

QWarterly Chronicles

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THE ESTATE TAX IS DEAD - LONG LIVE THE TAX

As one of America's greatest author's Mark Twain once said, "the reports of my death have been greatly exaggerated!" This same statement can be attributed to the widely reported death of the estate tax. In fact, the truth is that the estate tax has been temporarily repealed for 2010.

What has replaced it, albeit very quietly, is the loss of stepped up basis on an individual's death. In effect, we have swapped one tax for another. Unfortunately the tax that has replaced the estate tax, namely capital gains, affects many more of our clients than the estate tax ever did.

We have tried to keep everyone up to date on the changes in this area since the execution of the Economic Growth and Tax Relief Reconciliation Act of 2001 (affectionately referred to as EGTRRA) since it was signed into law by then President George W. Bush. Nobody, including all of the so-called "talking heads" in

Washington, D.C. ever thought that January 1, 2010, would roll around and the portion of EGTRRA that temporarily repealed the estate tax would still be in effect. Well, everyone was wrong!

Now the main question that we all face is, "what will Congress do about this situation?" There is a great deal of "chatter" about a potential retroactive repeal of the 2010 estate tax repeal – WHAT A MESS! The truth is that we can only plan for what we know the law is at any given moment. Given the circumstances in which we find ourselves, we have suggested that every individual and couple with a revocable trust contact their advisors to discuss this situation to ensure that their documents comply with the law.

Please feel free to contact us if we can be of any assistance in this matter.

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YOU BE THE JUDGE

All Bay Contractors, Inc. (All Bay) was a general contractor on a tenant improvement project. All Bay hired Pacific Northstar Mechanical, Inc. (PMN) as a subcontractor to install heating and air conditioning systems. There existed on the property an unguarded electrical circuit to which an ungrounded light

fixture was wired. This condition was present at the time All Bay and PMN commenced any work on the premises and neither was hired to perform any work related to the ungrounded fixture. Miguel Suarez and Luis Avila were employees of All Bay. On January 14, 2005, Suarez climbed a ladder inside the building for the purpose of making marks on the ceiling while Avila remained below holding the ladder. To steady himself, Suarez grabbed an I-bolt that was holding the ungrounded light

fixture. Suarez immediately received a shock that caused him to fall from the ladder and land on Avila. Both men were injured as a result.

Suarez and Avila (plaintiffs) brought suit against the former property owner and PNM alleging premises liability and general negligence. As to PNM, plaintiffs claimed that it was liable because one of its employees had previously received an electrical shock from the fixture and failed to report it to All Bay. It was also alleged that the PNM foreman was aware of the condition and failed to bring it to the



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**A road sign on the main road to Mombassa, leaving Nairobi:
TAKE NOTICE: WHEN THIS SIGN IS UNDER WATER, THIS ROAD IS IMPASSABLE**

attention of All Bay. In addition, it was claimed that PNM had a contractual duty to take necessary precautions to protect against conditions it created and to inspect facilities utilized by PNM in performing its work. PNM brought a summary judgment motion in which it contended that it was not liable to plaintiffs because it did not owe a duty to plaintiffs. PNM argued that it owed no duty because it was not the owner of the property and it did not create the dangerous condition. The trial court granted the summary judgment and dismissed the claim against PNM.

Plaintiffs appealed and argued that PNM did owe a duty of care under a general

negligence theory, though plaintiffs conceded that they did not have a valid claim against PNM based on the theory of premises liability. Questions on appeal were [1] whether there was a duty created by contract to report the dangerous condition and [2] whether a subcontractor had a common law duty to persons who were not the subcontractor's employees.

Should the court have found that a duty of care was owed by PNM to the employees of other contractors who might be exposed to a hazard known to PNM even though the hazard was not created by PNM?

See "ruling", page 6

Office Hours:

Our normal office hours are 8:30 a.m. to 5:30 p.m. Monday through Friday, Saturday by appointment only.

Closures:

Friday, April 2
Good Friday

Monday, May 31
Memorial Day

**Sign in a City restaurant:
OPEN SEVEN DAYS A WEEK AND WEEKENDS.**

CORPORATE DISSOLUTION: WINDING UP WHEN THE CHIPS ARE DOWN.

Legally, corporations have no expiration date; they can go on for as long as someone files the required annual documents and pays the minimum taxes. The oldest registered corporation in the Western Hemisphere is Harvard College, which was registered in 1650 and a mine in Sweden claims to be the oldest corporation in the world, with its charter dating back to June 16, 1288. Most don't make it quite that long. For reasons that business owners and executives are well aware of, there often comes a time in the life of a corporation where the shareholders decide to call it a day, and move on to other endeavors. In a down period such as the one we are still currently facing, the decision to cut bait is being made even more often than it normally would.

While it would be nice if the shareholders could snap their fingers and bring the affairs of the corporation to a tidy end, nothing in the law, especially corporate law, is ever that easy. There is a series of formalities, filings, official meetings and votes that the share-

If these formalities are not properly executed, the corporation may continue to exist, accrue taxes and be subject to liability through lawsuits.

holders and board of directors must go through in order to properly dissolve the corporation. The process of wrapping up the affairs of the corporation and filing the necessary documents to dissolve it is called the "winding up."

("winding down" would make more sense but I don't write the laws...) If these formalities are not properly executed, the corporation may continue to exist, accrue taxes and be subject to liability through lawsuits.

For instance, let's say that Company X develops a product that is widely anticipated, but turns out to be a flop and Company X decides to dissolve. Mr. X, as chairman of the board of Directors of Company X is charged by the shareholders with making the appropriate filings and paying the appropriate taxes

in order to legally dissolve the company. Mr. X is so distraught by the failure of his pet product that he is driven to drink and doesn't get around to filing the proper documents. Four years later, someone is using the product and it blows up and that person is

**A sign in the lobby of a Moscow hotel across from a Russian Orthodox monastery:
YOU ARE WELCOME TO VISIT THE CEMETERY WHERE FAMOUS RUSSIAN AND SOVIET
COMPOSERS, ARTISTS AND WRITERS ARE BURIED DAILY EXCEPT THURSDAY.**

injured. Company X can still be sued and if they are found liable, the shareholders could be made to pay. Furthermore, the corporation may continue to incur an \$800 minimum franchise tax for every year it continues to exist. If Mr. X had done as he was supposed to, the corporation would cease to exist and, after a period of time, creditors and those with claims against the corporation would be out of luck.

Even when the shareholders of a dissolving corporation are on good terms, dissolution is a stressful event. The board of directors of the corporation must decide how to provide for remaining liabilities, including notifying any outstanding creditors. Then it may divide its remaining assets. The law requires that the assets of the corporation be distributed to the shareholders in proportion to their ownership share in the company, but do you liquidate physical assets or distribute them intact?

Making these decisions can create friction in shareholder relationships already frayed by the stress of a failed business. Competent legal advice can help shareholders to understand their rights and responsibilities and therefore remove from the discussion some of the issues that may be causing stress.

When the shareholders don't agree on whether or not the corporation should be dissolved, the need for competent representation is even more urgent. A vote of 50% of the outstanding shares of the corporation is all that is required in order to dissolve a corporation. Shareholder(s) holding at least 50% of the outstanding shares of the corporation can elect to dissolve the corporation even if the holders of the remaining 50% would like to keep the company going. In this situation, as you can imagine, dividing the assets of a dissolved corporation becomes a delicate exercise,

especially considering the fact that a jilted shareholder can petition to have the dissolution and "winding up" removed to court and supervised by a judge, adding unnecessary expense to the process at a time when the parties would rather be focused on moving forward.

When the chips are down for a corporation and shareholders begin to discuss dissolution, the corporation needs the advice and counsel of a competent attorney to guide them through the process. An attorney can help to make the process as quick and efficient as possible. You might think that you can work it out with the other shareholder(s) but by the time you find out you can't, it might be too late. Take the high road, and retain counsel before a problem arises. It will help to make the dissolution process as painless, in terms of time, worry and cash, as it can be.

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About Quinlivan Wexler LLP

Patrick “Rick” C. Quinlivan and **Daniel “Danny” J. Wexler** bring almost 55 years of combined legal experience to Quinlivan Wexler LLP. With careful selection and addition of talented professionals to the firm, QW has grown over the years to the point where we now boast of many specialty areas to suit the needs of our clients.

Located near South Coast Plaza, QW engages in a general civil practice that includes civil litigation, business and corporate law, estate planning, probate, conservatorships and elder law.

The breadth of our litigation experience assures our clients’ representation by lawyers who fully understand the techniques, not only of trial advocacy, but of negotiations and persuasion as well. So, while being very meticulous about doing our homework, planning ahead, and writing precise contracts to prevent litigation, we are also fully prepared to litigate when it is in the best interests of our clients.

“Ruling”

The court on appeal concluded that there was no obligation created by the contract because the condition was not created by PNM’s work and the fixture was not a facility utilized by PNM in its work. However, the court did find that there was a general duty created by the Labor Code. Specifically, Labor Code §6400 provides that an employer on a multiemployer worksite has an obligation to protect against injury when its employees are exposed to a

hazard whether or not the hazard was created by the employer. The court found that the duty of an employer whose own employees are exposed to the hazard extends to the employees of others on the worksite.

This decision provides some guidance for the training of company management and employees. It is important that all understand that there is a broad duty of care that is imposed under the law and that this duty extends to the employees of other companies

who may be working on the same jobsite. It is logical that the duty also extends to third parties who are not employed by another contractor working on the jobsite. Simply stated, a hazard that is discovered by an employee must be reported regardless of who may be exposed to the hazard. The report should be made to supervisory personnel who in turn must follow up to ensure that the hazard is addressed by the responsible party.

Patrick C. Quinlivan