BRODY WILKINSON PC
ATTORNEYS AND COUNSELORS AT LAW

2507 POST ROAD, SOUTHPORT, CONNECTICUT 06890

Guiding Clients to a Safe Harbor

A YEAR OF ECONOMIC CHANGE

2009 continues to be a challenging time for all. Despite the current economic climate, the firm is actively engaged in a diverse range of exciting client matters, rewarding community projects and important professional initiatives. We invite you to read about recent Brody Wilkinson developments in this Client Update.

PRIMERUS Spotlight

IN OCTOBER 2008, BARBARA S. MILLER attended the annual conference of Primerus, a national association of top-rated law firms of which Brody Wilkinson is a member. Primerus members must have the maximum AV rating from Martindale-Hubbell, the peer review rating source that lawyers use to find other lawyers. In addition, Primerus firms must submit to a rigorous evaluation which includes candid assessments from judges, fellow attorneys, current and former clients, and bar associations. Individually, Primerus law firms are not large; but together, Primerus firms can serve clients on a national basis because of their knowledge of the personal and professional qualifications of fellow members. Brody Wilkinson often calls upon Primerus members to assist clients with legal matters in other states. Additional information about Primerus is available at *www.primerus.com*.

Southport Harbor photos by Kit Noble

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Beware of Overtime

IN THESE DIFFICULT ECONOMIC TIMES, many employers are asking their employees to work additional hours rather than hire new help. Unless an employee is exempt under federal and state law, overtime pay must be given for time worked over forty hours in one week. Overtime exemptions are available to general categories such as administrative, executive, professional and outside sales personnel, but the legal regulations have strict requirements for each of these positions. Merely putting an employee on "salary" does not get around overtime requirements. Also, "comp time" is usually not available for employees who are entitled to overtime pay. All employees who are subject to overtime requirements must keep an accurate record of hours worked each day. It is important to point out that an employee complaint to the labor department can result in an audit of payroll practices for the entire company, and result in levies of back pay and fines. Hence, when it comes to payment of wages, it is always better to be safe than sorry.

For more information, please contact Barbara S. Miller (bmiller@brodywilk.com).

Capital Gains on Sale of Principal Residence

UNDER CURRENT LAW, SELLERS OF A PRINCIPAL residence escape taxation on the first $500,000 of capital gains for joint filers and $250,000 for single filers. The home must be used as the taxpayer's primary residence for two out of the five years preceding the sale. As of 2008, if one spouse dies, and the surviving spouse is unmarried and sells the residence within two years after the death, then the surviving spouse can exclude $500,000 of gain (regardless of which spouse owned the property prior to death). Prior to 2008, the residence had to be sold in the year of death in order for the surviving spouse to be able to get the full $500,000 exclusion.

Effective January 1, 2009, the above rules still apply but homeowners can no longer take the full exclusion if there was any "non-qualified" use of the real property (*e.g.,* used as a vacation or rental home) prior to the home being held and used as their primary residence. In such case, the IRS will allow the exclusion only for the percentage of the gain equal to the percentage of years of ownership that the residence was used as the primary residence. The property will automatically be regarded as having been used as the primary residence for all years prior to 2009. Absences for less than two years for certain reasons will count as primary residence use. *For more information, please contact Lisa F. Metz (lmetz@brodywilk.com).*

Second Lien — What's it Worth?

IN THIS TURBULENT ECONOMIC ENVIRONMENT, there are an increasing number of loans going into default. Lenders may be requested to forbear from exercising their remedies and to participate in debt restructurings better known as "workouts." In connection with a workout, an unsecured lender may be offered a second lien position on a debtor's real estate or personal property assets in order to "collateralize" its unsecured debt. Even if the second lien attaches to equity in the collateral today, the lender may not have meaningful remedies if, down the road, it must foreclose on its second lien.

The first matter a second priority lender should consider is whether the first priority lender's agreement with the debtor prohibits the debtor from granting any additional liens against the collateral. If so, taking a second lien may trigger a default under the debtor's loan with its first priority lender. First priority lenders typically prohibit subsequent liens for a number of reasons, including that they do not want a subsequent lienholder interfering with their collateral. In the event of a default, the first priority lender wants to be the sole decision maker of when a debtor's assets get liquidated (which usually signifies the shutting down of the debtor's business) and does not want to have any duty to answer to a junior creditor. Sometimes additional capital infusions are welcomed by a first priority lender, and the first priority lender may consent to the granting of the subordinate lien. In that circumstance, the first priority lender and the second priority lender will typically enter into an "intercreditor agreement" which, among other things, addresses their relative collateral priority rights and under what conditions each lender may exercise its remedies.

If a second priority lender determines that its second lien attaches to equity in the debtor's assets and is not prohibited by the terms of the loan with the first priority lender, it must consider what it will end up with in the event the debtor defaults under the restructured loan and the lender faces foreclosure of its lien. Chances are that if the second priority lender's loan is in default, then the first priority lender's loan is also in default. In that case, any equity the second priority lender may have had in the collateral may be quickly eaten up by the first priority lender's default interest rate, collection expenses, and fees accruing with respect to the first priority lender's loan. Furthermore, if the first priority lender brings a foreclosure action against the shared collateral and there is not sufficient equity to fully satisfy the second priority lender's lien, the second priority lender will be faced with the decision of whether to buy out the first priority lender's debt (sometimes called a "redemption") or to have its lien in the asset "foreclosed out."

Although a second lien may adequately secure a second priority lender's debt in certain situations, in other scenarios the lender may be well advised to have multiple exit strategies and to take a second lien only in conjunction with other security devices.

If the first priority lender has not commenced a foreclosure action, and if the second priority lender still has equity in the collateral and chooses to foreclose upon the debtor's default, it will only be able to "foreclose out" the debtor's ownership interest in the asset and any liens junior to its lien. However, the second priority lender will not be able to foreclose out the first priority lender's lien. At the conclusion of a successful foreclosure action, it or the successful bidder will own the foreclosed asset subject to the first priority lender's lien. Therefore, the impact that the unaffected first priority lien will have on the value and marketability of the foreclosed asset should be carefully considered by the second priority lender. Although a second lien may adequately secure a second priority lender's debt in certain situations, in other scenarios the lender may be well advised to have multiple exit strategies and to take a second lien only in conjunction with other security devices. *For more information, please contact Seth L. Cooper (slcooper@brodywilk.com).*

Important Changes in Connecticut Estate & Gift Tax Laws

CT ESTATE TAX

Back in 2005, we wrote to you about changes in Connecticut's gift and estate tax laws. In particular, an estate of $2 million (after the application of deductions) would pay no Connecticut tax while an estate of over $2 million would pay a tax on the full amount (*i.e.,* no exemption). We also noted that certain married couples would have to change their estate plans to avoid Connecticut estate tax on the death of the first spouse if the federal estate tax exemption ever exceeded $2 million. It is once again time to revisit this issue because effective January 1, 2009, the federal exemption increased from $2 million to $3.5 million per person. Although it is not clear what the federal exemption will be after 2009, President Obama's tax reform plan (subject to Congressional approval, of course) would keep the exemption at $3.5 million.

The increase in the federal estate tax exemption in 2009 may require certain estate plans to be amended in order to avoid paying Connecticut estate tax at the death of the first spouse. Married clients with estates over $2 million should review their plans.

For certain married couples, if one spouse dies in 2009, there will be Connecticut estate tax of $254,911 imposed at his or her death on the $1.5 million difference between the federal and Connecticut exemptions. This tax would apply where the federal exemption amount is held in a "spray" trust for the benefit of the surviving spouse and children. It also would apply where the federal exemption amount is held in a trust solely for the surviving spouse but where income is not required to be paid out annually.

However, there is a way to avoid paying the Connecticut estate tax at the first spouse's death. Connecticut allows a separate "QTIP" election for amounts left in a qualifying trust for the surviving spouse even if such an election is not made for purposes of the federal estate tax. Thus, after using the $2 million exemption from federal and Connecticut tax, the next $1.5 million of assets can be held in a trust for the surviving spouse which requires all income to be paid annually to the surviving spouse. This trust would be exempt from federal tax but would qualify for the Connecticut marital deduction and defer the Connecticut tax until the surviving spouse's death. This change can be made to estate plans with an amendment to a revocable trust or a codicil to a will. With the change in the federal exemption, we encourage clients to review their plans especially if they have not done so in the last five years.

GIFT TAX EXCLUSIONS

For gifts made in 2009, the gift tax annual exclusion is $13,000 (up from $12,000 for gifts made in 2008) per recipient due to the annual inflation adjustment. This means that married couples can give $26,000 per recipient. However, if one spouse gives more than $13,000 per recipient from his or her separate assets, a gift tax return needs to be filed in order to use both spouses' exclusions. Any unused exclusion cannot carry over to a later year. There is no limit on gifts that may be made to cover an individual's medical or tuition expenses as long as they are paid directly to the provider. Those gifts do not count towards the annual exclusion limit. Gifts made to a Section 529 plan or to a Coverdell Education Savings Account do not qualify for the tuition exclusion. However, such gifts qualify for the annual exclusion and, under the tax law, an individual would be allowed to elect to spread the contributions made in a single year over five years for annual exclusion purposes. *For more information, please contact Lisa F. Metz (lmetz@brodywilk.com).*

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IRA Direct Charitable Donation Exclusion Extended

UNDER THE EMERGENCY ECONOMIC STABILIZATION ACT (enacted on October 3, 2008 and commonly known as the "Bailout"), the opportunity for taxpayers to make direct contributions from their IRA to a charitable organization has been extended for another year. Previously a part of the Pension Protection Act of 2006, the provision allows a taxpayer over the age of 70 1/2 to exclude a contribution up to $100,000 from their gross income for the year. The donation must be made via check or other transfer directly from the IRA custodian to the charitable organization to qualify. The Act extended the provision to apply retroactively to all of 2008, and through the end of 2009.

This provision is of dual advantage to Connecticut taxpayers. First, for taxpayers who do not itemize their deductions, or whose deductions are limited by their income level, the provision allows taxpayers to exempt the full amount of the rollover. If these taxpayers, instead, draw funds from an IRA *and then* donate those funds to a charitable organization, the charitable deduction they receive for such indirect transfer may not completely offset the income reportable on their income tax return. Second, in Connecticut and a number of other states, there is no charitable deduction for IRA distributions to charitable organizations for state income tax purposes.

Withdrawals from an IRA of any kind, however, remain subject to income tax. Therefore, the provision allows a Connecticut taxpayer to exempt the funds withdrawn from their federal income tax return, thereby reducing their state tax liability as a result. *For more information, please contact Robert L. Teicher (rteicher@brodywilk.com) who was assisted by Melinda E. Todgham (mtodgham@brodywilk.com) in writing this article.*

Conservation Easements Deduction Extended Under "Farm Bill"

ANOTHER OPPORTUNITY ORIGINALLY FOUND in the Pension Protection Act and extended this year is the deduction given for the charitable donation of conservation easements. Under the provision, found in the Food Conservation and Energy Act (enacted May 22, 2008), individual taxpayers can continue to take an immediate deduction of up to 50% of their contribution base for the donation of a conservation easement on real property (up from the regularly allowed 20% deduction). As with the IRA Charitable Donation exclusion, this provision is now effective through the end of 2009. *For more information, please contact Robert L. Teicher (rteicher@brodywilk.com) who was assisted by Melinda E. Todgham (mtodgham@brodywilk.com) in writing this article.*

Permanent Residents, Expats, Subject to New Tax Regime

IN AN EFFORT TO ASSIST RETURNING ARMED SERVICE MEMBERS AND VETERANS, the Heroes Earnings Assistance and Relief (HEART) Act (enacted June 17, 2008) has surprising and troublesome changes in the taxation of "covered expatriates." This includes U.S. Citizens who renounce their citizenship, and foreign nationals who have lived in the United States for at least eight of the previous fifteen years and give up their green card status.

Under the new provision, covered expatriates who leave the country after the date of enactment will be subject to tax on the unrealized capital gains of their worldwide assets, including all real and personal property, both tangible and intangible. The tax is determined as if the property had been sold for its fair market value on the day before expatriation, and is known as the "mark-to-market" tax. Deferral of payment of this tax may be available, but interest on unpaid taxes due will be charged at the normally applicable rate.

The new law applies to "covered expatriates." An "expatriate" is a U.S. citizen who relinquishes his or her citizenship, or a long-term resident (for eight of the fifteen years ending with the year of termination of residency) who ceases to be a permanent U.S. resident. A "covered expatriate" is an expatriate (a) whose average annual income for the five years preceding expatriation exceeds $139,000 (as adjusted for inflation); (b) whose net worth is $2 million or more on the date of expatriation; or (c) who fails to furnish evidence of compliance with all federal tax obligations for the 5 years preceding expatriation.

Additionally, the Act imposes a new special transfer tax on gifts or bequests made directly or indirectly by an expatriate or permanent resident to a U.S. citizen (so long as the transferor has left the country at the time the gift is made, or, in the case of a bequest, immediately before date of death). The tax rate is the higher of the highest marginal gift or estate tax rate at the time of transfer, and is imposed on the recipient of the gift or bequest (subject to an annual exemption). The new tax applies to gifts or bequests made by "covered expatriates." *For more information, please contact Robert L. Teicher (rteicher@brodywilk.com) who was assisted by Melinda E. Todgham (mtodgham@brodywilk.com) in writing this article.*

Proud Sponsor of the Fairfield Theatre Company

BRODY WILKINSON WAS A RECENT SPONSOR of two performances of musical artists Jefferson Starship and David Grisman at StageOne in Fairfield on April 19. This historic collaboration of music featured a mix of new material and timeless classics. The firm salutes the work and programming of the Fairfield Theatre Company.

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Representative Matters

BRODY WILKINSON'S BUSINESS GROUP represented Acme United Corporation (AMEX:ACU) in connection with the $2.5 million sale of Bridgeport-based industrial property to B & E Juices, Inc. James E. Rice and Barbara S. Miller oversaw the transaction. The property consisting of approximately 4 acres of land and 48,000 square feet of warehouse space will become the headquarters and primary warehouse of B & E Juices.

Brody Wilkinson's Business Group recently represented the Chinese Ministry of Health in opening a publishing division in Shelton, Connecticut. Based at Enterprise Corporate Towers, PMPH USA, Ltd. is a newly created U.S. subsidiary of People's Medical Publishing House, a Chinese government entity which is the largest medical publisher in China. PMPH USA, Ltd. will focus on publishing new books and digital products in clinical medicine. Barbara S. Miller and Seth L. Cooper handled the acquisition of a select, broad-based list of medical publications from a prominent medical publishing company in Canada on behalf of PMPH USA, Ltd. in addition to the corporate organizational work and commercial office lease. The transaction closed in a signing ceremony in the Great Hall of the People in Beijing, China.

Brody Wilkinson's Trusts & Estates Group created and implemented many sophisticated estate plans for our clients designed to pass wealth efficiently to the next generation in a way that incorporated their unique family goals and values. For some clients, the current depressed value of assets coupled with a low interest rate environment provided an exceptional opportunity to employ certain gifting strategies. As an example, the Group established a series of short-term grantor retained annuity trusts designed to transfer to our clients' children the income and growth on $20 million of transferred assets free of gift tax. The Group also transferred a Connecticut Irrevocable Trust to Delaware and reformed the trust to take advantage of the asset protection provisions of the Delaware trust code.

The trust was funded with interests in limited liability companies holding Connecticut real estate. William J. Britt and Lisa F. Metz worked on both of these matters.

Brody Wilkinson's Real Estate & Land Use Group represented the purchasers of an 8.9-acre lot adjacent to a pond and part of a four-lot subdivision in Lyme, Connecticut. Prior to the creation of the lot, the purchasers entered into an agreement to share the costs of the subdivision in exchange for the right to purchase the proposed lot at a discounted price. Located in a heavily wooded and well preserved area, it was the intent of all parties involved to create a subdivision with minimal impact on the surrounding environment. The subdivision was approved subject to certain conservation restrictions all of which were acceptable to the purchasers. Additionally, as part of the subdivision, 73.7 acres were made subject to a conservation easement restricting the use of the land for conservation purposes. Brian T. Silvestro and Justin L. Galletti handled this acquisition.

Brody Wilkinson's Business Group represented a small manufacturing concern in connection with the creation of a restricted stock plan for certain key employees followed by a partial redemption of the owner's stock. This approach was used to pass equity and control to a pre-selected group of key employees who would manage the business while the owner transitioned to retirement. The redemption was done before year-end to lock in the favorable capital gains rates. William J. Britt worked on this matter.

Accolades & Credits

SEVERAL BRODY WILKINSON ATTORNEYS were recognized in 2008/2009 for individual achievements both inside and outside the legal profession. We salute these attorneys for their significant accomplishments.

Ronald B. Noren was elected for a third one-year term as chairman of the Board of Bridgeport Hospital. As part of this position, Mr. Noren serves on the board of the Yale-New Haven Health System and its Compensation Committee.

Peter T. Mott was appointed chair of the Estate and Probate Section of the Connecticut Bar Association. His term will begin in June. Mr. Mott currently serves as vice-chair.

Thomas J. Walsh, Jr. was appointed vice chair of the Middle Market and Small Business Committee of the American Bar Association for a three-year term.

Douglas R. Brown and Stamford Probate Court Judge **Gerald M. Fox, Jr.** presented a probate and estates seminar to lawyers in connection with The Fairfield County Bar Association's "Brass Tacks Seminar Series." Mr. Brown also participated in a presentation at a national conference hosted by the American Law Institute-American Bar Association on "Managing Trusts and Estates Disputes With The Media in Mind."

Robert L. Teicher presented a program entitled, "Tax Issues In A Down Economy" at a recent Fairfield County Bar Association's Tax Law Committee Luncheon. The program addressed the topics of foreclosures and short sales, renegotiated debt, bankruptcy, and Bernard Madoff investors.

Seth L. Cooper is completing his third consecutive term as chairman of the Board of Directors for the Barnum Museum. In addition, Mr. Cooper was recently elected as vice chairman of the Board of Directors for Alpha Community Services, a Bridgeport-based division of the Central Connecticut Coastal YMCA which provides emergency shelters and transitional housing to homeless families.

Peter T. Mott and **James E. Rice** were selected by their peers for inclusion in the 2009 edition of *The Best Lawyers in America* in the areas of trusts and estates law, and energy law, respectively. Published since 1983, *Best Lawyers* is the oldest and preeminent peer-review publication that serves as an important referral guide to the legal profession in the United States. Through an exhaustive and confidential peer-review process in which thousands of leading lawyers evaluate their peers, *Best Lawyers* compiles lists of attorneys in 78 different areas of practice across all 50 states.

Peter T. Mott and **Douglas R. Brown** were recognized by their peers in 2009 as "Super Lawyers" in the area of Estate Planning and Probate as published in *Connecticut Magazine*. Based on a peer-review survey, Super Lawyers is a credible, comprehensive and diverse listing of attorneys in more than 60 practice areas. Used as a resource guide to hiring legal counsel, Super Lawyers listings are published as a special supplement in top newspapers and city and regional magazines across the country. In addition, Mr. Mott and Mr. Brown were named by *Law & Politics Magazine* as "New England Super Lawyers" in 2009.

Douglas R. Brown was elected co-chairman of the Board of Managers of the Brooklawn Park Association in Fairfield for 2008-2009.

Robert L. Teicher was appointed chair of the Tax Committee of the Fairfield County Bar Association.

Justin L. Galletti participated in Burroughs Community Center's 2nd Annual "Freezin' for a Reason" event by running into the ice-cold waters of the Long Island Sound with dozens of supporters to help raise money for the Bridgeport-based non-profit organization. Burroughs provides children and families in need with a variety of services, including after-school programs, tutoring, income tax filing assistance and English language programs.

Melinda E. Todgham was appointed to serve on the Board of Trustees of the Child Guidance Center of Mid-Fairfield County.