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Dana Richens

From The Editor

A Change of Seasons

Welcome to the Fall 2005 issue of Trust The Leaders—my first as the new editor of the publication. Other than being a bit superstitious about this being the 13th issue in the magazine's history, I am nothing but delighted to have been asked to serve as editor, and to have this opportunity to highlight the vast talent and expertise of my colleagues here at Smith, Gambrell & Russell, LLP.

My goal for this publication is for you, regardless of your profession, job description or educational background, to learn from each issue something that will be of value to you in your business or personal life.

Before introducing the articles appearing in this issue, I'd like to thank my predecessor, Terry Ferraro Schwartz, for her three years of exceptional service to Trust The Leaders. Terry took the helm of the magazine when it was nothing more than an ambitious gleam in the eye of SGR's Executive Committee, and shaped it into an award-winning publication that to this day remains unparalleled in the legal profession.

Now on to Issue 13.

This issue's cover story addresses a topic of interest to every employee and manager in the work force: violence in the workplace. Author Tracie Maurer outlines the factors most likely to contribute to workplace violence, and offers some practical advice on how to minimize the risk of a violent episode taking place in your office, factory or other place of business.

When the airwaves were inundated with stories about Terri Schiavo this past spring, many of us privately vowed to ensure that our own wishes concerning the use of life-sustaining procedures were properly memorialized. Have you taken such measures and, if so, are you confident they provide comprehensive protection for you? Laura Wartner's article explains some critical distinctions between living wills and durable powers of attorney for health care—a "must read" for anyone who has yet to prepare an advance directive or wants to confirm that existing documents expressing his or her intent are thorough and up to date.

What happens to an industrial site once it no longer serves any commercial purpose and its land is contaminated with hazardous waste? If it's a qualifying site under Georgia's and other states' "brownfield" laws, it may enjoy certain economic incentives for redevelopment. Phillip Hoover takes a look at "brownfields"—what they are, and the evolution of laws intended to encourage their revitalization.

One of the most important functions that a lawyer can provide is to ensure that clients are informed on a timely basis of changes in the law and advised as to how those changes may affect them. In this vein, this issue features two articles highlighting recent significant changes to state and federal law that may affect your business. First, Bill Wood takes us through recent changes to Georgia's corporate tax code. Next, Laura Woodson and Barbara Ellis-Monro discuss changes to the federal bankruptcy code and their impact on commercial debtors and creditors.

This issue's Client Profile features Little League Baseball, Incorporated, with whom SGR attorneys have had a relationship for nearly 30 years. SGR helps protect the trademarks and service marks of this noble organization, ensuring that when your children sign up for "Little League," they get the same genuine organization that has taught life's lessons to more than 30 million youngsters worldwide.

Finally, we are especially proud of this issue's Finish Line, which recounts SGR's "sponsorship" of two platoons of United States Army soldiers deployed in support of Operation Iraqi Freedom.

I hope you enjoy this issue of Trust The Leaders. Please feel free to contact me anytime with comments or ideas you have regarding our magazine.

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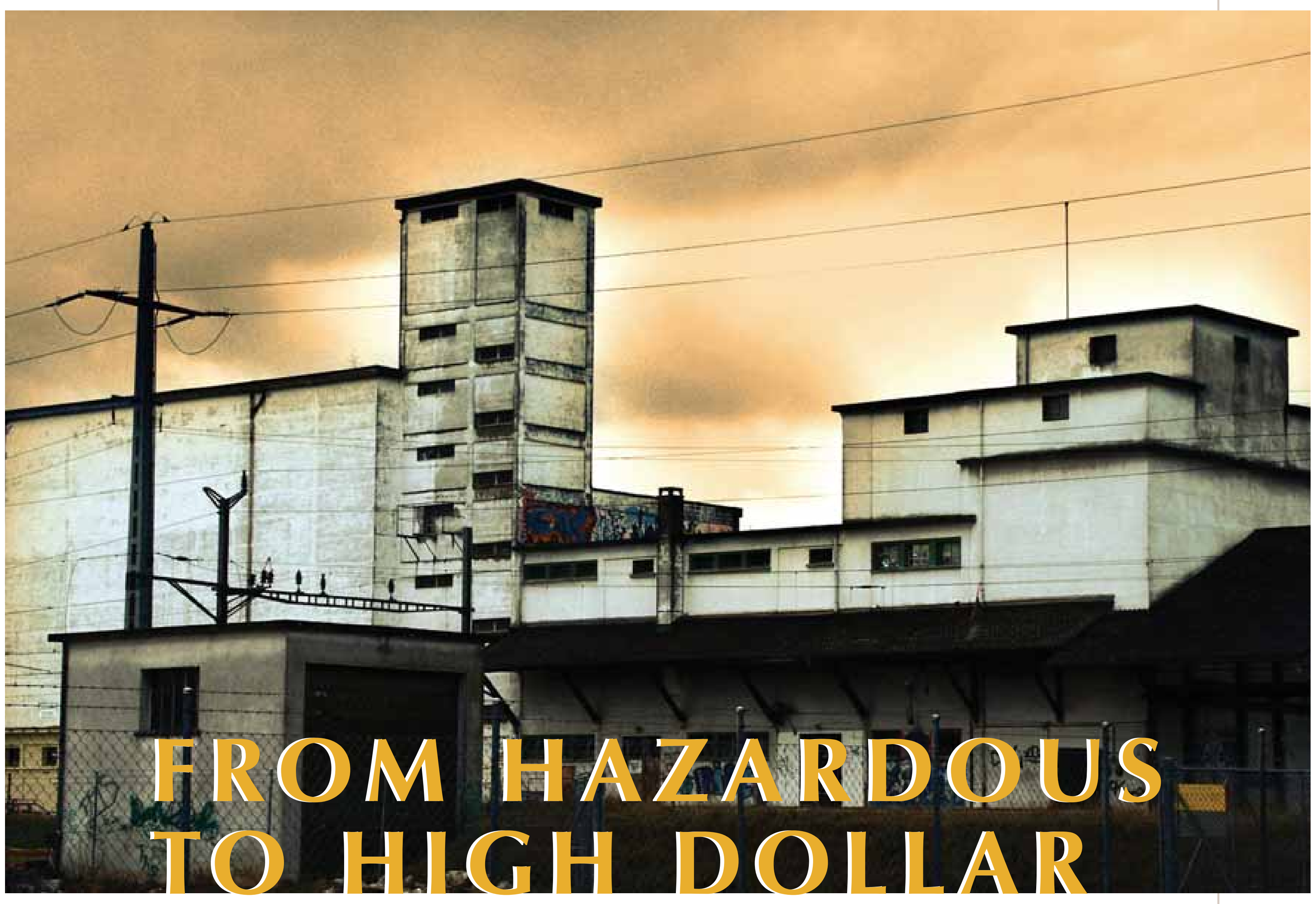

FROM HAZARDOUS TO HIGH DOLLAR

Developing Abandoned Industrial Sites

In recent years, both federal and state governments have become increasingly concerned about a condition sometimes called "environmental blight." The condition arises when otherwise valuable real estate is abandoned because of potential contamination resulting from past industrial use. Often, these "brownfields"—so named for the characteristic lifeless appearance of abandoned industrial sites—sit idle and unused for years out of fear that environmental cleanup would be cost prohibitive or could lead to unlimited liability for the property owner. The resulting brownfield is thus the unintended consequence of the various environmental cleanup laws, which inadvertently encourage development of pristine, uncontaminated land while allowing the brownfield properties to remain contaminated and unproductive.

In response to this phenomenon, the federal government and many states have enacted legislation designed to provide incentives for the cleanup and redevelopment of brownfields. Georgia has two such laws, the Georgia Hazardous Site Reuse and Redevelopment Act (the "Brownfield Act"), enacted in 2002, and the brownfield tax incentive law enacted in 2003, each designed to encourage redevelopment. To date, the "Brownfield Program" authorized by the Brownfield Act has resulted in the successful redevelopment of over 45 properties, including the wildly successful Atlantic Station—formerly the site of Atlantic Steel Company—in midtown Atlanta, which will house restaurants, theaters and retail space employing 30,000 people, and middle-income and upscale housing for 10,000 people, when completed.

The Brownfield Program

The Brownfield Program is administered by the Georgia Environmental Protection Division (EPD), Hazardous Waste Management Branch. The goals of the Program, as expressed by the EPD, are to (1) enhance protection of human health in the environment; (2) reduce urban sprawl by encouraging infill redevelopment; (3) revitalize neighborhoods; and (4) increase the tax base of communities. In order to realize these goals and encourage redevelopment of industrial properties, Georgia's brownfield laws provide significant incentives to potential purchasers of brownfield properties.

Qualifying for the Program

There are two categories of brownfield eligibility, both of which must be met in order for a project to qualify. The first category of eligibility applies to the property; the second to the purchaser. The State of Georgia does not define what is meant by "brownfield." Rather, Georgia's Brownfield Act simply establishes criteria for property to qualify for the various state brownfield incentives. First and foremost, a Georgia property cannot be considered a brownfield until a release of a hazardous substance has been discovered on the premises through environmental sampling. With a few newly created exceptions, the discovery must occur before a party wishing to participate in the Brownfield Program takes title to the property. There are some notable exceptions that preclude properties from qualifying as brownfields: (1) properties that are listed on the National Priorities List (federal "Superfund" sites); (2) properties that are the subject of a judicial or administrative order; (3) properties that are subject to a removal or remediation (*i.e.*, cleanup) order or voluntary agreement under federal law; and (4) properties that have a hazardous waste facility permit. Outside of these exceptions, any property that has had a release of a hazardous substance can qualify as a brownfield.

Once it is determined that a property is eligible for the Brownfield Program, the next question that must be answered is whether the purchaser is eligible. The most important limitation is that the purchaser must be a prospective purchaser rather than a current owner. The current owner of a brownfield is not eligible to participate in the Program unless that owner falls into the exception recently created by the amendments to the Act (discussed later in this article).

In addition to the "prospective purchaser" limitation, applicants to the Program must not have contributed to the release of the hazardous substance on the property, or have a substantial business relationship or other affiliation with a party responsible for the release. Finally, an applicant cannot be the current subject of an enforcement action of the Georgia EPD if it wishes to qualify. >>>>

Application to the State

If the prospective purchaser and the property are eligible, the next step is to file the correct application for the property in question. There are two types of applications that can be filed with the state. The first, a Prospective Purchaser Corrective Action Plan, is appropriate at sites where source material and/or soil require cleanup in order to achieve the appropriate level of protection for the planned land use. The Plan will typically specify what actions are needed to achieve the desired level of cleanup, and will provide for confirmatory sampling to assure that the standard is reached. The second type of application, an Initial Compliance Status Report, is appropriate in cases where site conditions are well understood, and the state can certify that the appropriate cleanup level can be reached without any further remediation at the site. The state uses the two types of applications because not every site will require active remediation in order to comply with risk reduction or cleanup standards.

The appropriate level of cleanup will depend on the proposed use for the property. The state recognizes two cleanup standards, residential and nonresidential, both of which are promulgated under Georgia's "Superfund" law. As could be expected, the residential standard is more stringent than the nonresidential, such that properties that are intended for future residential use are more likely to require active cleanup than those intended for nonresidential use.

Incentives for Participation

Currently, there are two types of incentives available under the Act: liability limitations and tax incentives. In order to obtain the liability shield, a prospective purchaser enters into a contract with the state under which the purchaser agrees to perform certain environmental investigation and, if need be, cleanup. Under a typical brownfield agreement, the prospective purchaser usually assumes responsibility for site investigation (soil and groundwater), soil cleanup, source material cleanup or removal, and compiling a Compliance Status Report to demonstrate completion of the work agreed to in the contract with the state. In return for accessing contamination on a property and conducting any necessary cleanup of soil and source material, a qualifying prospective purchaser of a brownfield can obtain from the state a limitation of liability that relieves it, as the new owner, from liability for groundwater cleanup, as well as liability for third-party claims arising from whatever release of a hazardous substance qualified the property as a brownfield in the first instance. Liability for the groundwater cleanup, and for monetary damages to third parties, remains with the previous owner of the property.

The investigation conducted by the potential purchaser forms the basis for the limitation of liability granted in the agreement with the state. In other words, the data gathered in the investigation establish the baseline site conditions for which the prospective purchaser will not be responsible. The limitation of liability typically takes effect upon the approval of the work plan for the site or upon concurrence by the state that no further cleanup is required. Under Georgia's Act, the limitation of liability is fully transferable to subsequent purchasers, unless such purchaser is otherwise

Atlantic **Station**

Atlanta, Georgia

Photo courtesy of Brownfield News, Chicago, Illinois

liable for the contamination due to some prior interaction with the property.

Georgia also provides tax incentives for brownfield redevelopment. The brownfield tax incentive law allows property owners to apply to their local taxing authority for preferential assessment of the brownfield property. The preferential assessment can reduce taxes on the property for 10 years, or until certified assessment and cleanup costs are recouped, whichever occurs first. To obtain the preferential tax treatment, the prospective purchaser simply has to produce an approved application for a limitation of liability to its local taxing authority.

Recent Amendments

While the Brownfield Program has been effective in assisting with the redevelopment of hazardous waste sites, it previously excluded properties that were contaminated with one of the most commonly encountered pollutants: petroleum released from underground petroleum storage tank systems. Historically, releases from these systems were regulated exclusively under Georgia's Underground Storage Tank Act and could be addressed under the Brownfield Program only if the petroleum were mixed with other hazardous waste. The petroleum exclusion has affected potentially hundreds of former industrial sites in Georgia that otherwise would have been appropriate candidates for participation in the Program.

To rectify this problem, the Georgia General Assembly passed amendments to the Brownfield Act in March of 2005, which, among other things, allow properties contaminated with petroleum to participate in the Brownfield Program.

While Georgia's Brownfield Program is still in its infancy, it already has been successful in assisting with the redevelopment of dozens of sites in Georgia.

Another exclusion has unfairly disqualified certain persons from participating in the Brownfield Program. Initially, only prospective purchasers qualified for the Program; current owners of property were ineligible even if they were not the party who contaminated the site.

The March 2005 amendments to the Act open a retroactive grace period for property owners who purchased their property after July 1, 2002. Thus, persons who purchased property after July 1, 2002, but before January 1, 2005, can still qualify as "prospective purchasers" despite the fact that they already hold title to the property. The justification for

this exception is that the development community at large was not commonly aware of the intricacies of the Act, and many unwittingly proceeded to purchase properties that otherwise would have qualified for the Program. For purchases completed after January 1, 2005, the true "prospective purchaser" rule remains applicable.

While Georgia's Brownfield Program is still in its infancy, it already has been successful in assisting with the redevelopment of dozens of sites in Georgia. With the new amendments opening the door to petroleum-contaminated sites and sites purchased after July 1, 2002, but before January 1, 2005, a whole new class of properties is now eligible for the Brownfield Program. Like the Atlantic Station project in midtown Atlanta, many of these sites are in prime locations and have lucrative development potential. The Act offers a qualifying developer the opportunity to quantify the environmental unknowns before taking title to property, thereby allowing the developer to factor in more precisely the environmental costs of the development. More significantly, the Act relieves a qualified developer from liability for ground water cleanup, which, in most cases, is the most expensive aspect of any environmental cleanup. The Act, and the limited liability it offers, represent a serious attempt by the State of Georgia to undo the "cooling effect" of environmental cleanup laws on the redevelopment of industrial sites, and to address environmental blight.

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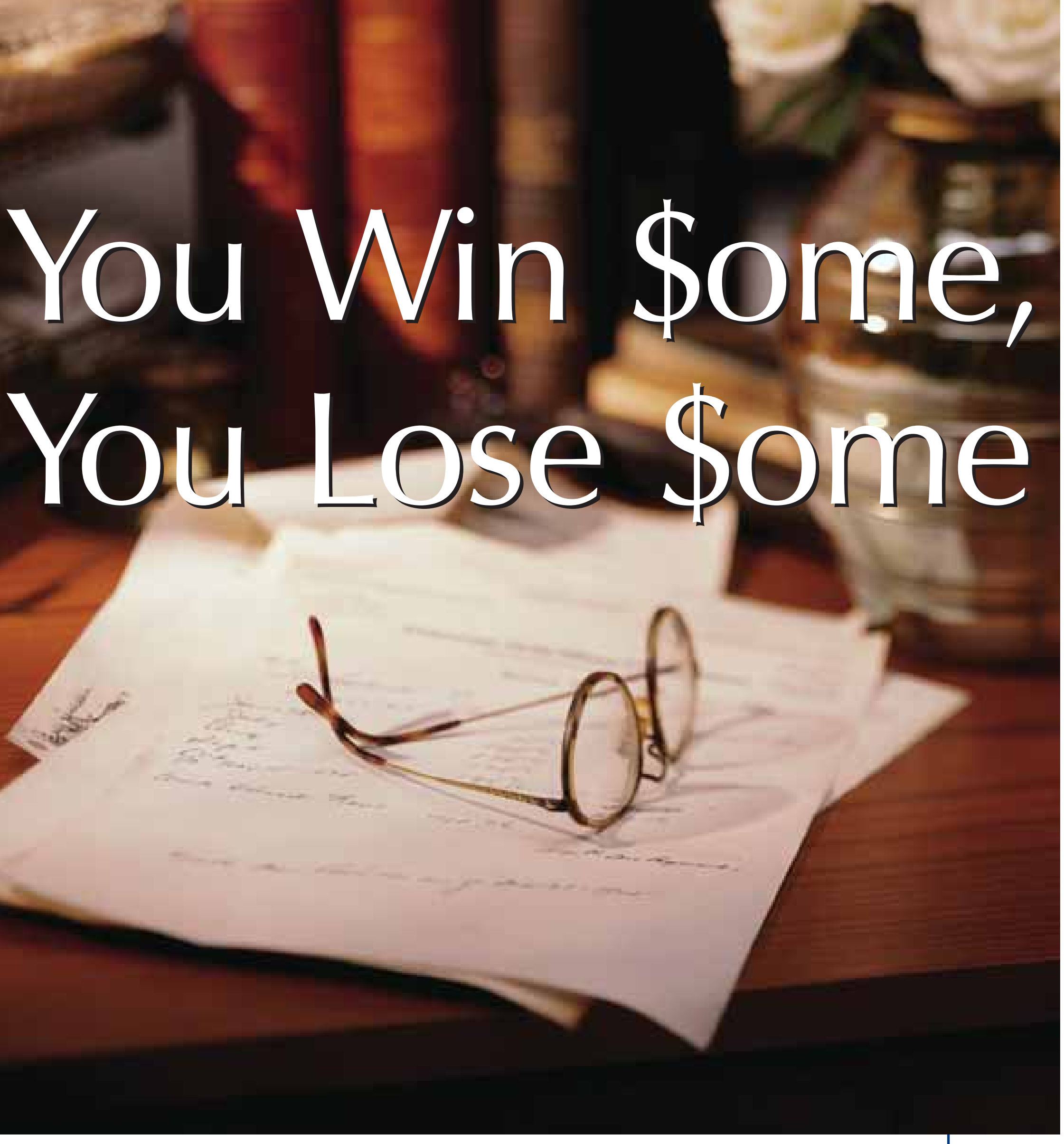


You Win $ome, You Lose $ome

Major Changes to Georgia's Corporate Tax Laws

If you own or operate a business in Georgia, you may have cause to thank the state General Assembly and shake your fist at it all at the same time. In its 2005 session, the General Assembly passed several bills, which Governor Sonny Perdue subsequently signed into law, that significantly reshape the landscape of Georgia business taxation. Some of the changes will be of benefit to your company, while others will be viewed as detrimental.

Major features and effects of the new legislation include:

- Significant revamping of the taxation of multistate business operations based in Georgia;
- The death of Delaware Holding Companies, or at least a very serious blow to their health; and
- Relaxation of rules regarding like-kind exchanges under Section 1031 of the Internal Revenue Code.

Multistate Operations

A company that transacts business in only one state is subject to state income tax only in that one state. If you only transact business in Georgia, your corporate taxable net income is subject to Georgia corporate income tax at a rate of six percent.

However, if your business corporation transacts business in multiple states, each state in which you transact business can levy an income tax based upon the amount of business you conduct within that state's borders. To determine how much business you transact in a particular state, most state revenue codes traditionally have looked at three different types of activity in their state: your personnel located in their state as measured by your payroll to persons in that state; the amount of real and personal property you have located in that state; and the level of sales to, or gross receipts from, customers located within that state.

For many years, Georgia law provided that Georgia corporate income tax at a rate of six percent could be levied against Georgia taxable income. Georgia taxable income was determined by taking federal taxable income, with certain adjustments, and multiplying that number by a fraction determined as follows:

$$\frac{\dfrac{\text{Property located in Georgia}}{\text{Property located everywhere}} + \dfrac{\text{Payroll paid to Georgia employees}}{\text{Total payroll}} + \dfrac{\text{Gross receipts from Georgia customers}}{\text{Total gross receipts}}}{3}$$

This placed an equal weight on Georgia payroll, Georgia property and Georgia gross receipts in determining the amount of taxable income subject to tax in Georgia. This formula was the law in Georgia for many years and was quite similar to the approach taken by most other states.

In recent years, many states, including Georgia, have taken steps to try to entice businesses to relocate into their state by easing the tax burden on businesses with a significant in-state presence. One way that Georgia tried to ease the burden on its corporate taxpayers was to modify the above apportionment formula in 1996 to place 25 percent weight on payroll, 25 percent weight on property and 50 percent weight on gross receipts. The effect of this change was to reduce the amount of taxable income subject to Georgia corporate income tax by reducing the resulting apportionment percentage number. For Georgia businesses that had a large majority of their plant and payroll located in-state but sales in many states, the Georgia tax burden was lessened merely by application of this revised mathematical formula.

In recent years, many states, including Georgia, have taken steps to try to entice businesses to relocate into their state by easing the tax burden on businesses with a significant in-state presence.

Let's look at an example using a fictional company. NightSky, Inc. is based in Georgia. Ninety percent of its property is located in Georgia, and 90 percent of its payroll goes to employees who are located in Georgia. Because NightSky has sales throughout the Southeast, only 20 percent of its sales are to Georgia customers.

Assuming NightSky had federal taxable income equal to $1 million and no Georgia adjustments, the 1996 change in the apportionment formula without any other change in facts would reduce NightSky's Georgia income tax by $7,000. Here is how:

Under the original formula, .9+.9+.2 divided by 3 produced an apportionment factor of .6666. Taxable income of $1,000,000 times the apportionment factor of .6666 resulted in $666,666 in Georgia taxable income. This amount times a six percent tax rate produced a Georgia income tax liability under the old equal-weighted formula in the amount of $40,000.

Under the double-weighted gross receipts formula enacted in 1996, the computation is as follows: .9+.9+.2+.2 divided by 4 = .55. Taxable income of $1,000,000 times the apportionment factor of .55 produces $550,000 in Georgia taxable income. This amount times the six percent Georgia income tax rate results in tax of $33,000. The Legislature thus provided this fictional corporation tax savings of $7,000 without any change in business operation facts.

Wait until you see what the Legislature has done for you now.

House Bill 191, which was passed by the General Assembly during the 2005 Session and signed into law on April 6, 2005, takes us to an entirely new level. For 2006, property will represent 10 percent, payroll will represent 10

percent and gross receipts will represent 80 percent of the apportionment formula. In 2007, property will represent five percent, payroll will represent five percent and gross receipts will represent 90 percent of the apportionment formula. Beginning in 2008, gross receipts will make up a full 100 percent of the Georgia apportionment factor.

Let's fast forward to calendar year 2008. Assume our same business facts given above for NightSky. A 100 percent gross receipts factor means that only 20 percent of NightSky's $1 million taxable income will be subject to Georgia tax, even though 90 percent of its property and 90 percent of its payroll are located here. Georgia taxable income of $200,000 (20 percent of gross receipts in Georgia times $1,000,000 taxable income) times a six percent corporate tax rate produces a tax of $12,000—a savings of $28,000 from the original equal-weighted apportionment formula that was the law for many years, with no corresponding change in facts. This is a tremendous incentive for businesses to expand personnel and property located in Georgia with no resulting increase in corporate income tax.

Delaware Holding Companies

In the past, when assisting clients in establishing a Delaware Holding Company (DHC), we advised them that any state income tax savings resulting from the creation of a DHC could well be short lived, as most states, including Georgia, were doing everything they could to neutralize the effect of this corporate structure. The Georgia Legislature has succeeded in dealing this tax-planning arrangement a serious, if not fatal, blow.

By way of background, the State of Delaware has a corporate income tax, but corporations that derive their incomes exclusively from intangibles are exempt from that tax. As a result, many businesses will form a Delaware corporation as a subsidiary or affiliate and transfer to that Delaware entity certain valuable intangible assets such as patents and trademarks. The newly formed DHC then grants a license to the original owner to allow that operating company to use the patent or trademark in exchange for the payment of a fee or royalty. The fee paid by the operating company to the affiliated DHC is a legitimate business expense, which reduces the amount of income of the operating company that is subject to state income tax. For its part, the DHC will have income only from the license fees or royalties, which represents income from intangibles, and therefore pays no state income tax to Delaware. The DHC also takes the position that it is not doing business in the states where its licensed property is being used.

In addition to the major change in the apportionment formula computation discussed above, Georgia House Bill 191 also sought to stop the loss of revenue brought about by DHCs by requiring companies to add back otherwise allowable deductions for interest expenses and intangible expenses directly and indirectly paid to related persons. As a consequence, patent, trademark and copyright royalty fees and license fees paid to affiliated DHCs are no longer deductible in computing Georgia taxable income. Interest expenses paid to affiliated DHCs in connection with intangible assets likewise are no longer deductible. In other words, this legislative action basically negates the benefits of having a DHC in place insofar as Georgia corporate income tax benefits are

concerned. (Note that while this article discusses the effect of HB191 on DHCs, the new law disallows the deductions for these types of payments to any related person, not just DHCs.)

IRC § 1031 Like-Kind Exchanges

Section 1031 of the Internal Revenue Code (IRC) allows a taxpayer to defer otherwise taxable gain in certain circumstances. In its simplest form, if you paid $100,000 for a piece of property (Parcel A) that you later sell for $200,000, you have taxable gain of $100,000, which is determined by subtracting your basis in the property (the $100,000 that you originally paid) from your selling price of $200,000. Suppose your purchaser owned a second piece of property, Parcel B, which interested you and was worth $200,000. IRC § 1031 would allow the two of you to exchange the two parcels of property—a "like-kind" exchange—without triggering any income tax. The gain would be deferred; your $100,000 basis in Parcel A would transfer and become your basis in Parcel B. You would not pay tax until you actually sold Parcel B.

Such an arrangement works fine for federal income tax purposes and for Georgia income tax purposes so long as Parcel A and Parcel B are both located within the State of Georgia. Any gain deferred on the sale of Parcel A will be captured when Parcel B is sold.

What if Parcel B is located in Florida or Alabama or Tennessee? Parcel A, located in Georgia, would generate taxable income in Georgia upon its sale. If Parcel A is exchanged for property in Tennessee, then Georgia may not be in a position to capture that gain when the Tennessee property is ultimately sold, and the deferred gain on the sale of Parcel A would, from the State's perspective, be lost.

As a consequence, for many years in Georgia, a like-kind exchange deferral was allowed only if Georgia property was exchanged for other Georgia property. An exchange for non-Georgia property triggered Georgia income tax.

Not anymore.

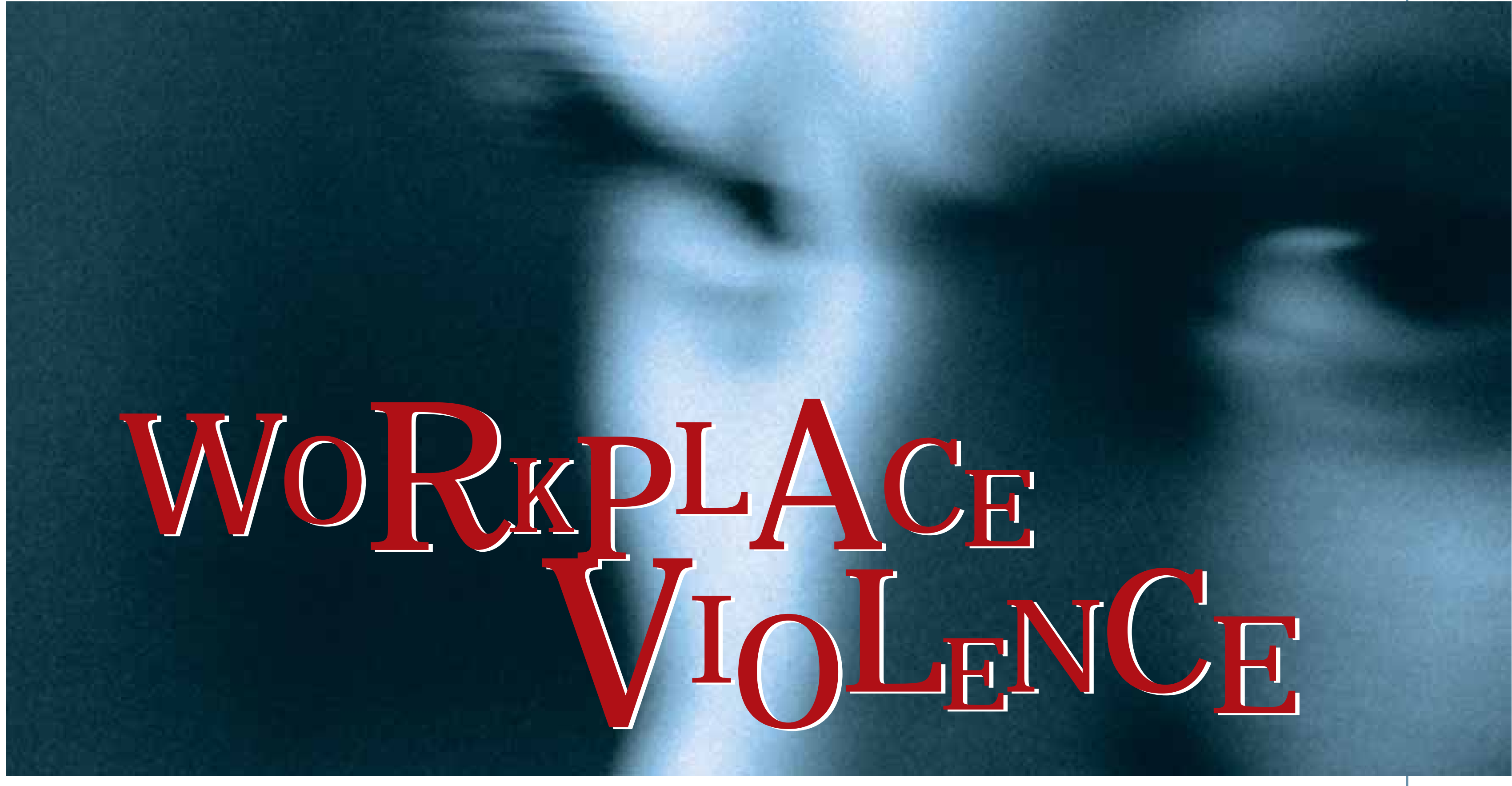
Sections 9 and 14 of House Bill 488, passed by the 2005 Legislature and signed into law by Governor Perdue, repeal for both individuals and corporations the requirement that Georgia property must be exchanged for Georgia property for tax to be deferred in a like-kind exchange. Under the new law, if the Section 1031 exchange is valid at the federal level, it is valid at the state level, and Georgia never gets to tax the gain deferred on the sale of the Georgia parcel if it is exchanged for non-Georgia property.

In a very rare move for the Georgia Legislature, these two

sections—and only these two sections out of 28 sections in the bill—were made retroactive to include the 2004 tax year (obviously someone with some significant political clout had such a sale in 2004!). You may be the beneficiary of this retroactive application. If you had such a disallowed transaction in 2004 and paid tax on the Georgia property portion of the like-kind exchange, give us a call. We can assist you in filing a state income tax refund to take advantage of this revision to the Georgia Code.

THIS COMMUNICATION HAS NOT BEEN WRITTEN AS A FORMAL LEGAL OPINION. ACCORDINGLY, IRS REGULATIONS REQUIRE US TO ADVISE YOU THAT ANY TAX ADVICE CONTAINED IN THIS COMMUNICATION WAS NOT INTENDED OR WRITTEN TO BE USED AND CANNOT BE USED FOR THE PURPOSE OF AVOIDING FEDERAL TAX PENALTIES.

Tracie Maurer



WORKPLACE VIOLENCE

RECOGNIZING RISK FACTORS AND FORMULATING PREVENTION STRATEGIES

In August of 1986, a part-time letter carrier walked into an Oklahoma post office and killed 14 of his co-workers before turning the gun on himself. The Oklahoma postal[1] tragedy brought national attention to the unfortunate, but growing, phenomenon of workplace violence.[2] Stories of workplace mass murders by unstable employees became commonplace for the local and national news media and the headlines were sensational: "Plant Worker Kills Six at Lockheed Martin Plant in Meridian, Mississippi" (*The Meridian Star*, July 2003); "Insurance Executive Kills Three at New York City Offices of Blue Cross/Blue Shield" (*NY1 News,* September 2002); "Xerox Technician Kills Seven Co-Workers in Honolulu" (*Honolulu Star-Bulletin,* November 1999); "Day-Trader Kills Nine, Then Self in Atlanta's Buckhead Community" (*The Atlanta Journal-Constitution,* July 1999); "Four Connecticut State Lottery Workers Killed by Accountant" (*The Washington Post,* March 1998).

Statistics from a study by the National Institute for Occupational Safety and Health (NIOSH), one of the most comprehensive studies of violence in the workplace, are staggering:

- Homicide was the second leading cause of death from an injury in the workplace, accounting for approximately 7,600 deaths from 1992 to 1997;
- Forty-one percent (41%) of all deaths from occupational injuries involving women were the result of homicides;
- Seventy-five percent (75%) of all occupational homicides were the result of gun use; fourteen percent (14%) could be attributed to knives or other piercing tools;
- Nonfatal workplace assaults resulted in nearly 900,000 lost workdays and an annual $16 million in lost wages; and
- In 1997 alone, employers were hit with over $4.2 billion dollars in lost productivity and legal fees due to workplace violence.

We look at these statistics and horrific incidents of workplace violence and ask, "What pushes these people over the edge?" "Could this happen in my workplace?" and "Didn't anybody see this coming?" The fact is that the warning signs of unstable persons are there. The signs, however, are often misread or ignored, or we attempt to justify telltale actions as "personality quirks." And the warning signs of overly stressed work environments are also there; we account for those who perpetuate such environments by describing them as "efficient" or "highly productive."

We would all agree that an unstable employee, coupled with an overly stressed work environment, creates a bad combination. Indeed, we see the effects of this dangerous combination in our workplaces on a regular basis. Statistically speaking, workplace homicides represent only a small portion of violent incidents in the workplace—approximately one percent.[3] In contrast, approximately one million workers a year—nearly 18,000 a week—are assaulted at work.[4] Workers are faced with threats, harassment, bullying, verbal and physical intimidation, stalking and other forms of unacceptable behavior that, when left unchecked, have the potential to lead to significantly more violent behavior. What, then, are employers supposed to do?

What is Workplace Violence?

Where does a personality quirk end and a potential risk begin? To answer that question, we first need to look at how we define workplace violence. Generally, people think of workplace violence solely in the context of physical assaults or homicides. Many mental health professionals consider such a definition too narrow, and instead define workplace violence more broadly, such as "any verbal or physical assault or any violence that occurs in the workplace even if its source is not related to the work environment"[5] or "any abusive, threatening, intimidating, or assaulting conduct against a co-worker whether physical or verbal. Such conduct can be seen in the form of shaking fists, throwing objects, destroying company property, written or verbal threats, swearing, insults, condescending language, hitting, shoving, pushing, kicking and the like."[6] When the definition of workplace violence is viewed in a more expansive context, the risk factors become clearer and, importantly, easier to manage. We examine those risks and strategies below.

What Should You Look For in Your Workplace?

A few years ago, in an effort to curb the increasing incidence of violence in its workplace, the United States Postal Service engaged the services of several mental health professionals to study its environment and its employees. The professionals determined two factors contributed to risky, dangerous workplaces; they characterized those factors as "violence-prone individuals" and "incident-prone environments." Studies by a host of other researchers similarly have identified both worker and environmental factors as contributors to workplaces that are at risk for violence. Below is a compilation of some of the most common factors.

Violence-Prone Individuals. Most of us have heard the term "Type A personality." Typically, it is used to describe someone who is extremely driven, meticulous, detail oriented, and narrowly focused on achieving certain goals, no matter what. But "Type A" is merely the tip of the iceberg for the violence-prone individual. For example, employees at a computer software company in a Detroit suburb reported a coworker who claimed to have gotten a military style haircut "for when I go psycho." The employee also threatened to kill one of his managers. Needless to say, the company quickly terminated this employee and took several precautions to prevent a violent situation at or after his termination meeting (many of those precautions are discussed later in this article). Clearly, this employee had problems that needed to be addressed immediately. >>>>

In other cases, are the signs as clear? They can be. Generally speaking, a violence-prone or destructive individual will display some or all of the characteristics listed below:

- Highly impatient; hypersensitive and overreactive to even the smallest issues
- Unreasonably judgmental; has rigid and righteous standards of which everyone else will fall short
- Highly suspicious (bordering on paranoid); often has an "it's me against the big, bad world" attitude
- Preoccupied by a need to control everything around himself or herself
- Creates unrealistic goals and timeframes
- Believes he or she is entitled to break the rules and, therefore, should be immune from consequences
- Engages in intimidation of others through extremely aggressive behavior or by constantly ridiculing or demeaning others
- Has sharp and dramatic mood swings
- Constantly allows himself or herself to be bullied and picked on by others
- Has history of violence, substance abuse or problems dealing with authority
- Is preoccupied with or owns a large number of weapons
- May have been subject to a recent traumatic event, such as an adverse employment action or domestic violence, or to recent or frequent disputes with supervisor or co-workers

Incident-Prone Work Environments. Unstable individuals are not the only factors that must be addressed when dealing with issues of workplace violence. As you read the following factors that typify an incident-prone environment, ask yourself, "Is my company a 'poster child' for a work environment that ... ":

- Is driven by "time, numbers and crises," resulting in customers being treated like royalty while employees are treated like peasants, or that expects greater productivity in less time by fewer people?
- Is subject to rapid and unpredictable change in the form of increased downsizing or rapid expansions in relatively short periods of time?
- Allows supervisors and managers to communicate frequently in excessively aggressive, condescending, explosive or passive/aggressive tones?
- Looks the other way when supervisors and managers allow subordinates to communicate with co-employees in similarly aggressive, condescending, explosive tones or allows co-employees to "scapegoat" others (such as allowing bullying or harassment of co-workers perceived to be "slackers")?
- Fosters company executives, managers and supervisors who are dismissive of employee feedback and ideas or whose leadership styles could be described as autocratic. In other words, do my executives, managers or supervisors conduct themselves in a manner that screams, "The work force is not paid to think"?
- Demonstrates a double standard in the application of policies and procedures between certain groups of employees, *e.g.*, management vs. general work force, or between the races or sexes?
- Has failed to implement effective mechanisms for addressing grievances or concerns?
- Has failed to train supervisors or managers to recognize truly troubled employees and provides no assistance to those who are in need of help?
- Lacks opportunities for job rotation or advancement?
- Permits external disruptions to prevail in the work environment, *e.g.*, temperature too hot or too cold; poor air quality; overcrowded work space with little privacy; excessive overtime; personnel shortages; high noise levels?
- Fails to perform background checks on new hires, resulting in persons with violent pasts working in the facility?
- Continues to promote, rotate or ignore problematic, less competent or emotionally charged individuals who should not be in management level positions?
- Allows employees' personal lives to be brought into the workplace?
- Fails to perform regular safety and security reviews of the premises and has no policy against workplace violence?

As you can imagine, any of these factors alone could present problems in your workplace. The unfortunate reality is that many companies have several of these factors working at any particular time, thus dramatically increasing the risk of an incident-prone environment.

Why Should Your Company be Concerned?

Overview Of Theories Of Liability. Employer liability for failing to take appropriate action in preventing workplace violence can be substantial. Potential liability exists under a number of legal theories.

In short, employers have a legal duty to provide reasonable protection to their employees and members of the general

public from violence in their workplace. Under Section 5(a)(1), often referred to as the "General Duty Clause," of the federal Occupational Safety and Health Act, an employer is required to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees." Twenty-six states, including Georgia, have adopted State Plans, approved by the Occupational Safety and Health Administration, which incorporate similar "general duty" language.

Most states, including Georgia, also impose employer liability for workplace violence pursuant to state common-law theories of negligent hiring or retention, *respondeat superior*, failure to warn (with regard to prospective employer recommendations), and premises liability. For purposes of this article, we focus on those theories—negligent hiring and retention, *respondeat superior* and failure to warn—that concern the employer-employee relationship.

"Type A" is merely the tip of the iceberg for the violence-prone individual.

Negligent Hiring and Retention. Liability under the theory of negligent hiring and retention is premised on the notion that an employer knew, or in the exercise of reasonable diligence should have known, of an applicant's or employee's propensity to engage in violent behavior, but hired or continued to employ the person nonetheless.

In negligent hiring cases, the significant factual issues concern the adequacy of the employer's pre-employment screening—what information was learned, or should have been learned, as a result of an effective screening prior to the applicant coming to work for the company. An employer may successfully defend against negligent hiring claims if it can prove the company took adequate steps to conduct criminal background checks, and dutifully checked employment references, and no information from its screening processes reasonably placed the employer on notice of the applicant's violent tendencies.

Similarly, the key issues in negligent retention claims concern whether, during the course of the employment relationship, the employer knew or should have known of an employee's propensity to engage in violent, dangerous or harassing behavior, but nonetheless failed to take reasonable steps to correct or remedy the situation. In other words, the focus in negligent retention cases is whether notice was provided to the employer of an employee's alleged misconduct and what, if anything, the employer did to eliminate the problem. Direct observations by managers and supervisors of an employee's unusual behavior are not the only way a company may be considered "on notice" for purposes of a negligent retention claim. Notice also can be imputed to the employer via customer or co-worker complaints. For purposes of establishing liability, the question is whether, when faced with evidence of violent or harassing tendencies, the employer took effective, meaningful disciplinary action to combat the conduct.

As the following case illustrates, an employer may be held liable for the subsequent death or injury of a co-worker or other person if an employee with known violent or dangerous propensities is hired or retained. The City of East Point, Georgia found out the hard way that failing to take appropriate action after being placed on notice of an employee's dangerous propensities can lead to substantial liability. In the matter of *Harper v. City of East Point*, 237 Ga. App. 375, 515 S.E.2d 629 (1999), a female plaintiff brought a claim against the City of East Point as a result of a police officer's assault of the claimant in the back seat of his patrol car. The Georgia Court of Appeals found there was sufficient evidence to present to the jury that the City knew or should have known of the officer's propensity to engage in sexual misconduct. In particular, the evidence showed that, prior to having hired the officer, the City was aware that the officer had pled guilty to making harassing phone calls and had lied about the incident on his employment application. In addition, it was shown that during the officer's employment with the City, the City also became aware of three other sexually inappropriate incidents, which, the court reasoned, should have put the City on notice of the officer's propensity to engage in sexual assault.

Respondeat Superior. Employer liability under the theory of *respondeat superior* is premised on the notion that the employer is vicariously liable for the wrongful acts of its employee if such acts were committed within the scope of the employee's employment and in furtherance of the employer's business. >>>>

The Georgia Code codifies the scope of an employer's liability in Section 51-2-2 as follows:

> Every person shall be liable for torts committed by … his servant by his command or in the prosecution and within the scope of his business, whether the same are committed by negligence or voluntarily.

In other words, a court looks at whether the employee's misconduct occurred while accomplishing the ends of his or her employer's duties. Unlike the negligent hiring and retention cases, claims brought under the theory of *respondeat superior* need not show that the employer had notice of the employee's propensity to engage in violent or inappropriate behavior. The primary requirement in these cases is that the employee's actions were related to his or her employment and were not personal in nature.

The classic example of claims brought under a *respondeat superior* theory concerns persons who perform security for their employers—*e.g.*, bouncers at a nightclub or after-hours security guards. Bouncers, for instance, are hired to protect the premises and keep out undesired or unruly patrons. In some cases, however, the overzealous actions of employees providing a security function have resulted in liability for their employers. For example, in the case of *Odom v. Hubeny, Inc.*, 179 Ga. App. 250, 345 S.E.2d 886 (1986), the Georgia Court of Appeals found a restaurant vicariously liable for the actions of its waitress. The waitress had punched and poured hot coffee on an unruly customer while attempting to remove the customer from the premises. According to the court, asking unruly customers to leave the premises was within the scope of the waitress's employment and in furtherance of the employer's business; thus, her actions could be imputed to the restaurant.

Duty To Warn; Letters Of Recommendation. A third area of potential liability for employers concerns the information provided to prospective employers about former employees. Typically, we recommend that references remain neutral, so as to guard against potential claims for defamation and invasion of privacy, and that the information provided to a prospective employer be limited to the employment law equivalent of "name, rank and serial number": dates of the candidate's employment, position(s) held, salary history and, if asked, whether the employee is "eligible" for rehire (*i.e.*, providing a one-word response to the question, "Would you rehire this person?").

In order to encourage a limited flow of information concerning employees who may be dangerous or who have engaged in unlawful conduct related to their employment, a number of states, including Georgia, provide a qualified immunity from liability for defamation and other potential claims for employers who provide statements to prospective employers regarding a candidate's job performance. The Georgia Code, however, requires that, in order for the immunity to apply, such comments must be provided in good faith and limited to the following subject areas:

- job performance
- any (substantiated) act committed by the employee that would constitute a violation of the laws of the State of Georgia
- ability or lack of ability of the employee to carry out the duties of his or her current or previous position

Further, the statements must be made to the prospective employer only upon request of the prospective employer or the person seeking employment.

An employer will not be protected under Georgia law if it is shown that the information was provided in bad faith (*i.e.*, lack of confirmed information); the information was disclosed in breach of a nondisclosure agreement entered into between the former employer and employee; or the information would be considered confidential under applicable feder-

al, state or local law (*e.g.*, statements based on medical information). In addition, employers should keep in mind that while Georgia law provides immunity from liability for statements made at the request of a prospective employer, it does not protect information voluntarily provided by a former employer without such a request.

Potential liability associated with providing a poor reference notwithstanding, employers also should be aware that at least two states, Florida and California, have allowed claims to proceed where the employer provided favorable references for employees previously terminated for violent and/or sexual misconduct.

In an unpublished Florida state court decision, *Jerner v. Allstate Insurance Co.*, No. 93-09472 (Fla. Cir. Ct. Aug. 10, 1995), families of five office workers shot by a co-employee were allowed to proceed to trial against the defendant insurance company, the killer's former employer. After being hired, then fired, by his subsequent employer, the individual shot the five workers, killing three, before turning the gun on himself. The victims' families argued that the insurance company should be held liable for monetary damages because it had written a letter of recommendation for the killer to his subsequent employer—even though the killer had been fired from the insurance company for carrying a gun in his briefcase.

In a 1997 California decision, *Randi W. v. Livingston Union School District*, 929 P.2d 582 (Cal. 1997), a female student brought claims against a school system arising from sexual molestation by her school principal. In addition, the student was allowed to proceed with claims against the principal's former employers on grounds that each had provided favorable job references but failed to disclose the principal's history of sexual misconduct charges.

As these cases demonstrate, an employer may be deemed to have a duty to warn prospective employers of a former employee's violent, dangerous or harassing propensities. But because liability may attach if disclosures of information are subsequently deemed improper, we highly recommend that you consult with counsel before disclosing any such information.

What Prevention Strategies Should You Implement?

Given the potential liability caused by dangerous employees and work environments, what can an employer do to reduce the risk of workplace violence? Listed below are a number of practical tips to help minimize the potential for violence in your work environment:

> Employers must implement, monitor and model "zero-tolerance" policies for violence and weapons.

- Implement a "zero-tolerance" policy as to violence that is communicated from, and modeled by, every level of management. Include a statement in that policy that weapons are banned from the premises.
- Train supervisors and managers to recognize and report troubling conduct.
- Require employees to report any threats and abusive behavior. Educate employees that their reports need not be limited to death threats. If possible, set up an anonymous system of reporting. Be sure to investigate all threats of violence.
- Have an action plan in place for responding to an incident of workplace violence.
- Take proactive steps during the hiring process:
  - Conduct thorough background checks.
  - Make sure applicants identify all prior employers and their reasons for leaving each former place of employment. Ask applicants to explain periods of unemployment.
  - Check references.
  - Make job offers conditional upon satisfactory results of reference and background checks.
- Make sure reasons for termination are not a surprise. Provide employees with regular oral and written evaluations of their performance, including specific goals, areas of improvement and an express statement of what will happen if no improvement is shown.
- Think ahead and take appropriate precautions when terminating employees:
  - Some suggest terminating on Mondays, rather than Fridays. The idea here is that the employee will have an

opportunity to begin the job search immediately instead of having a weekend to stew about the termination.

- Select an appropriate location for the termination meeting. If possible, hold the termination meeting in an office near an exit. This strategy minimizes the risk of exposing many others to a potentially violent situation, and allows the terminated employee to leave or be escorted from the premises discreetly.
- Choose a time for the termination when the potential for onlookers is small. If a low-traffic time is not available, make arrangements to send for the employee's personal belongings, and do so immediately. Have another manager or supervisor retrieve coats, keys and other immediately needed personal effects and bring them to the termination meeting room (without comment to onlookers). Explain to the terminated employee that any other items will be mailed to him or her within the next few days.

- Consider offering post-termination assistance such as severance pay, career counseling or your company's employee assistance program.
- Assess your security measures regularly. Easily fixed, but often missed, areas of potential risk include broken or ineffective locks and poor lighting, especially in parking areas.

A particular note should be made here about domestic violence. Domestic-related incidents continue to be a source of violence in the workplace. Domestic issues that start in the home often follow an employee to the workplace because the perpetrator knows this is the one place the victim can be found. If your company becomes aware of domestic violence issues involving one of its employees and has legitimate concerns that the threat may follow him or her into your workplace, you have some options. First, you can offer the employee time off until the situation is resolved. If possible, offer at least a portion of the time off with pay. This strategy removes a possible target from your workplace and allows the employee to focus on reaching some sort of resolution without worrying about the financial repercussions of missing work.

In addition, a 2000 amendment to Georgia's Labor and Industrial Relations Code permits employers to seek and obtain temporary restraining orders where an "employee has suffered unlawful violence or a credible threat of violence from any individual, which can reasonably be construed to have been carried out at the employee's workplace. ..." "Unlawful violence" is defined as assault, battery or stalking; a "credible threat of violence" is defined as "a knowing and willful statement or course of conduct which would cause a reasonable person to believe that he or she is under threat of death or serious bodily injury, and which is intended to, and which actually causes, a person to believe that he or she is under threat of death or serious bodily injury, and which serves no legitimate purpose."

Conclusion

Increases in depictions and acts of violence have touched all aspects of our society—from television and movies to schools and the workplace. With disturbing frequency, we see and hear news accounts of yet another disgruntled employee "going postal." There are, however, warning signs and proactive steps that employers can—and must—take to minimize their liability for claims arising from workplace violence. Employers must implement, monitor and model "zero-tolerance" policies for violence and weapons; assess and, if necessary, update security measures; implement comprehensive training and educational programs for supervisors and employees; investigate and take prompt, appropriate action for all claims of threatened violence; recognize and address factors that contribute to violence-prone individuals and incident-prone environments; conduct comprehensive employment and criminal background checks prior to hiring applicants; and consider the implications of what you say—or don't say—to warn prospective employers of the violent or dangerous tendencies of a former employee.

Endnotes

1. In the three years prior to the Oklahoma incident, postal employees had been killed by current or former co-workers in Alabama, South Carolina and Georgia. Following the Oklahoma postal incident, the term "going postal" became a frequently used phrase to describe employee violence. According to a 2000 Postal Service Commission Report and statistics from the Bureau of Labor Statistics, however, "going postal" is a myth. Statistics indicate postal employees are less likely to be homicide victims than other workers. *See* "Report of the United States Postal Service Commission on a Safe and Secure Workplace," U.S. Postal Serv. Annual Report, 2000.
2. One of the earliest media appearances of the phrase "workplace violence" appeared in August of 1989 in a *Los Angeles Times* article concerning another postal shooting, "Armed and Angry," *Los Angeles Times*, June 6, 1997.
3. Bureau of Labor Statistics, Census of Fatal Occupational Injuries (2000).
4. *Id.*
5. National Mental Health Ass'n, *Facts on Violence in the Workplace* (2005) (*citing* Ctr. For Mental Health Servs., *Preventing Violence in the Workplace,* U.S. Dept. of Health & Human Servs., Substance Abuse & Mental Health Servs. Admin., March 1994).
6. Canadian Centre for Occupational Health & Safety, *What is Workplace Violence?* (April 2005).

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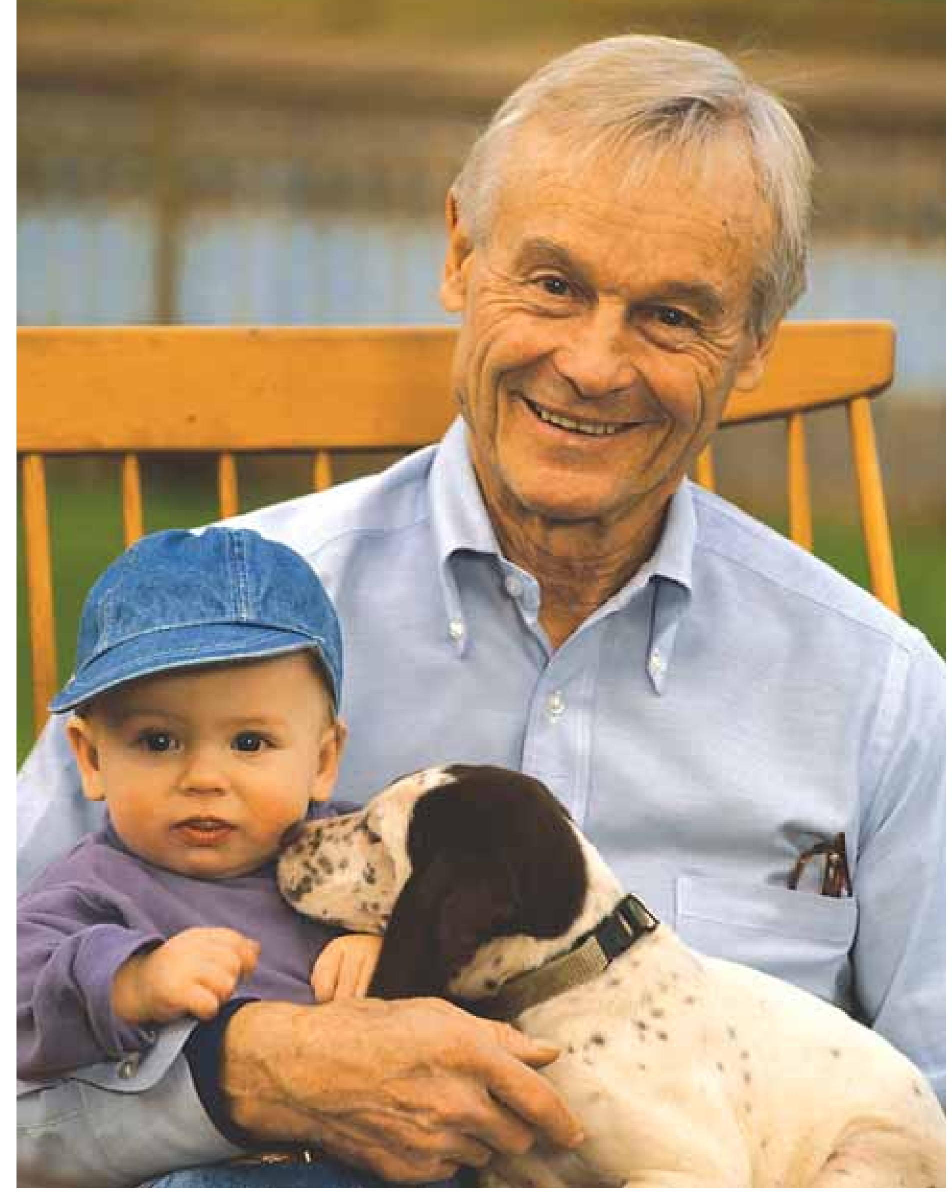


Most of us will not soon forget this spring's nightly news stories of Terri Schiavo and the very public battle to determine her fate. Hearing about her case made many of us pause to consider, "Could the same thing happen to one of my loved ones or me?" >>>>

POWER
OVER YOUR FATE

"Could the same thing happen to one of my loved ones or me?"

Regardless of varying religious, moral and political views on the subject, most states recognize the ability of a competent adult person to make a written directive, known as a "living will," with regard to the application or withdrawal of life-sustaining procedures in the event he or she becomes unable to make his or her own health care decisions. Much of the anguish suffered by Terri Schiavo's family might have been avoided if she had expressed her life and death wishes in a living will. However, a living will has only limited application and may not, by itself, be enough to ensure that the decisions you wish to have made are carried out by others. Thus, one needs to understand not only what a living will is and what it can accomplish, but also what a living will *cannot* do.

Living Wills

Georgia's living will statute was enacted in 1984 for the express purpose of recognizing the right of a competent adult, called the "declarant," to make a written directive instructing his or her physician to withhold or withdraw life-sustaining procedures upon the occurrence of certain conditions: a terminal condition, a coma or a persistent vegetative state. The Georgia law defines the term "life-sustaining procedures" as

> [A]ny medical procedures or interventions, which, when applied to a patient in a terminal condition

What If I Don't Have a Living Will?

Before discussing living wills, it may be helpful to examine Georgia law to determine what would happen in the event a person who has not executed a living will becomes unable to make his or her own health care decisions.

The Georgia Medical Consent Law authorizes certain persons to consent to surgical or medical treatment that may be recommended or prescribed by a physician. Such persons include:

- Any adult, for himself or herself, whether by living will or otherwise;
- Any person authorized to give such consent for the adult under the Georgia Durable Power of Attorney for Health Care Act (discussed later in this article);
- Any married person, whether an adult or a minor, for his or her spouse;
- In the absence or unavailability of a living spouse, any parent, whether an adult or a minor, for his or her minor child;
- Any person temporarily standing *in loco parentis*, whether formally serving or not, for the minor under his care;
- Any guardian, for his ward; and
- Any female, regardless of age or marital status, for herself when given in connection with pregnancy, or the prevention thereof, or childbirth.

If an adult is unable to consent to surgical or medical treatment for himself or herself, and in the absence of any other person mentioned above to consent on his or her behalf, the following persons are authorized to consent for him or her in the following order of priority:

- Any adult child for his or her parents;
- Any parent for his or her adult child;
- Any adult for his or her brother or sister; and
- Any grandparent for his or her grandchild.

Unfortunately, the provisions of this statute leave some questions unanswered. What, exactly, constitutes a "surgical or medical treatment"? Would the removal of life support constitute "medical treatment"? What about the withdrawal of nourishment and hydration? Because it is not clear whether this statute would allow the authorized person to direct the withdrawal of life-sustaining procedures, including the withholding or withdrawal of nourishment and hydration, we recommend that every adult execute a living will so that his or her wishes in this regard can be honored.

or in a coma or persistent vegetative state with no reasonable expectation of regaining consciousness or significant cognitive function, would serve only to prolong the dying process and where, in the judgment of the attending physician and a second physician, death will occur without such procedures or interventions. The term "life-sustaining procedures" may include, at the option of the declarant, the provision of nourishment and hydration, but shall not include the administration of medication to alleviate pain or the performance of any medical procedure deemed necessary to alleviate pain.

Because a living will applies only when the declarant is suffering under a terminal condition, a coma or a persistent vegetative state, it is important to know exactly what these conditions are. A "terminal condition" is defined by Georgia law as an incurable condition caused by disease, illness or injury which, regardless of the application of life-sustaining procedures, would produce death. A "coma" is a profound state of unconsciousness caused by disease, injury, poison or other means and for which it has been determined that there exists no reasonable expectation of regaining consciousness. Finally, a "persistent vegetative state" is a state of severe mental impairment in which only involuntary bodily functions are present and for which there exists no reasonable expectation of regaining significant cognitive function.

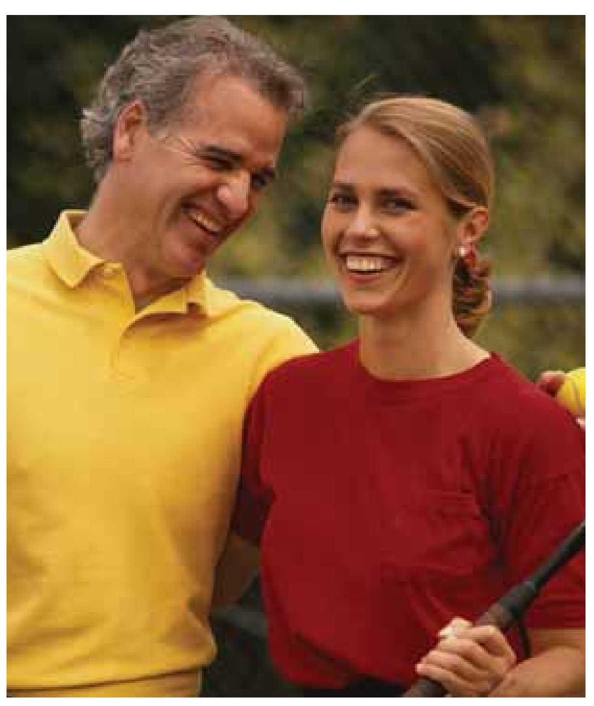
The procedures for establishing whether a person has a "terminal condition" or is in a "coma" or a "persistent vegetative state," such that the provisions of the living will are triggered, are similar for each condition. Two physicians, one of whom must be the declarant's personal physician, must participate in the determination process. They both must personally examine the declarant and make a specific written certification based on the condition of the declarant. For a terminal condition, the physicians must certify that there is no reasonable expectation for improvement in the condition of the declarant and that death of the declarant will occur as a result of the condition. In the event of a coma, the physicians must find that the declarant has been in a profound state of unconsciousness for a period of time sufficient for the declarant's physicians to conclude that the unconscious state will continue and that there exists no reasonable expectation that the declarant will regain consciousness. If the declarant is suffering from a persistent vegetative state, the physicians must state that the declarant's cognitive function has been substantially impaired and that there exists no reasonable expectation that the declarant will regain significant cognitive function. A living will can be given effect only if the required certification is made.

A declarant executing a living will may chose one, two or all three of the above-described conditions in which the living will is operative and life-sustaining procedures will be withheld or withdrawn. Thus, for example, a declarant could elect to maintain life-sustaining procedures if he or she is in a coma, but to have life-sustaining procedures withheld or withdrawn if he or she is in a persistent vegetative state. The declarant of a living will also has the opportunity to indicate whether the withholding or withdrawal of life-sustaining procedures will include the withholding or withdrawal of nourishment and hydration. A declarant may indicate that both nourishment and hydration be withheld or withdrawn, that neither be withheld or withdrawn, or that nourishment be withheld or withdrawn but not hydration.

The withholding or withdrawal of nourishment or hydration is an issue about which many people hold strong convictions. By indicating a choice in a living will, the declarant can be sure that his or her family and health care providers will know the declarant's wishes on this issue.

To be valid, a living will must be

{ An individual has the legal right to control all aspects of his or her medical care. }



signed by the declarant in the presence of at least two witnesses. Each of those witnesses must be a competent adult who is not related to the declarant by blood or marriage; would not be entitled to any portion of the estate of the declarant upon the declarant's death under any Last Will and Testament of the declarant; would not be entitled to any portion of the declarant's estate under the rules of descent and distribution; is neither the attending physician nor an employee of the attending physician or of the hospital or skilled nursing facility in which the declarant is a patient; is not directly financially responsible for the declarant's medical care; and does not have a claim against any portion of the declarant's estate. In addition, if a living will is executed in a hospital or skilled nursing facility, it must also be signed in the presence of either the chief of the hospital medical staff, a physician on the medical staff that is not participating in the care of the patient, or a person on the hospital staff who is not participating in the care of the patient and who is designated by the chief of staff and the hospital administrator, if witnessed in a hospital; or the medical director or any physician on the medical staff who is not participating in the care of the patient, if witnessed in a skilled nursing facility.

Georgia law clearly states that any declaration that constitutes an expression of the declarant's intent shall be honored, regardless of the form used. The Georgia living will statute does, however, provide a statutory form. Any declaration similar to the statutory form is presumed on its face to be valid and effective. Any living will executed on or after March 28, 1986 is effective from the date of execution unless and until revoked.

Thus, we have seen what a living will can do under Georgia law: it provides the declarant the opportunity to indicate under what conditions life-sustaining procedures will be withheld or withdrawn (a terminal condition, a coma or persistent vegetative state, or any combination thereof) and, specifically, whether the supply of nourishment or hydration should be withheld or withdrawn under those conditions. It is important to remember, however, that a living will applies only if the declarant is in a terminal condition, a coma or a persistent vegetative state and, even then, only if the physician certification procedures are met. Furthermore, a living will gives direction only with respect to life-sustaining procedures, as outlined above.

What happens if a person is unable to make his or her own health care decisions, but is not in a terminal condition, a coma or a persistent vegetative state? Or what will happen if a physician recommends for a person unable to make his or her own health care decisions a surgical or medical treatment that does not constitute a life-sustaining procedure? Presumably, a living will would not apply. Because of these limitations in the application of a living will, one might also desire to execute an additional document, called a "durable power of attorney for health care."

Durable Powers of Attorney for Health Care

An individual has the legal right to control all aspects of his or her medical care. However, if an individual becomes disabled, incapacitated or incompetent, his or her right to control treatment could be denied unless that individual has delegated to a trusted agent the power to make decisions. The Georgia Durable Power of Attorney for Health Care Act details the requirements for an individual, called the "principal," to appoint an "agent" to make health care decisions on his or her behalf.

When a valid durable power of attorney for health care (DPAHC) is in place, it will take precedence over a living will. The health care powers that may be delegated to an agent include all powers that an individual has to be informed about and to consent to or refuse or order withdrawal of any type of health care. This includes, for example, the decision to admit or discharge the principal from hospitals, nursing homes or other health care institutions; contracting for any and all types of health care facilities and services; and the examination and consent to disclosure of the principal's medical records. A DPAHC may even extend beyond the principal's death by allowing the agent to authorize an autopsy, make anatomical gifts and dispose of the principal's remains.

To have a valid DPAHC, the appointment must be in writing and signed by the principal, or by some other person in the principal's presence and at the principal's direction. The DPAHC must be witnessed by two or more competent adults. In addition, if a DPAHC is executed when the principal is a patient in a hospital or skilled nursing facility, it must also be witnessed, in the presence of the principal, by the principal's attending physician.

The Georgia Durable Power of Attorney for Health Care Act provides a statutory form that may be used to appoint a health care agent, but the statutory form is not intended to be exclusive and other forms may be used.

If the principal has a living will as provided by the Georgia Code, the living will is not operative so long as there is available an agent who is authorized by the principal's DPAHC to make decisions regarding life-sustaining or death-delaying procedures for and on the behalf of the principal. Furthermore, unless the DPAHC provides otherwise, an agent who is known to the health care provider to be available and willing to make health care decisions for the patient has priority over any other person to make decisions and to act for the patient in all matters covered by the DPAHC.

Thus, by executing a DPAHC, a principal can designate the person he or she desires to make health care decisions for the principal in the event the principal becomes incapacitated and is unable to make his or her own health care decisions. The principal can designate the scope of the agent's power in the DPAHC, thereby exercising a great deal of control over the agent's decision-making process. Because a DPAHC is much broader in scope than a living will, it also can apply in situations where a living will cannot. For this reason, a DPAHC provides a greater degree of health care protection for an incompetent adult than that afforded by a living will.

{ A living will gives direction only with respect to life-sustaining procedures. }

Conclusions and Recommendations

Due to the limitations inherent in a living will, we recommend that every adult execute not only a living will but also a durable power of attorney for health care. Although having these documents does not mean that there will never be a legal fight over an individual's medical care, those who execute these documents enjoy greater protection than those who do not, and there is a greater likelihood that their wishes will be carried out.

The DPAHC will name the person whom the individual thinks is best situated to make health care decisions for him or her if the individual cannot do so. The living will, in effect, serves as a "back-up" to the DPAHC. It provides details of the declarant's desires and can help the health care agent make decisions that reflect the declarant's wishes, as well as instruct family members and health care professionals about the medical care the declarant wants or does not want if for any reason his or her health care agent is unavailable. >>>>

HIPAA and "Springing" Powers of Attorney

The Georgia statutory form durable power of attorney for health care (DPAHC) is not a "springing" power—that is, it does not require a determination that the principal is incompetent before it becomes effective. Different forms of DPAHCs, however, may contain springing powers. Moreover, many of our clients have chosen to execute a springing general power of attorney (GPOA), naming a person to make financial decisions on the principal's behalf but only when the principal has been determined to be incompetent. If a DPAHC or a GPOA incorporates springing powers, the provisions of the Health Insurance Portability & Accountability Act of 1996 (HIPAA) become very important.

HIPAA was enacted to prevent unauthorized disclosures of protected health information. This can become a problem when the family of a patient is trying to determine whether the patient is incompetent in order to "activate" the patient's springing powers of attorney. Most springing powers of attorney require the opinion of one or more physicians that the principal is disabled before the power becomes effective. But HIPAA prohibits the principal's physicians from disclosing information about the principal's medical condition to anyone other than the principal or the principal's personal representative without the principal's or the personal representative's permission. The quandary is that the principal cannot give permission because he or she is incapacitated, and the agent named in the DPAHC or the GPOA cannot give permission as the principal's personal representative because the agent does not qualify as the personal representative until the principal has been determined to be incompetent.

What solutions are available to overcome this problem? We have three suggestions:

- Do not execute a springing power of attorney, but have the power of attorney become effective upon execution;
- If you have a springing power of attorney, execute a separate authorization allowing your physicians to disclose health information potentially relevant to a determination of incompetency; or
- Provide for an alternative method for determining incompetency, such as a committee of trusted relatives or friends.

Finally, if you have a living will or a DPAHC, we recommend that you review each of those documents on a regular basis to ensure that they still reflect your wishes and desires. As demonstrated by the unfortunate plight of Terri Schiavo, family members may have widely divergent views on the medical care and treatment to be provided to an incapacitated person. By having a living will and a DPAHC, you can take steps to ensure that there will be no question as to your desires regarding your medical care and treatment.

Laura Wartner
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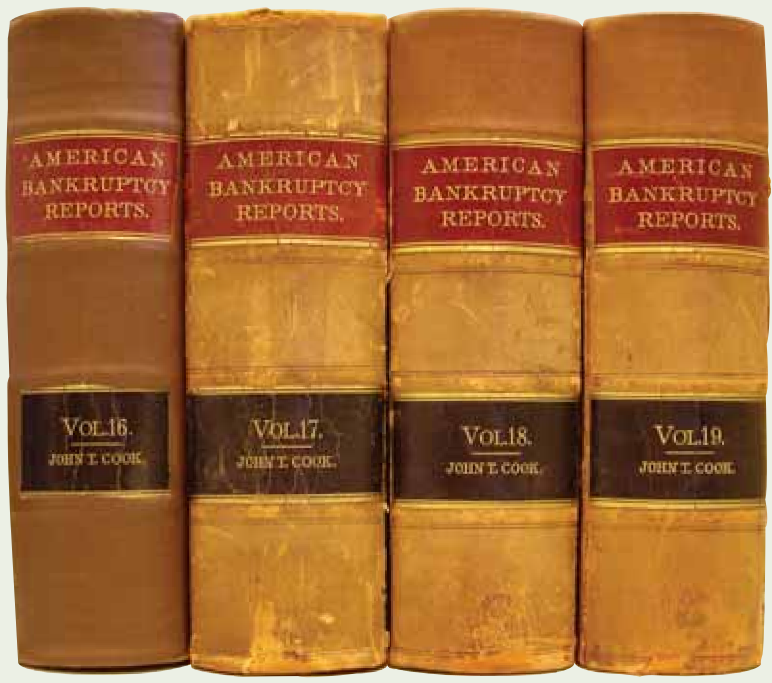
Other Considerations for Living Wills and DPAHCs

Beyond the importance of having a living will and a DPAHC, the Terri Schiavo case highlighted the turmoil that can result from widely divergent religious, moral and political viewpoints regarding a person's directive to withhold or withdraw life-sustaining procedures. Therefore, it is important for you to examine your personal values and desires regarding that issue before you execute a living will or a DPAHC. In most cases, it is equally important to communicate those values and desires to your family and your health care providers to confirm that they understand and will act with your values and desires in mind. You should also take great care in choosing the person to serve as your agent under a DPAHC, and speak to that person about his or her willingness to accept that role and abide by your directions. And do not feel constrained by the statutory forms. If you have specific wishes that are not addressed in the statutory forms, make sure those specific wishes are spelled out clearly in your living will and DPAHC.

Laura Woodson
& Barbara Ellis-Monro



CHANGING THE CODE

New Federal Bankruptcy Laws

After more than eight years of effort by various interest groups and lobbyists, President Bush signed into law the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "Act") on April 20, 2005. While much has been written and discussed about the effect of the Act on consumer bankruptcies,[1] the Act also will have a significant impact on business bankruptcy cases. Among other changes, the Act includes additional claims for certain trade creditors, lessors and employees, expanded defenses to recovery of alleged preferential payments, expanded grounds for dismissal of a Chapter 11 case or its conversion to Chapter 7, additional oversight and monitoring by the bankruptcy court and certain ombudsmen, limitations on bonuses and compensation available to senior management, additional reporting requirements for small business debtors and a new chapter of the bankruptcy code for international bankruptcy matters. Each of these changes is discussed herein.

Provisions of the Act go into effect at various times, with the majority of the provisions becoming effective on October 17, 2005. Exceptions to the October 17 effective date are noted below. This article summarizes some of the provisions of the Act that affect business cases, with emphasis on those provisions that we believe will be of particular interest to our clients. This survey, however, is not exhaustive and will not address all changes that may affect corporate cases. >>>>

Expanded Rights of Certain Trade Creditors and Lessors

Current bankruptcy law relies on the Uniform Commercial Code to allow a seller 10 days to seek to reclaim goods delivered to a debtor on credit. The Act expands this time period and provides that sellers may reclaim goods, or be granted an administrative claim for the value of goods, sold on credit during the 45-day period before bankruptcy. To take advantage of this expanded reclamation period, the supplier must provide written notice of an intent to reclaim the goods within 45 days of the debtor's receipt of the goods, or no more than 20 days after the bankruptcy filing if the 45-day period expires after the bankruptcy filing. Reclamation rights are subject to the rights of a creditor holding a prior security interest or lien in inventory; however, if the senior lender's security interest does not extend to all inventory, or if the lender is oversecured, reclamation claims may have value and should be asserted to preserve the potential priority claim of the supplier.

Similarly, trade creditors—that is, creditors who provide goods as opposed to, for example, a lessor or a lender—who have delivered goods to a debtor within 20 days prior to its bankruptcy filing are entitled to assert an administrative expense claim for the value of the goods if the sale was in the ordinary course of the debtor's business, even where the seller fails to provide timely notice of reclamation. The potential for increased administrative claims of this nature will likely reduce the funds available to pay general unsecured creditors, since administrative claims must be paid in full before distribution to lower priority claims, including general unsecured creditors. Because of the clear benefit to particular trade creditors at the expense of others, the new reclamation and administrative claims provisions will likely be the subject of much litigation.

The Act also creates new rights for landlords leasing nonresidential real property to a debtor by requiring the debtor to reimburse actual pecuniary losses to the landlord for pre-petition nonmonetary defaults under a lease of nonresidential real property. (By way of example, a nonmonetary default might occur if a shopping center tenant violated a covenant to keep its storefront open.) The Act eliminates the question, under current law, whether nonmonetary defaults must be cured in order for the debtor to assume a lease of nonresidential real property, and allows a debtor to assume the agreement without curing nonmonetary defaults to the extent that such defaults are impossible to cure, except that defaults arising from failure to operate in accordance with a lease must be cured through performance at and after assumption.

In addition to creating a new claim for certain landlords, the Act now limits the time available for the debtor to determine whether to assume or reject an executory contract or unexpired lease. Under current law, a debtor must assume or reject unexpired leases of real property within 60 days after filing its bankruptcy petition, but the bankruptcy court may, for cause, extend such time indefinitely. Courts routinely extend the time to assume or reject executory contracts and unexpired leases in business cases until confirmation of the debtor's plan for reorganization. The amendments to the Bankruptcy Code created by the Act limit this period and require a debtor to assume or reject an unexpired lease within 120 days after a bankruptcy filing. The court may not extend this deadline beyond an additional 90 days unless the lessor consents in writing to such extension. This revision enables a landlord to know more quickly whether it will need to find another tenant for the property.

Limitations on Preference Actions

The Act includes several creditor-friendly modifications to current preference law. Under current law, a creditor who finds itself a defendant in an action to avoid and recover preferential transfers—that is, payments on account of an unsecured obligation made by a debtor within 90 days prior to the commencement of a case—is required to prove both that the payments made by the debtor during the 90 days prior to the bankruptcy were made in a manner consistent with the parties' prior course of dealing and on terms that are ordinary in the debtor and creditor's industry. The Act expands the availability of the "ordinary course" defense by requiring that the creditor prove **only** that the payment was made either in accordance with the parties' prior course of dealing **or** in accordance with ordinary industry terms. In addition, the time period available to a secured party to perfect its lien without being subject to potential preference exposure has been increased from 10 days to 30 days after the debtor receives the property. Finally, the Act prohibits actions to recover transfers totaling less than $5,000 in business cases.

These changes will make it more difficult for a debtor in possession to recover alleged preferential transfers. And because preference and other avoidance actions are often the only source of distribution for unsecured creditors, the result will be that fewer funds will be available for distribution to all creditors. At the same time, some creditors who received payment shortly before the debtor filed bankruptcy will benefit

by being allowed to keep what otherwise would have been avoidable transfers.

Expanded Bases For Dismissal, Appointment of a Trustee and Court Oversight

Under current law, the United States Trustee makes decisions as to the composition and operations of committees appointed in Chapter 11 cases to represent various creditor or equity security holder groups, without oversight or approval by the bankruptcy court. The Act changes this structure by giving the bankruptcy court more control over the composition of such committees. Specifically, the Act allows the court to order the United States Trustee to change the membership of a creditors' or equity committee if necessary to ensure adequate representation or to increase the number of members to include a creditor who, although a "small business" concern (as defined later in this article), holds claims the aggregate of which is disproportionately large relative to the annual gross revenue of that creditor. Thus, creditors who may not be holding the largest claims of the debtor may nevertheless seek appointment to an official committee.

In addition to increased access to committee participation, the Act also provides for increased sharing of information with and participation by nonmember creditors by providing that the court may order additional reports or disclosures to the committee's creditor constituents. While most attorneys representing a committee share nonproprietary information with committee members, committees and their counsel now have an affirmative duty to share and communicate with all creditors represented by the committee.

Under prior law, a party in interest or the United States Trustee could move to replace current management of the debtor company with a trustee, and the court was required to order the appointment of a trustee if certain factors, such as fraud or dishonesty, were present. The Act requires, for all cases filed after April 20, 2005, that the United States Trustee move for appointment of a Chapter 11 trustee if there are reasonable grounds to suspect that the debtor's current management or board participated in fraud, dishonesty or criminal conduct in the management of the debtor or in public financial reporting.

The Act substantially expands the factors that constitute "cause" to convert a Chapter 11 (reorganization) case to Chapter 7 (liquidation), or to dismiss the case altogether. Many of the factors set out in case law that developed under prior law are now codified and include: (1) substantial or continuing loss or a diminution of the estate and no reasonable likelihood of rehabilitation; (2) gross mismanagement of the estate; (3) failure to maintain appropriate insurance; (4) unauthorized use of cash collateral; (5) failure to comply with court orders; (6) failure to pay post-petition taxes; (7) failure to comply with reporting requirements and pay statutory fees; and (8) failure to attain confirmation, revocation of confirmation orders, or material defaults under a confirmed plan. The court is now required to convert or dismiss a case upon a showing of any of these factors, unless there are unusual circumstances showing the relief is not in the best interests of creditors and a reorganization plan will soon be confirmed. In addition, if the debtor fails to file a tax return or obtain an extension for a return that is due after the filing of the case and the taxing authority requests that the court dismiss or convert the case, then if the debtor does not file the return within 90 days after such a request, the court again is required to dismiss or convert the case, whichever is in the best interests of creditors.

The Act creates two new ombudsman positions to monitor health care business cases and to protect the interests of individuals in cases where the debtor intends to sell personally identifiable information about persons, such as credit information.

The Act also substantially changes notice requirements and provides additional protection to creditors from inadvertent violations of the automatic stay provision of the Bankruptcy Code. Current law applies the provisions of the automatic stay, which prevents creditors from taking any action to collect, enforce or perfect their claims after a bank-

ruptcy case is filed, without regard for actual notice to creditors that the debtor is in bankruptcy. The Act now requires that a debtor serve notice to each creditor at an address specified by the creditor in at least two communications sent to the debtor within 90 days before commencement of the bankruptcy. Notices that are not sent in accordance with the new provisions (which also require the debtor to provide account numbers and contact persons if previously identified by the creditor) will not be effective, and a creditor will not be liable for monetary damages for a violation of the automatic stay if it has not been served at the address it specified.

Employee Claims and Limitations on Key Employee Retention Plans

The Act makes recoverable under the fraudulent transfer provisions payments to or for the benefit of an insider[2] under an employment agreement and not in the ordinary course of business if they occurred within two years prior to the filing of the bankruptcy petition and the debtor receives less than reasonably equivalent value in exchange for the transfers. These changes are an attempt to enhance the recovery of excessive prepetition compensation or severance to corporate insiders. These provisions apply to all cases filed after April 20, 2005.

In addition to the ability to recover payments made to corporate insiders, the Act provides that allowable administrative expenses do not include payments made to induce an insider of the debtor to remain with the debtor's business post-petition, such as under a Key Employee Retention Program (KERP), without a showing that the employee is essential to the survival of the debtor, and that he or she already has a bona fide job offer elsewhere. Even if the debtor is able to satisfy these requirements for a particular employee, the amount of the KERP payment may not exceed 10 times the mean transfer to nonmanagement employees during the calendar year preceding the KERP, or if there were no such transfers to nonmanagement employees, the payment cannot be greater than 25 percent of what the employee could have received during the calendar year preceding the bankruptcy. Similar limits also have been placed on severance payments to an insider and now require that any such payment be made only pursuant to a program generally applicable to all full-time employees. Further, the amount cannot exceed 10 times the mean severance payment made to nonmanagement employees during that calendar year.

In contrast to limits placed on senior management, a debtor's employees are now entitled to priority claims of up to $10,000, up from the current limit of $4,925, for pre-petition wages, salaries, commissions, vacation, severance and benefits. And while former law limited the priority for wages and benefits to those accrued within 90 days pre-petition, the new amendments extend that period to 180 days before bankruptcy. The effect of this increased look-back period, which applies to all cases filed after April 20, 2005, is that more claims for vacation and other benefits that accrue over time will qualify as priority claims.

> The Act creates a new provision concerning the payment of insurance benefits to retired employees.

The Act also creates a new provision concerning the payment of insurance benefits to retired employees. Under the amendment, which applies to all cases filed after April 20, 2005, if a debtor modified its retiree benefits while it was insolvent and within 180 days prior to its bankruptcy filing, the court must reinstate the old benefits unless the balance of the equities favors the modified benefits. It remains to be seen whether this change will have any material effect, given that airline bankruptcies appear to be making new law in this area on a weekly basis, and bankruptcy courts seem inclined to allow such debtors at least partial relief from their burdensome defined-benefit retirement plans. We can expect significant litigation over this new provision, as retiree health care is one of the most costly issues facing certain industries.

Small Business Debtors

The Act reflects a number of revisions affecting "small business" bankruptcy cases. The revisions are intended to expedite the Chapter 11 process for small business debtors, which is relatively simple to do since such cases typically involve only one large creditor, and to provide more oversight of these cases, since small businesses tend to have less effective management in place.

The Act refines the definitions of "small business" case and "small business" debtor. A "small business" bankruptcy case is one filed by a debtor in which total debt for the debtor and affiliate debtors is less than $2 million exclusive of insider debt, and no creditors' committee has been appointed or it is determined to be inactive. The Act imposes additional reporting requirements on small business debtors and requires that recent financial statements and federal income tax returns be filed within seven days of their bankruptcy filing, and that the debtor file periodic reports containing profitability information, projections of receipts and disbursements, comparisons of projections to actual results, and interim reports that include information on profitability, cash receipts and disbursement projections, comparisons of projections to actual, and data on compliance with the Bankruptcy Code and tax filings. The increased small business reporting requirements go into effect 60 days after the Judicial Conference prescribes and puts into effect new Federal Rules of Bankruptcy Procedure and Official Forms directing the required disclosures. Because small business cases do not have a creditors' committee to monitor the progress of the case, the Act also requires that the United States Trustee investigate a small business's viability, inquire about its business plan, attempt to develop an agreed scheduling order, visit the debtor's business premises if appropriate and advisable, and review and monitor diligently the debtor's activities, in order to determine as promptly as possible whether the debtor will be unable to confirm a plan.

A small business debtor must now file its plan of reorganization within 300 days of the commencement of the case, unless that period is extended by the court upon a showing that it is more likely than not that the court will confirm a plan within a reasonable period of time. Once filed, the plan must be confirmed within 45 days after it is filed, unless that period is extended, once again upon a showing that it is more likely than not that the court will confirm a plan within a reasonable period of time.

International Bankruptcy Matters

The Act repeals the current section of the Bankruptcy Code relating to cases ancillary to a foreign bankruptcy filing and creates a new chapter, Chapter 15, governing cross-border bankruptcy cases. This chapter is applicable when a non-U.S. debtor is the subject of a non-U.S. insolvency proceeding, but has assets located in the United States. Chapter 15 provides for direct access by a foreign representative of the debtor and by creditors to the U.S. bankruptcy court through the commencement of a case under Chapter 15 by the filing of a petition for recognition of a foreign proceeding. Once a petition is filed, the bankruptcy court may, at the request of the foreign representative and where relief is urgently needed to protect the assets of the debtor or the interests of creditors, grant provisional relief, including staying execution against the debtor's assets in the United States. Upon granting recognition of the foreign proceeding, the court may also suspend the debtor's right to transfer, encumber or otherwise dispose of any assets of the debtor; provide for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities; and grant any relief other than the special avoidance rights available to domestic trustees. This procedure does not commence a full bankruptcy case but merely enables a court to provide appropriate relief, including prevention of piecemeal distribution of a foreign debtor's U.S. assets.

Conclusion

For some creditors, the recent amendments to the Bankruptcy Code may prove beneficial by allowing them to assert reclamation claims or successfully defend against avoidance actions. For others, the result may be a smaller pool for possible distribution to creditors. In any event, the significant changes effected by this legislation are certain to be subject to interpretation through litigation in the coming months and years in bankruptcy courts nationwide.

Endnotes

1. For example, the Act creates a "means test" that limits the ability of individuals to file a "straight liquidation" Chapter 7 case, and will require more individual debtors to contribute some portion of their disposable income to creditors in a payment plan under Chapter 13.
2. The Bankruptcy code defines an "insider" of a corporate debtor as a director, officer or person in control of the debtor; a partnership in which the debtor is a general partner; a general partner of the debtor; or a relative of a general partner, director, officer or person in control of the debtor.

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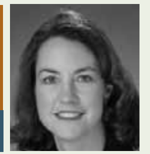

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Client Profile

Little League Baseball World Series at Howard J. Lamade Stadium in Williamsport, PA.

The Game of Life

Lessons of Little League® Reach Far Beyond the Diamond

"Character. Courage. Loyalty." For more than 60 years, the keystone-shaped logo of Little League Baseball and Softball has been emblazoned with these lofty ideals. And it is these ideals—not whether you win or lose—that bespeak what Little League is all about.

While you likely have heard of "Little League," what you may not know is that Little League Baseball, Incorporated is actually a federally chartered corporation with extensive operations in 76 countries. In 2004, Little League sponsored more than 7,100 leagues, providing a framework within which nearly 2.5 million young baseball and softball players in the U.S. and another 118,000 internationally were able to "play ball."

Little League was founded in 1939, and its organizers recognized early on that fundamental preparation for adult life can be accomplished on the baseball and softball diamond. Through athletics, youngsters not only develop skills but also learn their own strengths, the meaning of sportsmanship and cooperation, the essence of competition, and the qualities that constitute effective leadership. Little Leaguers learn about character, courage and loyalty, and develop citizenship, discipline, teamwork skills and physical well-being. More than 30 million Little Leaguers representing all walks of life have learned these fundamentals over the years—this is the heritage of the Little League movement, and the foundation of its success in youth sports.

Little League Baseball's Challenger Division enables boys and girls with physical and mental disabilities, assisted by their "buddies," to experience the thrill of playing baseball.

Little League® is not and has never been an elite, "win at all costs" program.

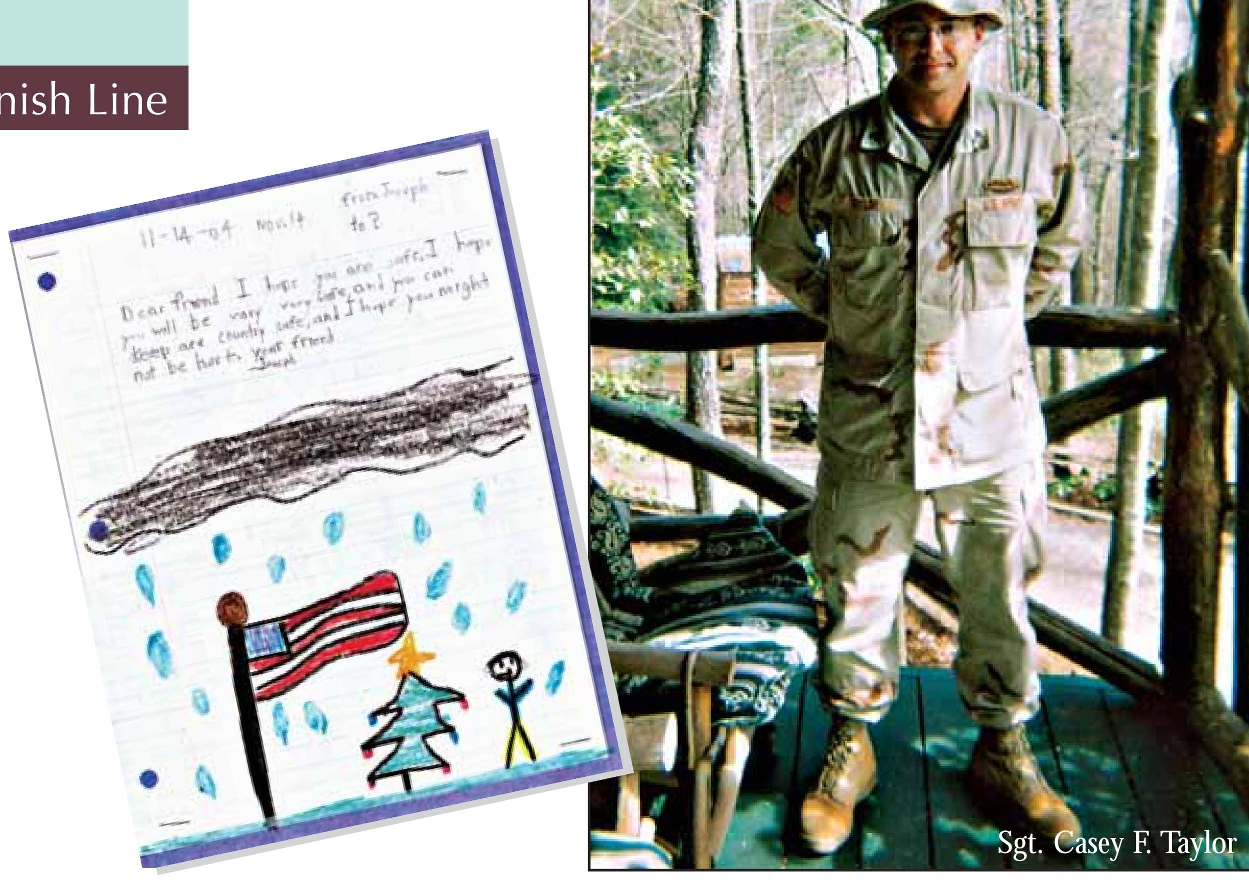
Because its focus is on character development goals, Little League is not and has never been an elite, "win at all costs" program. Instead, Little League strives to ensure that players have fun in a healthy, safe way. Players learn that winning is but one goal among many, and that in baseball and softball as in life, wins, losses, hits and strikeouts are all but inevitable. Little League stresses team achievements rather than individual accomplishment.

The Little League organization diligently protects the integrity of each player, each team and each community. Little League programs operate within specific boundaries for each league's territory to permit participation by all eligible youngsters within those boundaries. Adults in communities where no chartered Little League program exists can organize a program with help from Little League International.

Also well protected are Little League Baseball's registered trademarks. The United States Congress has granted Little League the exclusive right to use and authorize the use of the designations "Little League," "Little League Baseball" and the like. Given the fame of the Little League and Little League Baseball marks, the same are often misused. SGR assists Little League Baseball in precluding unauthorized uses of its trademarks, using a delicate touch in correcting or terminating such misuses, particularly when the media are responsible for the misuse. Occasionally, however, a heavier hand is necessary to deal with those who intentionally misuse Little League Baseball's marks in efforts to appropriate the enormous goodwill associated with the organization's trade symbols.

Although leagues may assess a registration fee, used to purchase uniforms and equipment and to maintain fields, the fee cannot be a prerequisite for playing. Little League rules do not permit any eligible candidate to be turned away. Emphasizing the spirit of Little League, rules require that every child plays in every game.

The 2005 Little League Baseball World Series will be played August 19-28, 2005 in Williamsport, Pennsylvania. If you happen to catch a game in person or on television, know that its participants are learning not only how to play baseball, but how to succeed in life.


11-14-04 Nov 14 from Joseph to ?

Dear friend I hope you are safe, I hope you will be very very safe and you can keep are country safe, and I hope you mright not be hurt. your friend Joseph

Sgt. Casey F. Taylor

Reaching Out

to SGR Family in Iraq

Patriotism ran especially high this winter and spring at SGR, as we proudly "sponsored" two platoons of the United States Army deployed to Iraq in support of Operation Iraqi Freedom.

SGR's troop sponsorship was the brainchild of Nancy Taylor, a paralegal in the Trusts and Estates department, whose son Casey, a sergeant and infantry rifle squad leader in the Army, recently completed his second tour of duty in Iraq. While Casey was in Iraq, Nancy arranged for SGR to sponsor two platoons of Casey's headquarters company ("My mom's always been involved in my career," he says proudly). Naturally, Sergeant Taylor was made the point man.

From October to May, members of the SGR community brought toiletries, books, games, DVDs, candy, beef jerky (no pork, since Iraq is a Muslim country), cards and letters from schools and scout troops of children of SGR attorneys and staff, footballs and other items to the office, where they were boxed up and, every two to three weeks, shipped to Iraq, c/o Sergeant Taylor, where he distributed the items to platoon members. Each shipment contained as many as 20 boxes, weighing anywhere from 15 to 30 pounds each.

"I was like Santa Claus with a gun," chuckles Sergeant Taylor, who now is back at the Fort Riley Army base in Kansas. "When the boxes would get to me, the mail guys would complain; they were big and heavy and there were a lot of them. Everyone would show up to get their mail, and as soon as they saw boxes for Sergeant Taylor, they knew goodies were coming."

> “They wanted to support the soldier, but didn’t know how to do it. This gave them an opportunity to feel good that they were contributing in some way.”

Dear Friend,

GOD Bless America! Thank you for serving our country! I know it isn't very pretty where you are, but it is beautiful here. The trees are on fire with red, yellow and orange leaves. The Christmas season is coming around, and soon, I hope everything will turn white. I know you won't have any snow and Santa probably won't come but maybe you remember one time when this [illegible] I am 12 yrs. old [illegible] grade [illegible] I love swimming, basketball and volleyball. Merry Christmas!

Your Friend,

[illegible]

God Bless the USA

The most popular items? DVDs, CDs, poker sets and books, all of which Sergeant Taylor wisely gave to the platoon sergeants to ensure equitable—and peaceful—distribution. Sergeant Taylor even traveled by armored Humvee convoy among three camps located throughout Sadr City, where the battalion was headquartered, to distribute the goodies from home to the troops.

Tragedy Hits Close to Home

Throughout the sponsorship, Nancy circulated at SGR e-mails from Sergeant Taylor that kept the firm apprised of his whereabouts and activities, to the limited extent he could disclose such details without compromising mission security. In early December, the harsh reality of the war was felt more vividly than ever, as SGR learned that Captain Mark Stubenhofer, whose wife was the first person to contact Nancy about troop sponsorship, had been killed by a sniper while out on patrol. Captain Stubenhofer had been the commander of the headquarters company, and Sergeant Taylor considered him a good friend. “It’s more difficult to lose your commander,” Sergeant Taylor explained. “He’s your dad and your mom. It’s hard to explain everything a commander means to a soldier.” High praise for a man who was only 30 years old when he was killed.

Stateside

Sergeant Taylor’s battalion was instrumental in destroying the rebellion in Sadr City and bringing peace to the area for elections.

In June, Sergeant Taylor returned to the United States with his battalion, and now awaits his discharge from the military later this year after nearly seven years of service. One of the biggest adjustments being stateside is not having to carry a gun 24 hours a day. “I feel naked without it,” he says. Apparently the feeling is common; Sergeant Taylor reports that he can tell who has just gotten back from a tour of duty in Iraq because they instinctively continue to pat their sides or reach under tables for weapons they no longer carry.

For her part, even with her son now back in the U.S., Nancy is arranging SGR’s sponsorship of a second group of soldiers in Iraq. “The response was overwhelming,” says Nancy. “The most important thing I learned is that people want to participate, to show support, regardless of political affiliation or how they feel about our being over there.

“They wanted to support the soldier, but didn’t know how to do it. This gave them an opportunity to feel good that they were contributing in some way.”

Trust The Leaders

Calling All SGR Alumni

Be sure to keep us informed so we can stay in touch. Please send your contact information to nkatz@sgrlaw.com, noting address changes, career information or other news you'd like to share with us.

We look forward to hearing from you.

If you do not have access to e-mail, you can contact us at 404-815-3981.

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