



By John K. Rossman



John K. Rossman is chair of our creditors' remedies and bankruptcy practice group. A nationally recognized authority on debt collection compliance and defense, Mr. Rossman counsels and advises national and international companies with an emphasis on business clients with a presence in the credit industry. He may be reached at RossmanJ@moss-barnett.com or 612.877.5396.



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It's Up to You - TIPS FOR FIGHTING & PREVENTING IDENTITY THEFT

Identity theft is rampant and can affect any individual from any segment of society. It is likely that you or someone you know has been the victim of this crime in some form.

The consequences for a victim of identity theft, even when it is spotted early, can be months of dealing with creditors and other financial institutions to clear up erroneous postings and to be reimbursed for fraudulent use of the victim's funds. Knowing what to do when you think you have been a victim will help make that process easier. The Federal Trade Commission (FTC) has recommended the following steps for victims of identity theft.

1) Contact the *fraud department of the three consumer reporting companies* (Equifax, Experian, and Trans Union) to place a fraud alert on your credit report. Twenty-five states – including Minnesota – allow a consumer to place a freeze on his or her credit report, thus in theory preventing any new credit from being issued using the consumer's personal identifying information unless and until the consumer "unfreezes" the report.

2) Contact *creditors and collection agencies* (both by telephone and in writing), and close accounts you know or believe have been tampered with or opened fraudulently. Also, file an ID Theft Affidavit (available at www.consumer.gov/idtheft/pdf/affidavit.pdf) with those creditors and collection agencies and follow up to ensure that credit bureau reporting has been updated.

3) File a complaint with the *FTC*.

4) File a *police report*. Many police departments provide a simplified format for consumers to file or you may use the complaint that you filed with the FTC.

Victims of identity theft need to know it is up to them to take affirmative steps to address the situation. A mere verbal statement to a creditor asserting that you are the victim of identity theft is generally not sufficient. If possible, the victim should try to identify the time and place, and even the perpetrator, of the crime.

But preventing identity theft is probably your best defense. Among the many steps you can take are:

1) Not giving out personal information, especially over the phone or by email, unless you know that you are providing it to a reliable entity;

2) Minimizing the amount of personal information that you carry with you. In particular, avoid carrying your social security card or credit cards that you do not use regularly;

3) Checking your credit reports once a year;

4) Paying attention to monthly statements and billing cycles; and

5) Using only secure internet sites for purchases or other business.

For further information regarding identity theft, how to prevent it, and what to do when it happens, visit these websites: www.ftc.gov/bcp/edu/microsites/idtheft/consumers or www.idtheftcenter.org.



GALAXY OF STARS

Q: What does it take to build the brightest galaxy of Family Law Stars in the upper Midwest?

A: Teamwork!

Every person in Moss & Barnett's Family Law Practice Group is a "frontline" player when it comes to dealing with the myriad personal, interpersonal and legal issues that constantly arise in matters involving the greatest sensitivity and importance. Featured below are the legal assistants, paralegals and attorneys who comprise our highly successful and award winning Family Law Team.

How brightly does our Family Law Team shine? Here is a partial listing of the accolades received from competing attorneys and peer reviewers by our Family Law lawyers:

- **Best Lawyers in America**
Ed Winer
Susan Rhode
Ben Henschel
- **Minnesota Law & Politics "Super Lawyers"**
Susan Rhode (Top Vote Getter)
Ed Winer (Top 40)
Ben Henschel (Top 40)
- **Hennepin County Bar Association Professionalism Award**
Susan Rhode
- **Worth Magazine "Top 100 Attorney"**
Ed Winer
- **Minnesota Law & Politics "Rising Stars"**
Jim Vedder
Jana Deach

Back row (left to right):

Mara Gollin-Garrett (LA)
 Marj Neal (P)
Susan Rhode (A)
 Ann Thorne (LA)
Shannon Bixby (A)
Ed Winer (A)
 Loralee Berle (LA)
 Carol Spohn (P)
 Susan Shetty (LA)
 Petra Hennek (LA)
Ben Henschel (A)
 Rhonda Habel (P)
 Marilyn Newstrom (LA)

Front row (left to right):

Cheryl Riggs (LA)
 Michelle Ebert (LA)
Jim Vedder (A)
Jana Deach (A)
 Sharon Artmann (LA)
 Adrienne Summerfield (P)

A = Attorney
 P = Paralegal
 LA = Legal Assistant





Paul Van Valkenburg and Kevin Busch

PAUL VAN VALKENBURG AND KEVIN BUSCH HONORED FOR COMMUNITY SERVICE

Each year Moss & Barnett recognizes an employee for service to the larger community with the Paul Van Valkenburg Award. The honoree in 2006 was Kevin Busch, chair of our commercial department, who was recognized for his service to several organizations, including Children's HeartLink, Habitat for Humanity, Catholic Social Services, and Church of the Nativity of our Lord.

The individual for whom this award was named, Paul Van Valkenburg, one of our retired attorneys, received the Help & Hope Award at the 30th anniversary dinner of Lawyers Concerned for Lawyers (LCL). This award recognizes service to LCL and its clients. Paul has been active with LCL, an organization devoted to helping lawyers recovering from alcoholism and chemical dependency, for most of its 30 years, including serving as its chair.



CHUCK PARSONS HONORED WITH DISTINGUISHED SERVICE AWARD

Chuck Parsons, a member of our real estate practice group, was recently named the 2006 recipient of the Distinguished Service Award by the Real Property Law Section of the Minnesota State Bar Association. This award is given to those who make significant contributions to the field of real property law.

Chuck has been actively involved in the Section for over twenty years, serving as a member and chairperson of the Real Property Council, a member of the Section's legislative committee (including service as co-chair), and a member of the Title Standards Committee.

He is also an elected member of the American College of Real Estate Lawyers and the American College of Mortgage Attorneys and has been voted as one of the Top 40 real estate lawyers and one of the Top 100 lawyers in Minnesota by *Minnesota Law & Politics*. Chuck is also included as a leading real estate lawyer in the highly prestigious attorney roster, *Chambers USA*.

GLEN SCHUMANN NAMED TO JUDICIAL SELECTION COMMISSION

Glen Schumann, a member of our intellectual property practice group, was recently appointed by Governor Tim Pawlenty to the Minnesota Judicial Selection Commission. The Commission, which consists of 49 members, 27 appointed by the Governor and 22 appointed by the Minnesota Supreme Court, solicits judicial candidates, evaluates applicants, and recommends three to five finalists to the Governor for appointment to vacancies on Minnesota district courts and the workers' compensation court of appeals.



Chuck Parsons and Glen Schumann



EMPLOYERS — TAKE TIME TO REVIEW YOUR VACATION POLICY

Contrary to the belief of many weary employees longing for a vacation, employers in Minnesota are not required to provide employees with paid vacation time. Those employers who choose to do so have been able to establish the terms for vacation pay with little interference from the courts. The Minnesota Court of Appeals, however, issued an opinion last year, which is currently on appeal to the Minnesota Supreme Court, that may render many employers liable for vacation payments in situations where the employer’s policy provides otherwise.

Fresenius Medical Care, Inc. had a vacation policy that provided paid vacation benefits to employees. The policy specifically stated that no payment for unused vacation would be made if an employee was terminated for misconduct. *Fresenius* terminated Susan Lee’s employment for misconduct and refused to pay her for accrued but unused vacation time. The district court found in favor of Fresenius Medical Care. The Minnesota Court of Appeals reversed, however, finding that vacation pay constitutes “wages” under Minnesota law and that the Minnesota statute requiring payment of earned but unpaid wages at the time of an employee’s termination invalidated the Fresenius Medical Care policy.

While many employers provide for some payment of vacation pay upon termination of employment, it is not uncommon for vacation policies to limit the amount of vacation pay that will be paid out upon termination of employment or to limit the circumstances under which payments will be made, as did the Fresenius Medical Care policy. Unless and until the *Fresenius* decision is reversed or the Minnesota legislature provides for employer freedom in developing and implementing vacation policies, such policies appear to be unenforceable in Minnesota. Accordingly, employers may want to consider changing their written policies to eliminate any limits on payment upon termination.

Although the *Fresenius* case only addressed “vacation” leave, there is reference to “paid time off” as “wages” in other Minnesota cases. Accordingly, employers with paid time off policies should consider that the *Fresenius* ruling also might affect the implementation of such policies and may want to consider changing them if they limit payment upon termination of employment.

The *Fresenius* case focused on the Minnesota statute requiring payment of wages upon termination of employment. It did not address employer policies relating to forfeiture of earned vacation during the course of employment. Many employers have policies that prohibit employees from carrying over all or some of their vacation time from one year to the next. As it is unclear

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By Marcy R. Frost



Marcy R. Frost practices employment law with an emphasis on management counseling. She advises clients regarding the numerous questions that arise in connection with compensation and changes in employment status. Ms. Frost also drafts employment policies and employment, independent contractor, confidentiality, non-competition and separation agreements that maximize her clients’ rights and competitive advantage. She may be reached at FrostM@mossbarnett.com or 612.877.5338.



ELECTION OF DIRECTORS

Dave Senger and **Tom Shroyer** were recently re-elected to three-year terms as members of the firm’s Board of Directors. Dave is a member of our business law practice group and Tom is a member of our litigation practice group. They join returning directors Rick Johnson, Rick Kelber, Susan Rhode, and Curt Smith and adjunct directors Brian Grogan and John Rossman.

From left to right: Rick Johnson, Susan Rhode, Rick Kelber, Tom Shroyer, Dave Senger, and Curt Smith



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"... REVIEW YOUR VACATION POLICY"

whether *Fresenius* will impact how the Minnesota courts will deal with these kinds of policies, employers who want to limit their vacation pay liability should consider adopting an "accrual cap" approach. A policy that establishes a maximum accrual level and provides that an employee will not accrue any additional vacation pay until the accrual level drops below the maximum should still pass muster even under an aggressive reading of *Fresenius*.



RISING STARS 2007

Yuri B. Berndt
Tax Law

Jana Aune Deach
Family Law

Matthew P. Kostolnik
Litigation

Christopher D. Stall
Business/Corporate Law

James J. Vedder
Family Law

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WE ADDED TWO NEW ATTORNEYS TO OUR FIRM IN OCTOBER 2006.

Shannon M. Bixby, a graduate of William Mitchell College of Law, joined our family law practice group. Prior to joining our firm, she had served as a judicial clerk for a Hennepin County District Court judge handling family law cases.

Patrick J. Butler joined our business law practice group. A graduate of William Mitchell College of Law and a former CPA, he has prior experience working for national accounting firms and in the private practice of law.

ELECTION OF NEW SHAREHOLDERS

Four attorneys were recently elected as shareholders of the firm: **Jana Aune Deach** and **James J. Vedder** of our family law practice group, **Elizabeth H. Kiernat** of our real estate practice group, and **Michael S. Poncin** of our creditors' remedies and bankruptcy practice group.

From left to right: Shannon Bixby, Jim Vedder, Mike Poncin, Betsy Kiernat, Jana Deach, Patrick Butler





CHANGES IN RULES FOR RETIREMENT PLANS

By Arthur J. Glassman



Arthur J. Glassman works with businesses, business owners and individuals in the areas of employee benefit plans, wills and trusts, and business and corporate operations. He may be reached at GlassmanA@moss-barnett.com or 612.877.5272.

and Cindy J. Ackerman



Cindy J. Ackerman represents individuals and business clients in the areas of estate planning, probate and trust administration, taxation and non-profit organizations. She may be reached at AckermanC@moss-barnett.com or 612.877.5330.

For several years, Congress has worked on improving the laws governing retirement plans sponsored by employers, attempting to encourage employers to maintain such plans and to protect the employees enrolled in such plans. In August 2006, the Pension Protection Act of 2006 (PPA), the culmination of this initiative, became law. The PPA made several changes to the laws governing retirement plans, including defined contribution plans – profit-sharing and 401(k) plans. Following is an overview of some of the more important provisions that affect these plans:

Encouraging Automatic Enrollment in 401(k) Plans. One concern of Congress was the failure of many employees to elect to participate in employer-sponsored plans. In order to encourage employers to adopt 401(k) plans with automatic enrollment (*i.e.*, employee deferrals are made unless the employee affirmatively “opts out”), the PPA provides various protections to employers, including clarifying that ERISA preempts any state laws that would require employee consent to payroll withholding. The employer will be required to give an annual notice to employees explaining the employees’ right to elect out of the plan.

An optional non-discrimination safe harbor for automatic enrollment plans, effective for plan years beginning after 2007, will require that the automatic deferral percentage be at least 3% in the first year of participation, increasing each year to 6% in the fourth year and thereafter. The employer must match at least 100% of the first 1%, and at least 50% of the next 5%, of employee deferrals or must make a 3% non-elective contribution. Employer contributions under automatic enrollment plans must be fully vested after two years of service.

Providing Employees with Investment Advice. Many employers maintain plans under which employees are responsible for choosing how to invest the funds. Employers and their advisers have been reluctant to provide individual investment advice to employees for fear of incurring liability if the investments do not perform well. To address this problem, the PPA includes a new prohibited transaction exemption that will allow “qualified fiduciary advisers” to offer personal investment advice to plan participants. This provision is effective starting January 1, 2007. A qualified fiduciary adviser (*e.g.*, a registered bank, investment company, broker-dealer, or insurance company) may provide investment advice if either (i) its recommendations are based on a computer model certified by an independent third party or (ii) its compensation is not based on the investments selected. Various disclosure requirements also apply. The plan sponsor (typically the employer) is generally protected against liability to participants in connection with such advice.

Default Investment and Reallocation Safe Harbors. Another problem faced by employer-plan sponsors is the failure of employees to select investments. One approach has been for the plan sponsor to designate a “default” investment, but the potential liability for losses in an employee account often result in the default investment’s being one of the more conservative choices, which may not be appropriate for all employees. To address this issue, the PPA amended ERISA Section 404(c) so that it will insulate fiduciaries from liability for losses caused by a plan sponsor’s investment decisions when a participant fails to make an investment election, if certain conditions are met. The Department of Labor is required to provide guidance on how plan sponsors can satisfy their fiduciary responsibilities for the

investment of assets where the participant has not made any investment choices.

Changes in Accelerated Vesting Requirements for Employer Contributions. Effective for plan years beginning in 2007 and later, all employer contributions (not just matching contributions) must vest at least as rapidly as either three-year “cliff” vesting or a six year “graded” vesting schedule.

Benefit Statements. Beginning with the first plan year after 2006, periodic benefit statements must be given to participants on a specific schedule. Pending issuance of further guidance, delivery of the statement will be deemed timely if it is provided not later than 45 days following the “applicable time period.” The “applicable time period” is a specified period for which the statement is required. For example, for a participant-directed calendar year plan, the applicable time period is each calendar quarter, and the first statement would have to be provided by May 15, 2007 (45 days following the quarter ending March 31, 2007). For a participant-directed fiscal year plan with a June 30 plan year, the statement would need to be provided no later than November 14, 2007 (45 days following the quarter ending September 30, 2007, the first applicable time period). For a non-participant-directed calendar year plan with an annual reporting period, the deadline for providing the statement for the 2007 calendar year would be February 14, 2008.

Certain Prior Laws Become Permanent. The PPA eliminated the sunset provisions of pension-related portions of the Economic Growth & Tax Relief Reconciliation Act of 2001 (EGTRRA). These provisions significantly simplified the portability, plan design, and administrative rules, increased contribution limits for most types of retirement accounts, including the catch-up provisions for employees age 50 and older, and established Roth 401(k) contributions. These provisions were scheduled to expire in 2010.

Increased Options for Participants. The PPA also provides several new options to plan participants and their beneficiaries:

Distributions Prior to Retirement. Pension plans may provide for distributions to an employee who has attained age 62 and who is not separated from employment at the time of the distribution.

Rollovers Directly into a Roth IRA. After December 31, 2007, participants of 401(k) plans, 403(b) plans, tax-sheltered annuities, governmental 457 plans, and other qualified trusts may roll over plan assets directly to a Roth IRA. The rollover is not tax free. The limitations applicable to rollovers of traditional IRAs to Roth IRAs also apply.

Rollovers by Nonspouse Beneficiaries. After December 31, 2006, a nonspouse beneficiary may roll over a qualified plan account (e.g., 401(k) account) upon the death of the participant to an inherited IRA and take distributions from the account over his or her lifetime. The beneficiary will avoid tax on the rollover and will be taxed only when the assets are withdrawn. This rule applies only to direct rollovers.

Tax-Free IRA Distributions to Charities. Individuals age 70½ or older may distribute up to \$100,000 of their IRA account assets to charitable organizations (excluding private foundations) in 2006 and 2007 without recognizing income and without taking a charitable deduction. This distribution qualifies as a required minimum distribution.

Investments in Employer Stock. Some qualified plans require that a portion of a participant’s account be invested in the employer’s publicly-traded stock. The PPA allows a participant (or the participant’s beneficiary) to divest any employer stock in which the participant’s employee contributions and elective deferrals are invested. In addition, a participant who has completed at least three years of service may divest a portion of the employer contributions invested in employer stock.

This is only a summary of various provisions of the PPA. Regulations containing additional specific requirements and guidance for implementing these changes are due from the Internal Revenue Service and Department of Labor early in 2007. If you are interested in a more complete summary of the key provisions of the PPA, the American Society of Pension Professionals and Actuaries has posted an excellent explanation at http://www.asppa.org/government/ASPPA_HR_4_Summary_Final.pdf.

By Thomas J. Shroyer

President and
Chief Executive Officer



Thomas J. Shroyer counsels and advocates for clients on a wide range of legal issues and is certified by the Minnesota State Bar Association as a Civil Trial Specialist. He can be reached at ShroyerT@moss-barnett.com or 612.877.5281.

MOSS & BARNETT CLIENTS PROTECTED

The Minnesota Supreme Court is considering a rule obliging law firms to file a publicly available document stating whether they have professional liability insurance coverage.

This is motivated by the fact that nearly 50% of all Minnesota lawyers in private practice are completely uninsured. All too often, clients victimized by malpractice have been shocked to learn that they have no insurance protection.

In a spirit of full disclosure, we are pleased to advise that Moss & Barnett is fully insured by *Attorneys' Liability Assurance Society* ("ALAS"), a risk retention insurance pool comprised of large law firms throughout the United States. ALAS has been insuring lawyers since 1976 and it is the largest insurer of law firms in the world. ALAS also enjoys very high ratings for quality and financial strength, according to independent studies.

In addition, ALAS provides Moss & Barnett with rigorous quality control recommendations, quality reviews and continuing education programs.

Our participation in the ALAS insurance program is an important part of our commitment and dedication to providing our clients with truly professional services.

IMPORTANT NOTICE

This publication is provided only as a general discussion of legal principles and ideas. Every situation is unique and must be reviewed by a licensed attorney to determine the appropriate application of the law to any particular fact scenario. If you have a legal question, consult with an attorney. The reader of this publication will not rely upon anything herein as legal advice and will not substitute anything contained herein for obtaining legal advice from an attorney. No attorney-client relationship is formed by the publication or reading of this document. Moss & Barnett, A Professional Association, assumes no liability for typographical or other errors contained herein or for changes in the law affecting anything discussed herein.

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