

## CAL-OSHA ADOPTS NEW ERGONOMIC STANDARDS

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1. Maintain RMI records for a minimum of one year;
2. Maintain records identifying the person conducting the evaluation, the unsafe condition identified, the action taken to correct the potential unsafe work practice;
3. Take good faith steps to correct or minimize exposures to RMIs to the extent feasible;
4. Train employees regarding potential RMIs;
5. Have worksite evaluations conducted by experts.

*Elize Clowes recently joined the Employment Law Group of Carr, McClellan's Corporate and General Business Department.*

## ESTATE PLANNING AND THE 1997 TAX ACT

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### EXCISE TAXES ON QUALIFIED PLAN AND IRA DISTRIBUTIONS

One very welcome change in the law is a complete elimination of the special 15% excise tax on excess accumulations and excess distributions under qualified plan and IRA-type accounts. Often called the "success penalty," these special taxes were levied in addition to the income tax (and, in the case of the excess accumulations excise, the death tax), and resulted in the assessment of taxes at death on IRA and qualified plan balances at a combined rate that could exceed 85%. The repeal of these excise taxes simplifies planning for IRA and qualified pension plan distributions.

### OTHER CHANGES

Other changes also merit notice. There is a new limitation on the ability of taxpayers to create and fund charitable remainder trusts (requiring that the charity's remainder interest at the outset of the trust be at least 10% of the value of the trust gift). Additionally, the Section 6166 special family business estate tax deferral provisions have been amended to reduce the preferential interest rate (from 4% to 2%), and to increase the amount of the estate eligible for the preferential rate. Consequently, borrowing from the government to pay estate taxes has never been less expensive!

Although beyond the scope of this article, the income tax rules applicable to sales of residences have been changed by this legislation – eliminating the Section 1034 tax free roll-over provisions governing the sale and replacement of a home. The 1997 Tax Act substitutes an outright capital gains exclusion of \$250,000 for single homeowners and \$500,000 for married homeowners. As a result of this change, many people who would otherwise never pay a tax on a capital gain following the sale of a home are now faced with some tax (fortunately, at lowered capital gains rates).

### CONCLUSION

By and large, the changes highlighted above represent Congressional "tinkering" with the tax law, rather than wholesale significant change. Real relief in the estate and gift tax areas was left by Congress and the Administration for another day - and given the "social policy" nature of these special taxes on wealth transfers, we continue to wonder if that day will ever come.

*Stephen D. Anderson is a member of Carr, McClellan's Estate Planning, Trust and Probate Department.*

If you have any general questions that you would like answered in *Perspectives*, please direct your calls to our Executive Director, Charles Schretzmann, at (650) 696-2597. We will try to address them in a future issue.

The area code for our Burlingame office has changed from 415 to 650.

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STRATEGIES  
FOR  
BUSINESS

## CAL-OSHA ADOPTS NEW ERGONOMIC STANDARDS

*By Elize Clowes, Esq.*

The most significant new workplace safety regulation in recent history went into effect on July 3, 1997. The California Occupational Safety and Health Standards Board ("Cal-OSHA") adopted ergonomics regulations for the workplace, which create extensive potential obligations for California companies with ten or more employees.

The ergonomics regulations are triggered by the occurrence of certain injuries defined as repetitive motion injuries ("RMIs"). Following is a brief summary of the ergonomics regulations, including incidents that trigger the regulations, the actions required of employers, and suggestions for minimizing RMIs.

### TRIGGERS FOR THE REGULATIONS

The ergonomics regulations are triggered when two or more RMIs have occurred within a rolling 12 month period after July 3, 1997, and all of the following conditions exist:

- The employees who suffered the RMIs were performing a repetitive job, process or operation of "identical work activity";
- The RMIs were "predominantly caused" (i.e., 50% or more) by the repetitive job, process or operation;
- The RMIs and their predominant causes have been objectively identified and diagnosed by a licensed physician.

### WHAT IS AN RMI?

An RMI must be diagnosed by a licensed physician as a musculoskeletal injury predominantly (more than 50%) caused by a repetitive job, process or operation.

### WHAT IS A "JOB," "PROCESS" OR "OPERATION"?

The regulations do not define the terms "job," "process" or "operation," but the scope of the regulation will be limited by the term "identical work activity," which is defined as performing the same repetitive motion tasks such as, but not limited to, word processing, assembly or loading.

### EMPLOYER OBLIGATIONS

Once the ergonomics regulations are triggered by the conditions above, an employer must evaluate work sites, control exposures that have caused RMIs and train employees to avoid RMIs.

- **Work Site Evaluations.** In a work site evaluation, the employer must identify any exposures that have caused RMIs. Although the regulations are not explicit, it appears that an employer is required to evaluate only those jobs, processes or operations of identical activity that have already resulted in reports of RMIs to more than one employee in a rolling twelve-month period.

- **Controlling Exposures.** If an exposure that causes an RMI cannot be eliminated, an employer is required to minimize its effect to the extent feasible. Although the regulations again are not explicit, it appears that if an employer elects a control measure, it will be deemed appropriate as long as the employer acts in good faith and is not aware (after reasonable inquiry) of another method that would cause a greater reduction in injuries at a reasonable cost.

- **Training.** An employer's program to minimize RMIs must include training of employees. The training must include an explanation of:

- The exposures which have been associated with RMIs;
- The symptoms and consequences of injuries caused by repetitive motion;
- The importance of reporting symptoms and injuries to the company; and
- The methods used by the company to minimize RMIs.

### PENALTIES

An employer can be penalized by Cal-OSHA for up to \$7,000 for each violation of the ergonomic regulation.

### SUGGESTIONS

Employers should track RMIs. If more than one RMI occurs in a 12-month rolling period, it is advisable to:

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ESTATE PLANNING AND  
THE 1997 TAX ACT

By Stephen D. Anderson  
As most of you know, President Clinton recently signed the Taxpayer Relief Act of 1997. While the Act provides little significant "relief" in the Estate and Gift Tax area, it does include a series of minor changes which will benefit many of our clients over the coming decade.

ESTATE AND GIFT  
EXEMPTION INCREASE

Perhaps the most often discussed change under the new law is the increase in the estate and gift tax exemption from \$600,000 currently to \$1.0 million by 2006, as follows:

| Year      | Exemption Amount |
|-----------|------------------|
| 1998      | \$625,000        |
| 1999      | \$650,000        |
| 2000-2001 | \$675,000        |
| 2002-2003 | \$700,000        |
| 2004      | \$850,000        |
| 2005      | \$950,000        |
| 2006      | \$1,000,000      |

This change is intended to mitigate the effects of inflation on the value of estate assets otherwise subject to estate taxes (ie., the current \$600,000 exemption is now worth far less than when it originally came into the law in the mid-1980s). Importantly, most documents designed to create "exemption equivalency" ("bypass") trusts automatically take into consideration whatever amount constitutes the exemption at the date of the decedent's death. Further, the gift and estate tax exemptions are "unified" – so that any exemption not allocated to gifts during a lifetime is available to be used at death.

INFLATION INDEXING - GIFT TAX  
ANNUAL EXCLUSION AND  
GST EXEMPTION

The 1997 Tax Act includes impor-

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tant changes in the annual exclusion amount for gifts, as well as the exemption from the separate 55% Generation-Skipping Transfer ("GST") tax. Currently, these limits are \$10,000 and \$1.0 million, respectively. Commencing in 1999, the new law will index the amount taxpayers may give annually without reporting a gift to the government, as well as the amount which may "skip" generations without estate tax.

These changes are beneficial to many individuals because full use of the annual exclusion and the GST exemption are important estate planning techniques. Donors should note, however, that the new gift indexing methodology rounds down to the nearest \$1,000 – so we may not see an increase in the exclusion (to \$11,000) for several years.

SMALL BUSINESS EXEMPTION

The prize for the most complicated, Byzantine set of new rules certainly belongs to the newly-enacted estate tax exemption for owners of interests in small family businesses. The exemption is the product of an intense lobbying effort on behalf of small business owners who are often unfairly burdened by the estate tax. The exemption, which is applicable only to death transfers, excludes from a taxpayer's estate interests in qualifying family businesses worth up to \$1.3 million. This new exemption encompasses the general estate tax exemption discussed above – rather than being in addition to the exemption. Thus, the value of the exemption actually decreases with each increase in the general estate tax exemption.

In order to qualify, a business interest must meet a highly complex set of rules regarding family ownership, type of business, years of operation, and continued family ownership and operation after a taxpayer's death. The effect of the exemption (as compared to estates without any qualifying family business interests) is a decrease in estate tax of about 20%. Because of its complexity, many professionals are already calling for the repeal of this part of the new tax law.

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obtains neither the property nor its value and is exposed to double risks: the debtor may again default, and the collateral may deteriorate from extended use. The Supreme Court determined that the replacement value standard accurately gauged the debtor's use of the property.

In a footnote, the Supreme Court cautioned that the replacement value standard leaves the bankruptcy courts to determine the best way of ascertaining the value. The Court stated that whether replacement is the equivalent of retail value, wholesale value or some other value will depend on the type of debtor and the nature of the property. The Supreme Court noted that replacement value cannot include certain items. As an example, the Court explained that where the proper measure of the replacement value of a vehicle is its retail value, an adjustment to the value might be necessary because a creditor should not receive portions of the retail price that reflect the value of items the debtor does not receive when he retains his vehicle, such as warranties, and reconditioning. The Court also pointed out that a creditor should not gain from modifications to the collateral, for example, the addition of accessories to a vehicle which would not be covered by the creditor's lien.

Justice Stephens dissented, stating that he believed that foreclosure was the proper method of valuation.

In the Chapter 13 context, collateral usually takes the form of improved real property, vehicles, and business equipment. Carr, McClellan can help you make the appropriate decision regarding the bankruptcy issues.

*Jeremy W. Katz is a member of Carr, McClellan's Creditor's Rights and Bankruptcy Department.*



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OF THE PROPERTY."

NEW ATTORNEYS . . .

The firm is pleased to announce that **Elise Clowes** and **Nicholas L. Spyros, Jr.** have joined Carr, McClellan.

**Elise Clowes** has joined the Employment Law Group of Carr, McClellan's Corporate and General Business Department as Special Counsel. Ms. Clowes is an experienced practitioner of fifteen years, and her specialty is employment and labor law. She is a graduate of the University of California School of Law (Boalt Hall).

Ms. Clowes has represented public and private companies, many of them in the high tech sector, in all areas of labor and employment counseling and litigation, including discrimination and wrongful termination lawsuits, union issues, ADA compliance, and trade secret and non-competition matters.

**Nick Spyros** has joined Carr, McClellan's Corporate and General Business Department. Mr. Spyros received his J.D. from Georgetown University Law Center, and also received an MBA and BS degree in Physics from Georgetown. In addition to the practice of law, Nick has experience in financial services and start-up operations.

IN OUR PROFESSION . . .

STEVEN D. ANDERSON

Steven D. Anderson became the Co-chairman of the professional Advisory Council of the Peninsula Community Foundation.

NORM I. BOOK

Norman I. Book has been appointed President of the San Mateo County Historical Association.

W. GEORGE WAILES

W. George Wailes has been appointed to the Calendar Coordinating Committee for the State Bar Conference of Delegates.

## CHAPTER 13 BANKRUPTCY PLANS: THE SUPREME COURT SPEAKS REGARDING COLLATERAL VALUATIONS

By Jeremy W. Katz, Esq.

If you are a secured lender and receive notice that your debtor has filed a Chapter 13 bankruptcy petition, give it your prompt attention. Failure to do so could lock you into the debtor's valuation when you may otherwise be entitled to a higher valuation pursuant to a recent Supreme Court decision.

Chapter 13 of the Bankruptcy Code allows an individual with regular income to reorganize his or her affairs if the individual has unsecured debt of less than \$250,000 and secured debt of less than \$750,000. Although Chapter 11 bankruptcies are available to these individuals, Chapter 13 is streamlined, much less expensive, and the individual receives a "super-discharge".

When a Chapter 13 plan contains secured debt, the plan must list the value of the collateral and inform the secured creditor of how, in the absence of promptly surrendering the collateral, the debtor intends to pay (how much and over what period of time) for the collateral. Determining the value of the collateral has long been the center of controversy and the subject of much litigation regarding Chapter 13 plans.

Prior to the Supreme Court's recent decision, the various courts of appeal employed three different methods of determining the value of a secured claim. The Fifth Circuit employed a foreclosure-value standard, pursuant to which the value of the collateral was determined by the amount the secured creditor would realize upon foreclosure and sale of the collateral. Other circuits, including the Ninth Circuit, followed a replacement-value approach. Still other circuits, for example the Seventh Circuit, settled on a value which is the midpoint between foreclosure value and replacement value.

THE PLAN MUST LIST THE VALUE OF THE COLLATERAL AND INFORM THE SECURED CREDITOR OF HOW THE DEBTOR INTENDS TO PAY – HOW MUCH AND OVER HOW LONG A PERIOD OF TIME – FOR THAT COLLATERAL."

On June 16, 1997, the United States Supreme Court held that when a Chapter 13 debtor seeks to retain and use a creditor's collateral, the Chapter 13 plan must provide for the payment to that creditor of the replacement value of the collateral.

Here, in summary, are the facts of the case, *Associates Commercial Corp. v. Rash* [138 L.Ed. 2d 148, 1997 U.S. LEXIS 3688 (1997)], and the Supreme Court's reasoning.

In 1989, Mr. Rash purchased a tractor truck for \$73,700 for use in his freight-hauling business. Mr. Rash made a down payment and agreed to pay off the balance in 60 monthly installments. The truck was pledged as collateral for the loan.

In 1992, Mr. and Mrs. Rash filed a Chapter 13 bankruptcy. At the time of the filing, the remaining balance owed on the truck was \$41,171. The Chapter 13 plan proposed that the Rashes retain the truck for use in their business and pay the lender, over 58 months, the amount of \$28,500, which the Rashes argued was the present value of the truck. The lender objected to the plan, claiming that the truck was worth \$41,171, the full amount the lender was owed.

The Bankruptcy Court, after holding an evidentiary hearing, determined that the lender would receive \$31,875 after foreclosure and sale of the truck. The Court, therefore, fixed the amount of the lender's claim at \$31,875 and approved the plan. After numerous appeals, the Fifth Circuit, *en banc*, affirmed.

The Supreme Court reversed the Fifth Circuit, holding that the value of the collateral, and consequently the amount of the secured claim, is the price a willing buyer in the debtor's trade, business or situation would pay to obtain like property from a willing seller. The Supreme Court disapproved the foreclosure valuation and the midpoint valuation. The Supreme Court reasoned that when a debtor surrenders the collateral, the creditor obtains it immediately and is free to sell it and reinvest the proceeds. However, if a debtor keeps the collateral and continues to use it, the creditor

## STRATEGIES FOR BUSINESS

### ARBITRATION PROVISIONS IN EMPLOYEE HANDBOOKS

By Lori A. Lutzker, Esq.

If your firm's Employee Handbook contains a requirement that employees submit employment disputes to binding arbitration, the requirement may not be enforceable – even if your firm obtains written acknowledgment forms. A recent Federal case suggests that it is necessary for an employer to demonstrate that an employee has "knowingly agreed" to be bound by an arbitration requirement.

In *Nelson v. Cypress Bagdad Copper Corporation*, the Ninth Circuit Court of Appeals sided with a discharged employee. Here is what occurred.

Melton Nelson worked for 19 years for Cypress. A little over a year before he was fired, Cypress issued an employee handbook to each of its employees. Nelson signed an acknowledgment that he had received the handbook, agreed to read and understand its contents and to contact his supervisor if he had any questions. The handbook contained a provision requiring disputes to be resolved by binding arbitration.

When Nelson was terminated a year later, he filed a complaint in the United States District Court alleging that his former employer had violated the Americans with Disabilities Act ("ADA") and the Arizona Civil Rights Act ("ACRA"); the complaint also included a number of other claims that had not yet been decided. The employer responded by arguing that Nelson was required to submit his dispute to binding arbitration since he had signed the handbook acknowledgment form.

NELSON HAD AGREED ONLY TO READ AND UNDERSTAND THE HANDBOOK; HE DID NOT AGREE TO BE BOUND BY ITS PROVISIONS. MERELY SIGNING THE FORM DID NOT CONSTITUTE HIS KNOWING AGREEMENT TO ARBITRATE AND HIS CONSEQUENT SURRENDER OF HIS STATUTORY RIGHT."

#### KNOWINGLY AGREED, OR NOT?

The Ninth Circuit disagreed. In order for the arbitration clause to be binding, it had to be established that Nelson knowingly agreed to arbitrate his claims under the ADA and ACRA, and the court found that there was no evidence of a knowing agreement. The acknowledgment form Nelson signed was not a valid waiver. Nothing in the acknowledgment notified Nelson that the handbook contained an arbitration clause or that by accepting the handbook he was waiving his right to a judicial forum in which to resolve his claims.

The court found that under the express terms of the acknowledgment, Nelson had agreed only to read and understand the handbook; he did not agree to be bound by its provisions. Merely signing the form did not constitute his knowing agreement to arbitrate and his consequent surrender of his statutory right.

The court also found that the fact that Nelson continued to work for Cypress after he received and read the handbook was not the type of knowing agreement the law requires. The bargain between an employer and employee – to waive the right to a judicial forum for civil rights claims in exchange for employment or continued employment – must be specifically stated, which the court found did not occur in the Nelson case.

We strongly recommend that employers seek advice of counsel in drafting appropriate arbitration provisions and employee acknowledgment forms.

Lori A. Lutzker is a member of Carr, McClellan's Litigation Department.



## WHEN IS “PAYMENT IN FULL” NOT?

By Lori A. Lutzker, Esq.

If you are having a dispute with one of your customers and receive a check with the notation “Payment in Full,” do you know what your legal rights are? Can you cash the check and still claim further payment? If you are uncertain, it is not surprising; law in this area has changed dramatically over time.

In 1951, the California Supreme Court established the rule in California for conditional checks issued to settle a disputed claim. Specifically, the Court found that when a debtor issued a check in full satisfaction of a claim by writing “payment in full” on the check, or stating in a letter that the check was for the entire amount due, if the creditor cashed the check there was an “accord and satisfaction.” In other words, after cashing the check, the creditor was unable to pursue the debtor for any further sums owing even if the creditor verbally or in writing told the debtor that it did not accept the check as “payment in full.”

A creditor's options increased in 1987 when the California legislature changed the existing law by enacting Civil Code section 1526. In relevant part, that section provides:

Where a claim is disputed or unliquidated and a check or draft is tendered by the debtor in settlement thereof in full discharge of the claim, and the words “payment in full” or other words of similar meaning are notated on the check or draft, acceptance of the check or draft does not constitute an accord and satisfaction if the creditor protests against accepting the tender in full payment by striking out or otherwise deleting that notation or if the acceptance of the check or draft was inadvertent or without knowledge of the notation.

Under this Code section, if a creditor crosses out the words equivalent to “payment in full,” it may cash the check and still preserve its right to seek the balance.

Recently, a California bankruptcy court was faced with a situation in which the creditor decided to cash a check that was for an amount less than the full amount in dispute and had the notation “payment in full for all services to date” on it. The creditor did not cross out the lan-

“YOU AS A  
CREDITOR MAY BE  
ABLE TO ACCEPT  
A PARTIAL  
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guage, but instead sent the debtor a letter stating that, while it accepted the payment, it did not agree that it was payment in full. The debtor subsequently argued that since the creditor had failed to delete the language on the check, Civil Code section 1526 was inapplicable and the creditor was barred from seeking any further payment.

The court acknowledged that a literal interpretation of section 1526 might hold that the statute does not apply in cases where an oral statement, separate communication, or accompanying letter, rather than the check itself, communicates that the creditor wishes to reject the debtor's offer to settle the claim. However, the court found that the language in the statute that allows the creditor to accept the check and still seek further payment if it “otherwise deletes” the notation on the check was broad enough to include a letter to the debtor since the letter clearly indicated the creditor's rejection of the check as constituting an accord and satisfaction of a disputed claim. This demonstrates that the law is ever changing and there are no clear-cut answers.

Today, you as a creditor may be able to accept a partial payment even with a “payment in full” notation or words to that effect as long as you clearly notify the debtor that you do not accept it as payment in full. However, you should consult your legal advisor before you do

### CARR, MCCLELLAN WINS BED RACE TROPHY

We are delighted to report that our 1997 team was awarded the coveted trophy for Most Humorous entry in this year's annual San Mateo County General Hospital Foundation bed race fund-raising event. Our team of five, *Race Judicata and Her Legal Beagles*, was dressed in long floppy ears, tails, spotted T-shirts, dog noses, collars and leashes, and pushed a bed that was festooned with Milk Bone biscuits.

Congratulations go to **Lori Lutzker** (Race Judicata) who conceived this year's theme, and to her beagles – **John Andersen**, **Steve Anderson**, **Penny Greenberg** and **George Wailes**. Who said lawyers have no sense of humor?!!

## FAMILIES & INDIVIDUALS

### PENSIONS AND ROLL-OVER IRAS: U.S. SUPREME COURT HOLDS THAT COMMUNITY PROPERTY LAW IS PREEMPTED BY FEDERAL LAW

By Albert J. Horn, Esq.

Just before it recessed for the summer, the United States Supreme Court announced its decision in *Boggs v. Boggs*, a case that had been closely watched by attorneys in all nine community property states, including California. The case had been considered so important to Californians and California estate planning attorneys that the Board of Governors of the State Bar took the highly unusual step of authorizing its Estate Planning, Trust and Law Section to file an *Amicus Curiae* (friend of the court) brief with the Supreme Court, which the Court accepted. Keith P. Bartel, a Director/Shareholder of our firm and a probate litigation specialist, was one of the principal authors of the brief.

#### THE BOGGS CASE

The *Boggs* case involved a simple factual situation. Isaac Boggs and Dorothy Boggs were married for more than thirty years prior to Dorothy's death in 1979. At the time of Dorothy's death, Isaac had worked for his employer for thirty years, and he continued to work for that employer an additional six years until he retired. After Dorothy's death, Isaac remarried and he and his second wife, Sandra, remained married until his death in 1989.

Isaac's employer had a generous retirement program that included a monthly annuity and a savings plan that paid out a large lump-sum when Isaac retired. He rolled this lump-sum pay out over into an Individual Retirement Account (IRA) to defer taxes. The monthly annuity continued for Sandra after Isaac's death. The roll-over IRA was still intact at Isaac's death, and Sandra was given the equivalent of a life estate in the IRA.

Isaac and his first wife, Dorothy, had three sons. When Dorothy died, she left one-third of her half of the community property outright to Isaac and gave the other two-thirds to her sons, subject to the equivalent of a life estate to Isaac. On Isaac's death, the sons claimed their mother's community property share in the retirement benefits from Sandra, and the *Boggs* case was born.

“IN A 5-4 DECISION,  
THE COURT HELD  
THAT ERISA  
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Sandra claimed that the sons were not entitled to anything by reason of their mother's bequest to them. She claimed that the Employee Retirement Income Security Act of 1974 (ERISA) had preempted state law, which allowed a nonparticipant spouse (Dorothy) to transfer by testamentary instrument an interest in undistributed pension plan benefits. The trial court held against Sandra and in favor of the sons, and on appeal the U.S. Court of Appeals for the Fifth Circuit affirmed in a 2-1 decision.

#### THE SUPREME COURT REVIEW

Since the decision of the Fifth Circuit Court was in direct conflict with an earlier (2-1) decision of the U.S. Court of Appeals for the Ninth Circuit (*Ablamis v. Roper*), the Supreme Court granted *certiorari* (review). It said in its majority opinion: “Given the pervasive significance of pension plans in the national economy, the congressional mandate for their uniform and comprehensive regulation, and the fundamental importance of community property law in defining the marital partnership in a number of States, the question [of preemption] is of undoubted importance.” In a 5-4 decision, the Court held that ERISA preempts state community property laws as they would otherwise apply to pensions and roll-over IRAs.

The difficulty of this issue is illustrated by the fact that the Supreme Court decision was split 5-4, and both Court of Appeals decisions were 2-1, with the Ninth Circuit 2-1 in favor of preemption and the Fifth Circuit 2-1 against preemption. Leaving aside the legal problems created by ERISA, the protection of the working participant spouse (Isaac) when weighed against the rights of the nonworking nonparticipant spouse (Dorothy) can lead to a lot of “on the one hand” and “on the other hand.”

#### THE EFFECT

What is the practical effect of the *Boggs* case? For most of our clients: None. Our estate planning attorneys have anticipated this problem and have typically included a provision in wills that confirms to the participant spouse all interest in all pension and IRA plans. But the *Boggs* case does have important significance because it reminds us that our community property laws can be superseded by federal law in certain cases. Thus, we must plan carefully with respect to all of our assets including pensions and IRAs.

*Albert J. Horn is a member of Carr, McClellan's Estate Planning, Trust and Probate Department.*