Willson & Pechacek, P.L.C. Newsletter

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College Education Relief

by Frank W. Pechacek, Jr.

Section 529 of the Internal Revenue Code has been revised such that parents struggling to save for their children's college education have received a much needed tax break. The revised tax law allows you to make withdrawals from state college saving plans, also known as §529s, completely free of federal taxes on the income generated, if the money is used to pay certain college expenses. In the past, income on §529 savings plans was tax deferred, not tax free.

Each of the dozens of §529 plans available through each state are unduly complicated and each plan has its own set of rules, investment options and tax treatment.

For the first time anyone, regardless of income level, can open a §529 account and contribute enough to pay for both basic college education and most graduate degrees. You maintain control of the account until the money is withdrawn to pay the tuition bills. But beware: three states still tax the earnings of money withdrawn at the state level. In 14 states, withdrawals out of §529 plans are totally free of state income tax.

The State of Iowa utilizes Vanguard Family of Mutual Funds and the plan name is "College Savings Iowa". The maximum contribution is $146,000.00. In addition, the State of Iowa allows a state maximum income tax deduction for a contribution of up to $2,180.00 per §529 account. The withdrawals from the plan are tax free for both Iowa and federal tax returns. The expense load is .65% per year. For more information visit *www.collegesavingsiowa.com* or call toll free 888-672-9116.

The State of Nebraska utilizes Union Bank and Trust and its plan is entitled "College Savings Plan of Nebraska". It allows a maximum contribution of $250,000.00 and the maximum annual income tax deduction on the Nebraska State income tax return is $1,000.00. Its expense load ranges from .83% to 1.68% annually. You can contact the Nebraska plan on the internet at *planforcollegenow.com* or call toll free 888-993-3746.

In 2002, Smart Money magazine rated Nebraska as one of the top four states in the country with regard to §529 plans. Further, in May 2002 Money magazine rated both Iowa and Nebraska in the top four states.

Federal law allows a gift up to $11,000.00 per year per person under the annual gift tax exclusion. A special exclusion allows a person establishing a §529 account to gift five years of annual exclusion gifts in one year, which means the account owner can contribute $55,000.00 in 2002 without incurring federal gift tax or generation skipping tax.

Federal law allows education distributions from a §529 account to be used for "tuition, fees, books, supplies, and equipment required for

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Pregnancy Related Disability

by Bruce B. Green

Pregnancy and childbirth can be times of great joy. They also have their drawbacks — morning sickness, fatigue, and labor pains, just to name a few. Many women find it difficult, if not impossible, to work during the later parts of pregnancy and immediately after childbirth. The medical and other expenses associated with pregnancy, childbirth, and raising a child can place added significance on keeping a job or using job-related benefits.

Iowa law can help. Iowa law prohibits most employers from discriminating against employees because of pregnancy, miscarriage, childbirth and recovery from these conditions. With few exceptions, Iowa employers with four or more employees must comply with certain statutorily imposed obligations.

Some of these obligations are basic — employers cannot exclude from employment job applicants or employees who are pregnant. Others are less obvious. For example, disabilities caused by pregnancy, miscarriage and childbirth must be considered temporary disabilities under the employer's health or disability insurance. The same applies to the employer's sick leave plan. Although Iowa law does not require an employer to purchase or create these types of insurance or plans, if it

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Snake Oil Salesmen Beware: False Advertising Violations

by Michael J. Davenport

In the last two years a number of courts around the country have addressed issues under the false advertising provisions of a Federal statute called the Lanham Act. The Lanham Act provides a civil remedy for a party damaged by a competitor's false advertising. The statute creates a cause of action against a competitor who, in connection with the sale of goods or services, uses a "false or misleading description of fact, or false or misleading representation of fact, which ... in commercial advertising or promotion, misrepresents the nature, characteristics [or] qualities ... of his or her or another person's goods, services, or commercial activities." 15 U.S.C. §1125(a)(1)(B). Claims for violations of the Lanham Act are brought in Federal Court and are most typically accompanied by a request for a preliminary injunction seeking an immediate halt to the offending ads or claims.

In order to "prove" a claim under the Landham Act, a plaintiff must affirmatively prove that the challenged claim is false or misleading, not merely that the claim is unsubstantiated by clinical testing or other proof. For example, if an ad states that "Brand X is more effective in treating headaches than Brand Y," Brand Y can prevail only if it has clinical or other proof that, in fact, Brand X is not more effective than Brand Y. This proof can be derived from clinical tests conducted by the plaintiff or from what the plaintiff argues is a proper interpretation of the defendant's own data.

Only where a commercial makes what is called an "establishment claim," which is a claim that the advertiser has clinical or other test proof that its product will perform a certain way, can a Lanham Act plaintiff prevail by showing that the advertiser has no such supporting clinical proof. An example of an "establishment claim" would be that "clinical tests prove that Brand X is more effective in treating headaches than Brand Y". This standard of proof applies when the ad relies on scientific studies, whether implicitly by making a claim while showing a graph or diagram, or explicitly, by stating, for example, "that studies show ....".

If a plaintiff persuades the Court that the challenged ad is literally false, or false on its face, the Court may grant relief without considering extrinsic evidence of consumer reaction to the ad. However, where the plaintiff claims that an ad is literally true but nonetheless has a tendency to mislead, confuse, or deceive, the plaintiff must come forward with additional evidence, usually in the form of a properly conducted consumer survey, demonstrating that a material number of consumers were misled by the ad. This requirement may be forgiven in some instances if the plaintiff can prove that the defendant intended to communicate the allegedly misleading claim.

An example of an implied claim might be a commercial declaring, "Is Brand X more effective than Brand Y? You make the choice" with two accompanying images, one of a headache sufferer relieved of a headache after taking Brand X, and the second of a headache sufferer continuing to suffer after taking Brand Y. Although on its face, the advertisement does not explicitly state that Brand X is more effective than Brand Y, the viewing public could quite reasonably perceive the commercial as conveying that message.

In that instance, because the ads do not make an establishment claim and are not explicitly false, the burden would be on the challenger to come forward with two distinct types of proof. First, the challenger must show, through a consumer survey, that a substantial portion of the public

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College . . . (Continued from page 1)

the enrollment or attendance of a designated beneficiary at an eligible educational institution, as well as expenses for special needs services in the case of a special needs beneficiary which are incurred in connection with such enrollment or attendance."

Under tax law a "member of the family" now is defined to mean: (1) a son or daughter or a descendant of either (therefore including grand-children and great-grand-children); (2) a stepson or stepdaughter; (3) a brother, sister, stepbrother, or stepsister; (4) the father or mother or an ancestor of either; (5) a stepfather or stepmother; (6) a cousin; (7) a son or daughter of a brother or sister; (8) a brother or sister of the father or mother; (9) a son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law or sister-in-law; or (10) the spouse of the designated beneficiary or the spouse of any individual described above.

The §529 account owner can withdraw the funds from the account if the beneficiary does not attend college or for any other reason. Earnings within the account would then become taxable plus a 10% penalty. Better yet, you can change the beneficiary to another family member if the originally intended beneficiary does not attend college.

Payback Time - Estate Recovery In Iowa

by Trent D. Reinert

The high cost of healthcare and nursing home expense has caused many individuals to turn to government assistance in order to pay for necessary medical expenses. The government program in place, known as Medicaid, is a cooperative federal and state program designed to provide assistance to those persons whose income and resources are insufficient to pay their medical expenses. If an individual qualifies for Medicaid and receives benefits during his or her life, a medical assistance debt is created and it is possible that all or a portion of the benefits received may have to be repaid at the time of the recipient's death. The collection of Medicaid benefits is known as Estate Recovery.

Congress enacted legislation in 1982 requiring each state to seek recovery of Medicaid payments from the estates of benefit recipients. Many states, including Iowa, refused to enforce the Estate Recovery laws until the federal government threatened to deprive federal funds to those states. Effective July 1, 1994, Iowa amended the state Medicaid laws to comply with the federal mandate. Today, only Texas and Michigan do not have Estate Recovery programs.

According to state statistics, approximately 400 Medicaid recipients die every month in Iowa. The Estate Recovery program learns of the deaths of Medicaid recipients through the county offices of the Iowa Department of Human Services. Once Estate Recovery learns of the recipient's death, a history report detailing all medical assistance paid to the recipient after July 1, 1994, is obtained, and a copy of the report and a response form is sent to the representative of the recipient's estate. The representative must complete the response form, identifying any assets remaining and any debts owed by the recipient or the recipient's estate, and return it to Estate Recovery with a repayment check if appropriate.

In certain situations, the medical assistance debt may be deferred or waived by Estate Recovery at the time of the recipient's death. The debt may be deferred if there is a surviving spouse, a minor child, or a child who was blind or disabled at the time of the recipient's death. If deferral is allowed, a medical assistance lien is created, and upon the death of the surviving spouse, the death of the blind or disabled child, or the time the minor child reaches the age of 21, the medical assistance debt is collected to the extent assets had been received by such individual from the Medicaid recipient. The medical assistance debt may also be waived if collection would cause an undue hardship on the recipient's estate or surviving family members.

If the medical assistance debt is not deferred or waived, Estate Recovery will proceed with collection of the benefits paid to or on behalf of the recipient. For purposes of Estate Recovery, assets are defined as "any real property, personal property, or other asset in which the recipient, spouse, or child had any legal title or interest at the time of the recipient's, spouse's, or child's death." Assets subject to the collection proceedings include bank accounts, excess burial funds, real estate, household goods, vehicles, personal effects, annuities, life insurance proceeds (if the recipient's estate is the beneficiary of the policy), and assets held in certain trusts to which the recipient had direct access during his or her life. In addition to assets owned by the recipient at the time of his or her death, any assets transferred within five years of the recipient's death may be included in estate assets and subject to repayment of the medical assistance debt.

Certain expenses, including estate administration fees, funeral and burial expenses, expenses of the recipient's last illness, and federal and state taxes, take priority over the medical assistance debt and may be paid before repayment is made to the Estate Recovery program. After payment of allowable expenses, the personal representative of the recipient must pay any remaining assets to the Iowa Department of Human Services to the extent of the outstanding medical assistance debt. If assets are available for Estate Recovery, and the recipient's personal representative distributes those assets to estate beneficiaries prior to repayment of the medical assistance debt, the personal representative may be held personally liable for all or a portion of the debt. The extent of liability for the personal representative is limited to the full value of property belonging to the recipient's estate that was under the control of the personal representative.

The abundance of government assistance recipients in today's society has made it increasingly important for individuals to have a fundamental understanding of the subject of Estate Recovery. Without proper knowledge, individuals may inadvertently take actions that create problems for themselves or estate beneficiaries. The Medicaid and Estate Recovery laws are complicated and can cause a great deal of confusion. A qualified professional should be consulted to ensure full compliance with these laws.

Disability . . . (Continued from page 1)

does, it must treat pregnancy and childbirth-related disabilities as other temporary disabilities.

Further, any written and unwritten employment policies and practices addressing the commencement and duration of leave, the availability of extensions, the accrual of seniority, and other benefits and privileges must not be applied differently between pregnancy and non-pregnancy related disabilities.[1]

If no leave is available under the employer's insurance or sick leave plans, an employee is nonetheless entitled to take up to eight weeks of unpaid leave. If the employer's insurance and sick leave plan provide some, but not enough coverage, the employee can take a combination of paid leave and unpaid leave totaling eight weeks. The employee, however, must give timely notice to her employer, and may be required to obtain a medical certification verifying her disability.

If your employer is treating you differently because of pregnancy, miscarriage or childbirth, contact your attorney to see if Iowa law can help.

[1]The law equally applies to disabilities caused or contributed to by legal abortion and the recovery therefrom. However, an employer may elect to exclude health insurance coverage for abortion unless the life of the mother would be endangered if the fetus were carried to term or where medical complications have arisen from the abortion.

False Advertising . . . (Continued from page 2)

believes that the ad is saying that Brand X is more effective than Brand Y. Second, the challenger must come forward with scientific proof, typically one or more clinical tests, showing that Brand X is not more effective than Brand Y.

Once the challenger makes this showing, it can probably obtain injunctive relief. The Courts have generally held that where the plaintiff proves that the comparative ad is false or misleading, irreparable harm to a competitor is generally presumed, warranting the issuance of an injunction. Non-comparative ads may also be enjoined with a showing of a logical connection between the alleged false advertising and the sales position of the plaintiff's competitive product.

While the Lanham Act does not guarantee "truth in advertisement", sticking to the "truth" in advertising products and services is not only the ethical way to advertise, but the best way to avoid false advertising claims

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Willson & Pechacek, P.L.C.
421 West Broadway, Suite 200
P.O. Box 2029
Council Bluffs, Iowa 51502
(712) 322-6000
Website: www.willsonpechacek.com

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All potential clients are urged to make their own independent investigation and evaluation of any lawyer being considered. This notice is required by rule of the Supreme Court of Iowa.