meet the gross income filing threshold. Any outstanding credit amount is not required to be recaptured if: (i) the taxpayer dies; (ii) involuntary or compulsory conversion and the taxpayer acquires a new principal residence within two years; (iii) transfer to a spouse, or to a former spouse incident to a divorce. (the transferee steps into the transferor's shoes for both the regular and accelerated recapture rules, and the transferor is no longer responsible for any recapture).

If the home is acquired from a related person, the taxpayer's basis cannot be determined by reference to the transferor's adjusted basis. The taxpayer's property basis cannot be stepped up to the fair market value (or special use value) on the date of death or alternate valuation date, if applicable, if the transferor was a decedent.

States generally do not incorporate federal tax credits, but recapture provisions may create a different basis in the property, and thus a different gain or loss upon sale for federal and state income tax purposes. ■

CECB Banking Group

By Rodney H. Nichols

The CECB Banking Group, with over 100 years combined experience, has been assisting both local and national lenders for decades with all of their legal needs. Our Banking Group consists of attorneys who have over 100 years combined experience representing financial institutions in all aspects of business, including regulatory, operations, complex commercial loan documentation, workouts and collections.

While the current economy has presented challenges for the lending industry, it has also presented a unique opportunity. Now is an ideal time for lenders to consider restructuring loans to strengthen collection positions, and at the same time reduce the chances of a default down the road. This is also an opportunity to properly document loans which a lapse of time has revealed could have been documented better.

We handle all matters in a time and cost efficient manner, and our customer service is second to none. Our long history in this practice area and our experience sets our group apart from all the rest. Please contact the CECB Banking group if we can be of help to your institution. ■

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in this issue

New First-Time Home Buyer ➤ 1
CECB Banking Group ➤ 1
Grantor Retained Annuity Trusts ➤ 2
Which Divorced Parent Can Claim The Dependency Exemption ➤ 2
Limited Liability Company's Apparent Authority to Borrow Money ➤ 3
Disregarded Entities Must Pay Own Employment Taxes ➤ 3
Bank Economic Presence Creates Nexus ➤ 3
Meet Our Super Lawyers for 2008 ➤ 4
Meet our Rising Star for 2008 ➤ 5
Cliff Brown Named Best Lawyer ➤ 5
New Restrictions on Sale of Vacation and Rental Property ➤ 5
New Statutes May Require Change to Power of Attorney ➤ 6
New FDIC Interim Rules for Revocable Trust Accounts ➤ 6
Meet Our New Attorneys ➤ 7
Understanding the Fine Print Things to Consider Before You Sign ➤ 8

Grantor Retained Annuity Trusts: A Silver Lining

By Emily Bell

It's difficult to avoid–the depressed economy and crumbling of Wall Street has taken over the news media. All of us can feel the impact of these difficult times with higher gas prices, a stalled real estate market and decline in our investments. There is, however, a silver lining in the dark cloud of the current economy: an estate planning and tax savings technique that is perfect for times like this.

Grantor Retained Annuity Trusts (or GRAT's, as they are commonly known) are successful when the IRS assumed rate of growth ("IRS rate") is lower than the actual growth rate of assets. The premise behind GRAT's is relatively simple. The taxpayer (also called the "Grantor") transfers assets that he or she expects to grow in value into a trust. For a specified term of years, the trust pays an annuity to the Grantor based on the IRS rate. If all goes as planned, the trust assets will appreciate at a faster rate than the IRS rate and there will be assets left in trust after the annuity term has ended. At the end of the annuity term, the remaining trust assets are distributed to the beneficiaries named in the trust, such as the Grantor's descendants, and removed from the Grantor's estate for estate tax purposes. If done correctly, there is no gift involved and hence no gift tax. The GRAT allows a portion of the Grantor's assets to be successfully removed from his or her estate and passed down to his or her descendants without incurring any gift tax.

The best assets to put into a GRAT are those that are expected to grow in value in a relatively short amount of time (although the term can vary). For example, if you are a small business owner with shares of stock or LLC interests that currently have a low fair market value, but you expect these assets to grow dramatically in value over the next few years, these assets are the perfect candidate to fund a GRAT. This is especially true when the IRS rate is at a historic low, as this makes it easier to "beat" the IRS rate and have assets left over for descendants at the end of the annuity term. The IRS rate used for this purpose is determined by the IRS on a monthly basis and is based on interest rates and the economy.

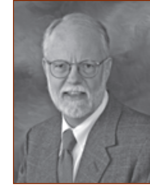
To illustrate the mechanics and benefits of a GRAT, consider this example: A 60 year old taxpayer contributes $500,000 worth of LLC interests into a GRAT on October 15, 2008. The annuity term of the GRAT is five years. In order to "zero out" the GRAT to avoid gift taxes, the Grantor will receive an annual annuity payment of $111,684 (which can be paid in kind by distribution of LLC interests). If the trust earns income at a rate of 5% and trust principal grows at a modest 5% per year, almost $126,300 will be left at the end of the five year term to distribute to the Grantor's descendants free of gift tax. The Grantor has decreased the value of his estate by $126,300 without incurring a gift tax.

Another way a GRAT may help to reduce the value of the Grantor's estate is by virtue of the GRAT being treated as a "grantor trust" for income tax purposes. This means that the Grantor is responsible for paying income taxes on the GRAT's income. It's a win-win situation: the Grantor is reducing the value of his estate and the assets in the GRAT are allowed to grow rather than being distributed to pay taxes.

If the assets decrease in value so much so that the annuity payment to the Grantor is less than what is required to be paid based on the IRS rate, then all of the assets will be paid to the Grantor during the term of the trust, and there is nothing left to pass to descendants at the end of the annuity. This merely puts the Grantor in the same position he or she would have been had no GRAT been created. The same is true if the Grantor dies during the annuity term. All or part of the assets will be included in his or her estate for estate tax purposes, but this is what would have happened had the GRAT not been created. Therefore, there is truly only a potential upside and no downside to creating a GRAT.

There is a silver lining to this dark cloud we are under - you can take advantage of historically low IRS rates in order to decrease estate taxes and pass on wealth to future generations. If you would like to discuss the potential use of GRAT's in your particular circumstances, please contact a member of the CECB Estate Planning Practice Group. ■

Which Divorced Parent Can Claim the Dependency Exemption



By Frank C. Carnahan

The IRS issued final regulations establishing a "bright line" test to determine which parent has custody for the greater part of a year so as to be entitled to the dependency exemption. The test counts nights spent: i) at the parent's residence (whether or not the parent is present); or ii) in the company of the parent when the child does not sleep at the parent's residence. A child is in the custody of one or both parents for more than one-half of the calendar year if one or both parents have the right under state law to physical custody of the child for more than one-half of the calendar year. A parent may be absent because of military duty, a hospital stay, business trip, or other reasons, and a child who does not reside with a parent for a night is treated as residing with the parent with whom the child would have resided for the night but for the absence. The final regulations include examples of how to allocate the nights during which a child resides with a third party, such as a grandparent. A declaration to release a claim to an exemption must be made on Form 8332 or similar document, and a court order or decree (or a separation agreement) may not substitute for the declaration. The IRS also left unchanged the rule that the custodial parent may revoke a release unilaterally. ■

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.

Case Note-Limited Liability Company's Apparent Authority to Borrow Money

By John M. Carnahan, III

A recent Appellate decision out of State of Kansas involving construction and financing of a motel at the Wichita Airport, gives rise to the importance of having background information on the entities with which you deal, and who is authorized to act on their behalf, both from a lending standpoint as well as doing business and execution of contracts.

In the Corporate arena, the actual authority of Board of Directors and Officers has been well established over the course of many years of Legislative action and Court interpretation.

Limited Liability Company's, however, are the new kid on the block, having only been with us a little less than 20 years.

The Sunflower Bank, N.A. v. Airport Red Coach Inn of Wichita, L.L.C.[1] case, is an excellent example of not looking at the actual underlying documents, and instead relying on the "apparent authority", to determine the authority or authorization of the party executing the loan documents. The original Operating Agreement of Airport Red Coach Inn of Wichita, L.L.C. required unanimous consent of members to borrow funds, and further required that "… all LLC members … execute instruments of indebtedness." The parties decided to amend the Operating Agreement, so that the LLC manager could sign instruments of indebtedness without the signature of the other members, under the concern that the language would require each member to sign for individual liability on the loans and not in a representative capacity with the LLC being the borrowing entity and the only responsible party, unless there were independent guarantees entered into between the parties with the bank.

As always, the construction and opening of the motel process did not go well financially, giving rise to default on the loan and disputes between the parties as to the validity of the loan and the security interest in the real estate and personal property assets of the LLC.

The Kansas Appellate Court concluded that the bank had a copy of the LLC's Operating Agreement before any money was advanced. It was therefore clearly given notice of the General Manager's authority, and should have required resolution or written authorization of **all** members of the LLC, in order for it to be able to borrow money and grant security interest in its assets. While the loan documents themselves could be signed by a designated party, i.e., General Manager in this case, there is a distinction between the authority to execute loan documents and the authority to borrow money.

Problems like this are very simple to avoid, if up front, the lending entity, i.e., the bank, has a copy of the Operating Agreement, certificate that it is a true and correct copy, and there have been no amendments to the document, and there should be a clear line of authority or instructions, to borrow money and create security interests in assets, signed by all the members. The Court rejected the argument that a "General Manager", has apparent authority on behalf of an LLC, to have executed the loan documents. The same line of analysis would also apply in the case you are dealing with a Limited Liability Company and entering into a major contract with long term financial significance, for example only, a lease agreement, construction contract, or other types of commitments in which both parties expect full performance. In those situations involving LLCs with large number of members where it might be impractical to have all the members sign all the authorization forms, then the better course of conduct might be to request legal opinion of counsel, confirming that they have reviewed the documents and are rendering a clean opinion that the party signing the documents, has full authority to act on behalf of and bind the LLC, or a resolution signed by all members confirming that the General Manager has the authority to sign and that the Operating Agreement expressly authorizes same and the General Manager is acting pursuant to that authority.

[1] 175 P.3d 883 (Kan.App.Ct.2008)

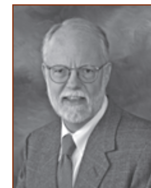
Disregarded Entities Must Pay Own Employment Taxes

By William E Evans

Final regulations issued by the Internal Revenue Service [Reg. § 1.1361-4, Reg. § 301.7701-2(c)(2)(iv)] will require disregarded entities to pay their own employment taxes and file all related information returns for all wages paid to employees on or after January 1, 2009. Under prior rules, a disregarded entity had a choice: it could pay its own employment taxes, or the owner of the disregarded entity could pay the taxes under the owner's name and tax ID number. Now, all disregarded entities paying wages must have their own tax ID number. These regulations are only applicable to employment taxes. A disregarded entity continues to be disregarded for other Federal tax purposes.

Bank Econonic Presence Creates Nexus

By Frank C. Carnahan



Bank Economic Presence Creates Nexus

A national bank which solicited business and received significant gross receipts from interest and fees paid by Indiana customers had a substantial nexus with the state subjecting it to the Indiana financial institutions tax (FIT). The bank argued physical presence was required under the Commerce Clause, but, the Indiana Tax Court found that the U.S. Supreme Court has not extended the physical presence requirement beyond the realm of sales and use taxes. MBNA America Bank v. Indiana Department of State Revenue, Indiana Tax Court, No. 49T10-0506-TA-53, October 20, 2008.

Meet our Super Lawyers® for 2008

Each year, *Law & Politics Magazine* mails over 23,000 ballots to Missouri and Kansas lawyers, asking them to nominate the best lawyers they've personally observed in action. Research is then conducted on each candidate, dividing them into more than 60 practice areas. A panel of preeminent peers in each practice area then evaluates each candidate. From the original pool of candidates, only 5% of Missouri and Kansas attorneys are selected as Super Lawyers®.

While we feel all of our attorneys at CECB are *super lawyers*, here are the three named by *Law & Politics* as Super Lawyers® for 2008.

John M. Carnahan, III, John E. Price, Clifford S. Brown

Cliff Brown is shareholder and in the Estate Planning Practice Group and concentrates his practice in the areas of estate planning, probate, trust litigation and related tax matters.

Cliff 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. As a Board member, Cliff's role involves the investigation and determination of the character and fitness of individuals seeking admission to the bar, determining the qualifications of practicing attorneys from other states seeking to be admitted to the Missouri Bar, and in developing, administering, and grading the examinations of new applicants seeking admission to the bar.

A graduate of the University of Missouri-Columbia (B.S., with honors, in 1965 and J.D. in 1968), Cliff 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 to provide continuing legal education to members of the legal profession.

Cliff's community involvement includes being a Member of the Board of Directors of Community Foundation of the Ozarks, a Member of the Ad Hoc Committee for the Developmental Center of the Ozarks, as well as being a member of the Board of Directors of the Burrell Center.

John Carnahan is a shareholder in the Transactional and Estate Planning Practice Groups of CECB. He concentrates his practice in the areas of tax planning, corporate transactions, estate planning, and business succession planning for family-owned businesses, which has also included providing advice and assistance in real estate acquisitions and development, financial institution organization and compliance, business and estate planning, and the acquisition and sale of businesses.

In 2005, the Missouri Senate confirmed John's appointment by Governor Matt Blunt to serve on the University of Missouri Board of Curators, representing the Seventh Congressional District. The Board of Curators is a nine-person governing body of a four-campus system including the University of Missouri-Columbia, the University of Missouri-Kansas City, the University of Missouri-Rolla, and the University of Missouri-St. Louis.

John received his bachelor's degree from 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. In 1975, John received his LL.M. in Taxation from the University of Miami.

John is a member of the Springfield Metropolitan and American Bar Associations, as well as The Missouri Bar Foundation, and he has been active in Bar Association activities involving continuing legal education.

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

John has significant experience in environmental law over the last 20 years. He has handled litigation with government agencies and private parties under the Clean Air Act, Clean Water Act, Superfund and toxic torts. He regularly advises business clients on environmental regulation, permitting issues and real estate transactions. He also has many years experience with large and 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.

John received his bachelor's degree from the University of Northern Iowa, with honors, in 1975 and his law degree, cum laude, in 1979 from the University of Missouri-Columbia where he was a Member of Order of the Coif, and Note and Comment Editor of the Missouri Law Review.

He 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 on the Springfield Sister Cities Association Board of Directors. He is a member of the Springfield Metropolitan and American Bar Associations, as well as the Missouri Bar.

Meet our Rising Star® for 2008

Rodney H. Nichols

The Rising Stars selection process is similar to that of the Super Laywers® 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.

Congratulations to Rodney H. Nichols on being named a 2008 Rising Star by *Law and Politics.*

Rodney H. Nichols is a shareholder in the Transactional and Litigation/Dispute Resolution Practice Group of Carnahan, Evans, Cantwell & Brown, P.C. He concentrates his practice in the areas of banking; creditor's rights; commercial, real estate and probate litigation as well as general corporate and business matters.

Rodney is a member of the Bank Counsel Section and Advisory Board of the Missouri Banker's Association, the Civil Practice and Procedure Committee of the Missouri Bar, the Federal Practice Committee for the Western District of Missouri, and previously served as Chairman of the Commercial Law and Insolvency Committee of the Springfield Metropolitan Bar Association. Mr. Nichols is also on the Springfield Metropolitan Bar Association's Federal Bench & Bar Committee, and has formerly served as Chair of the SMBA's Programs Committee.

He received his bachelor's degree from Missouri State University in 1992 and his law degree in 1996 from the University of Tulsa College of Law. Mr. Nichols is a graduate of Leadership Springfield, Class XVI.

Rodney also devotes a significant amount of time to the community as a member of the Board of Directors for the Developmental Center of the Ozarks and Ozark Greenways. In October 2004, Mr. Nichols was appointed by the Greene County Commissioners to serve as a Member of the Greene County Library Board of Trustees. In 2003, Mr. Nichols was recognized by the Springfield Business Journal with their "40 Under 40" award, for his outstanding contribution to the community and his profession. In January 2007, Mr. Nichols was appointed as a Member of the City of Springfield's Jordan Valley Park Tax Abatement and Tax Increment Financing Commission. ■

Cliff Brown Named Best Lawyer

Carnahan, Evans, Cantwell & Brown, P.C. salute **Cliff Brown** on being recognized as one of the most distinguished and respected Trust and Estate attorneys in the 2008 edition of The Best Lawyers in America. This year marks the 14th consecutive year that Cliff has been acknowledged in Best Lawyers. When it comes to estate planning, trusts, probate and related tax matters, trust Cliff and the team at Carnahan, Evans, Cantwell & Brown, P.C. ■

New Restrictions on Sale of Vacation and Rental Property Conversions to "Home"

By Frank C. Carnahan

Code Sec. 121 to allow individuals to exclude gain realized on the sale or exchange of a principal residence from income up to $250,000 for individuals, or $500,000 on a joint return. *The Housing Assistance Tax Act of 2008* eliminates exclusion of gain from the sale of a principal residence allocable to periods during which none of taxpayer, taxpayer's spouse, or the taxpayer's former spouse used the property as a principal residence. Gain is allocated based on the time the property is utilized for qualified and non-qualified uses. This limits the ability to convert a vacation home, or rental or investment property into a principal residence for at least two years before its sale to avoid recognizing the gain.

Gain not subject to the new rule includes: i) gain for any period before January 1, 2009; ii) time after the last date the property is used as the principal residence during the five-year period ending on the sale date (you can move out prior to sale); iii) any period (maximum aggregate 10 years) taxpayer or taxpayer's spouse is serving on "qualified official extended duty" as an armed forces member, a Foreign Service officer, or an intelligence community employee; iv) for other temporary absence not exceeding two years in the aggregate because of a change of employment, or health conditions; or iv) for other temporary absences due to unforeseen circumstances specified by the IRS.

The ratio computation is determined after applying rules reducing gain excluded by depreciation allowed or allowable. Taxpayer's gain attributable to depreciation allowed or allowable after May 6, 1997 is not excluded from income, so not included when calculating the amount of gain allocated to non-qualified use.

Use of part of the property for business applies as under prior law. No allocation of gain is required if the both the residential and business portions of the property are within the same dwelling unit. If the portion of the principal residence used for business purposes is separate from the dwelling unit, gain from the sale or exchange of the property must be allocated between the residential and business portions of the property. Any depreciation taken after May 6, 1997 must be recaptured out of the potential gain realized. ■

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New Statutes May Require Change to Power of Attorney

By Clifford S. Brown

Depending upon your view of the matters covered, two new statutes, which became effective August 28, 2008, may require a revision of your durable powers of attorney.

I. ANATOMICAL GIFTS

"Anatomical gifts" are gifts of bodies or body parts for education, research or transplant purposes. Under the prior law, such a gift could be made after your death by your agent under a durable power of attorney, but only if such was expressly authorized in the power of attorney.

The new law defines an "agent" as including a person authorized to make health-care decisions on your behalf "by a power of attorney for health care." This agent may consent to an anatomical gift after your death if the agent "could have made an anatomical gift…immediately before the decedent's death." Thus, it is crucial to determine if your agent could have agreed to an anatomical gift before your death, whether or not the agent did in fact agree to such gift.

This is where the new law works a substantial change, by providing that your agent *could* agree to a lifetime anatomical gift.

> "unless the power of attorney for health care or other record **prohibits** the agent from making an anatomical gift."

The result? Unless your health-care power of attorney **prohibits** your agent from agreeing during your lifetime to an anatomical gift effective at your death, then the agent can agree to such gifts during your lifetime and/or after your death.

The rules governing the application of new statutes generally make statutes applicable only in the future, in this instance only a health-care power of attorney executed on or after August 28, 2008. For those who want no questions, however, a revision of your health-care power of attorney may be in order.

II. RIGHT OF SEPULCHER

The "right of sepulcher" is the right to control the "burial, cremation or other final disposition" of a deceased person's body. In short, the right to control a deceased person's funeral. Under the prior law, this right was conferred first upon the surviving spouse, if any, then the children, parents and siblings, if any, in that order.

The new law changes this order by granting first priority to an

> "attorney in fact designated in a durable power of attorney wherein the deceased specifically granted the right of sepulcher…to such attorney in fact."

Thus, an individual may "specifically" confer the right of sepulcher on his or her agent ("attorney in fact"), but in the absence of a specific grant, then the priority remains surviving spouse, children, etc.

The person designated under the power of attorney must be at least 18 years old, mentally competent, and "willing to assume responsibility for the costs of disposition" of the decedent's body.

Many individuals have strong beliefs regarding anatomical gifts and the right to designate who will control their funeral and burial. Disagreements among family members regarding these matters can be heated and ultimately destroy family relationships. The new statutes provide a definitive means for an individual to resolve any questions, one way or the other, and to control his or her own destiny.

If these matters, as well as avoiding potential family disputes, are of importance to you, then a revision of your powers of attorney may be in order. If we can help, please call. ■

New FDIC Interim Rules for Revocable Trust Accounts

By Emily J. Bell

The FDIC rules regarding revocable trust accounts recently changed based on the new interim rule made effective September 26, 2008, and the passage of the Emergency Economic Stabilization Act of 2008 ("EESA"), effective October 3, 2008. The FDIC will now insure up to $250,000 per beneficiary for a revocable trust account if the account owner has $1,250,000 or less in revocable trust accounts at one FDIC-insured institution. Revocable trust accounts are those accounts that are either "payable-on-death" ("POD") to certain beneficiaries or established in connection with formal revocable trusts.

Prior to the effective dates of the new interim rule and EESA, the FDIC would only insure accounts up to $100,000 per "qualifying beneficiary," which included only the account owner's spouse, children, grandchildren, parents and siblings. This rule excluded a number of possible beneficiaries, including in-laws and friends. The interim rule, however, does not discriminate based on the relationship of the beneficiary to the account holder. Rather, any beneficiary will count in terms of insurability and actual ownership interests of each beneficiary is irrelevant.

For those revocable trust account owners with more than $1,250,000 and more than five named beneficiaries, a slightly different rule applies. These owners are insured for the greater of (i) $1,250,000, or (ii) the aggregate amount of all the beneficiaries' interests in the trusts, up to $250,000 per beneficiary. This coverage is based on the actual ownership interests of each beneficiary.

These new rules are best illustrated by the following examples:

John Client has a revocable trust account at #1 Bank with a balance of $750,000. His revocable trust agreement names three beneficiaries. Therefore, the maximum FDIC insurance coverage is $250,000 per beneficiary, or $750,000 (3 beneficiaries x $250,000). If, however, John only names two beneficiaries in his trust, then the account would be insured for $500,000.

Jane Client has a revocable trust account at #1 Bank with a balance of $1,500,000. Her revocable trust agreement provides a life estate to her husband worth $200,000, $30,000 to her sister and $2,000 to each of her five children. The total beneficial interests equal $240,000. Jane is insured for the greater of $1,250,000 or $250,000; therefore, she would be insured up to $1,250,000.

On January 1, 2010, the coverage amount decreases from $250,000 to $100,000 per beneficiary, and the maximum coverage decreases from $1,250,000 to $500,000. ■

Meet Our New Attorneys

CECB welcomed John L. Waite III in August 2008

John is an associate in the Litigation/Dispute Resolution Group of Carnahan, Evans, Cantwell & Brown, P.C. He concentrates his practice in the areas of creditors' rights, creditors' bankruptcy, and civil and business litigation.

Prior his legal career, Mr. Waite worked for over five years in the financial sector, first as a portfolio administrator for State Street Bank and then as an assistant trader for M&I Global Securities Lending. This experience provides him with a better appreciation for our clients' needs and an insight into financial institutions and markets.

In addition, Mr. Waite was a commissioned officer in the Artillery Branch of the United States Army National Guard. He served as a platoon leader in a Multiple Launch Rocket System Battery and a Fire Direction Officer for a Paladin Battery.

Mr. Waite served as law clerk for the Visiting Judges Chambers, U.S. Bankruptcy Court for the District of Nevada, 2003-2004. He also served as judicial intern for the Honorable Linda B. Riegle, U.S. Bankruptcy Court for the District of Nevada, 2003.

Mr. Waite received his bachelor's degree from Missouri State University in 1996 with a dual major in Finance and Insurance & Risk Management and a minor in the University's Reserve Officer Training Corps.

While attending the U.S. Army's Officer Basic Course in Ft. Sill, Oklahoma, Mr. Waite continued his education and in 1999 graduated with a Masters of Business Administration degree from Missouri State University. Mr. Waite then graduated from the William S. Boyd School of Law, University of Nevada, Las Vegas, in 2003.

Mr. Waite is currently admitted to practice law in the states of Missouri and Kansas. And is a member of the Springfield Metropolitan, Missouri, Kansas and American Bar Associations.

Paul D. Link joined the Branson office of CECB in October 2008.

Paul is Of Counsel in the Transactional and Litigation/Dispute Resolution Groups of Carnahan, Evans, Cantwell & Brown, P.C. He concentrates his practice in the areas of real estate, commercial transactions, general corporate and business matters as well as civil litigation.

Prior to joining Carnahan, Evans, Cantwell & Brown, P.C., Mr. Link was City Attorney for the city of Branson. His duties included advising all elected and appointed officials on all matters involving city business, including preparation of ordinances, resolutions, contracts, advising on Neighborhood Improvement Districts (NID), Community Improvement Districts (CID), Transportation Development Districts (TDD) and Tax Increment Financing (TIF). In addition, he managed the Legal Department for the city of Branson which included civil litigation and prosecution of ordinance violations in municipal court.

Mr. Link received his Bachelor's Degree from Missouri State University in 1993 and his law degree from the University of Missouri – Kansas City in 1996. His is licensed to practice in Missouri, Kansas, U.S. District Court for the Western District of Missouri and the U.S. Court of Appeals, 8th Circuit.

Mr. Link was recognized by the Springfield Business Journal with their "40 Under 40" award, for his outstanding contribution to the community and his profession. He is also a graduate of Leadership Springfield, Class XV. Mr. Link's professional memberships include the Springfield Metropolitan Bar Association, the American Bar Association, Missouri Bar, Kansas Bar, Missouri Municipal Attorneys Association and the International Municipal Lawyers Association.

Emily J. Bell joined CECB in January 2008

Emily 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.

Emily is a Springfield native, and she received her undergraduate degree in 2000 from Texas A&M University, where she graduated summa cum laude. Ms. Bell received both her law degree and LL.M. in Taxation from New York University School of Law. Ms. Bell interned for the General Counsel's office for the New York City Council as well as the New York City Administration for Children's Services, Department of Legal Services-Child Abuse/Neglect Unit.

After graduating from NYU, Emily practiced corporate law for two years at Gibson, Dunn & Crutcher LLP in New York. After leaving corporate law, Ms. Bell practiced in the estate planning group at McLaughlin & Stern, LLP in New York. She then returned to Springfield and joined Carnahan, Evans, Cantwell & Brown, P.C.

Ms. Bell is a member of the Junior League of Springfield and is on the Board of Directors of Junior Achievement – Ozarks District. She was recently appointed to the Board of Directors of the Make-A-Wish Foundation of Missouri.

Ms. Bell is a member of the New York Bar and the Missouri Bar as well as a member of the Greene County Estate Planning Council and the Springfield Metropolitan Bar Association.

Season's Greetings

Understanding the Fine Print: Things to consider before you sign

By Ric Ashe

When a business makes a deal with another company, be they a supplier, a manufacturer, or an end user, the only terms most people think about are the type, quantity, and price of the good or service being bought and sold. The remaining terms, often written in small print and located in dense paragraphs on the back of a purchase order, order acknowledgment or other types of prewritten agreements are often overlooked or dismissed as "boilerplate" language that really doesn't matter.

When a dispute arises over the goods or service, however, the fine print often becomes the most important part of the agreement. Below are some helpful hints to avoid agreeing to terms that can come back to haunt you:

1. Everything is Negotiable. The golden rule to remember in reviewing any prewritten agreement is that everything is negotiable. Indeed, courts will view your signature on an agreement as evidence that you have negotiated and agreed to each and every term. So, no matter how standard a pre written agreement, purchase order, or order acknowledgment may appear, read each paragraph closely and keep your pen handy. While you may find some agreements really are "take it or leave it," do not assume this is the case. If you find something in the fine print that offends you, cross it out and place the burden on the other side to object to your changes.

2. Warranties. The law provides that all products come with an implied warranty of merchantability-a guarantee that the product will perform as described. This implied warranty, however, as well as express promises about product performance made by a salesman, can be lawfully disclaimed by the seller. If you are selling goods, the disclaimer should be written in bold type and must include the phrase "WARRANTY OF MERCHANTABILITY" to be effective. If you are buying goods, read the fine print carefully for any such disclaimers and cross-out the same. In addition, if you are promised a warranty for a specific period of time, make sure it becomes part of the written agreement.

3. Limitation on Damages. If something goes wrong with a good or service, the harmful consequences may extend well beyond the price of the good or service. Like warranties, however, a seller or service provider can limit the amount of recoverable damages to things like the "cost or repair or replacement" or the "total value of the contract." If you are purchasing a product or service, make sure that you do not give up your right to recover any additional consequential damages your business may suffer as a result of a defective product or service. If you are a seller of a product or service, on the other hand, is wise to try to limit such damages to the cost to repair or replace the defective product or service so that you do not become saddled with every consequence that arises from a defect in your product or service.

4. Attorney Fees. The decision to include an attorney fee provision in an agreement should be based on two factors: (a) the relative resources of each party; and (b) the nature of the potential dispute. For example, a landlord would generally want an attorney fee provision in a lease because, more often than not, a dispute between the landlord and tenant will involve the failure to pay rent, a cause of action on which the landlord is likely to succeed. If your business sells products on a cash basis, on the other hand, an attorney fee provision could encourage litigation by an unsatisfied customer that might not otherwise occur.

5. Venue/Jurisdiction. The state and county in which litigation must occur is often the deciding factor in whether or not to pursue a claim against another party. Do not agree to a venue or jurisdiction provision that requires your business to file its claim in another state. The transactional costs associated with litigating on the west coast, on the east coast, or in a foreign country could make it difficult or impossible to justify filing an otherwise valid claim.

6. Risk of Loss. If a product is being delivered by ground, air or sea, there is always a risk that the product could be damaged along the way. For the seller, it is important to shift the risk of loss to the buyer from the moment it leaves the warehouse. Obviously, a buyer should not agree to assume the risk of loss until the good arrives at your door.

7. Dispute Resolution. Many pre-written agreements require that any dispute be resolved through private arbitration rather than through the court system. When deciding whether to include such a provision in an agreement, keep the following in mind. Arbitration is generally less formal and less expensive because it places the entire case into the hands of one person, the arbitrator. Trial is generally more formal and more expensive because it requires a judge, jury and, in most cases, a right to appeal.

8. Give the Agreement to Your Attorney Before You Sign. The time, effort and cost of having your attorney review a contract before you sign is infinitely smaller than the time, effort and cost of having your attorney prosecute or defend a lawsuit that turns on the fine print. ■

New Due Date for Furnishing Certain Information Returns to Receipents

By Frank C. Carnahan

The Emergency Economic Stabilization Act of 2008 changed the due date from January 31 to February 15 of the year following the return year for furnishing to recipients Copy B of Forms 1099-B, Proceeds From Broker and Barter Exchange Transactions, 1099-S, Proceeds From Real Estate Transactions, and only if substitute payments in lieu of dividends, tax-exempt interest, or payments to attorneys are reported, 1099-MISC, Miscellaneous Income. The change applies to returns required to be filed after 2008. An incorrect due date is printed in the 2008 General Instructions for the Forms. ■

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Holiday Hours

We will be closed the following days in observence of upcoming holidays:

We will be closing at 3 p.m. Wednesday, December 24th

Thursday, December 25th

Thursday, January 1st

Founded in 1979, the law firm of Carnahan, Evans, Cantwell & Brown, P.C. has offices in Springfield and Branson, Missouri. An "A-V Rated" preeminent law firm by Martindale-Hubbell, our attorneys are engaged in the general business practice of law with an emphasis the following areas:

- Business Organization and Planning
- Corporate
- Estate Planning
- Probate
- Trust Administration
- Transactions
- Real Estate
- Employee Benefits
- Banking
- Commercial Litigation and Dispute Resolution
- Environmental
- Zoning and Land Development
- Intellectual Property
- Arbitration and Mediation
- Franchise
- Mechanics' Liens and Foreclosures
- Pension and Profit Sharing
- Employment

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