BUSINESS LAW UPDATE
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PRIORITY Read

Michigan Creates a New Underground Storage Tank Cleanup Fund

By: Alan C. Schwartz; schwartza@millerjohnson.com; 616.831.1751

Effective as of December 30, 2014, Michigan has a new Underground Storage Tank Cleanup Fund to help pay for the cleanup of contamination caused by releases from refined petroleum underground storage tanks (Act 416 of the Michigan Public Acts of 2014). Each year, the first $20 Million of the 7/8 cents-per-gallon tax on refined petroleum sold for resale in Michigan is deposited in the Fund. Claims may be made against the Fund for any release that is discovered and reported on or after December 30, 2014, provided that the tank was in compliance with all registration and fee requirements, and provided that the release was reported within 24 hours after its discovery.

Claims are subject to a $15,000 deductible (applicable to persons who own or operate fewer than 8 tanks), or a $50,000 deductible (applicable to persons who own or operate 8 or more tanks). For purposes of calculating the number of tanks a person owns or operates, each compartment of a multi-compartment tank counts as a separate tank. The limit on the amount of all claims during any claim period (October 1 to September 30) is $1 Million for owners or operators of 1 to 100 tanks, and $2 Million for owners or operators of more than 100 tanks.

Although the Fund is primarily concerned with releases from tanks and underground piping connected to tanks, claims may also be made with respect to releases from dispensers and aboveground piping under limited circumstances.

The new law establishes an underground storage tank authority to review and process claims. The authority is required to establish a schedule of cleanup costs that will be reimbursed by the Fund. The Fund is required to reimburse costs only if

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Cleanup Fund, *continued*

monies are available in the Fund. If the Fund runs out of money during any claim period, pending requests for reimbursement are held for payment as monies become available in subsequent years, and may be prioritized for payment by the authority.

Certain costs are not eligible for reimbursement from the Fund, including costs arising from releases that are caused by an owner or operator's intentional, knowing, willful, or deliberate noncompliance with applicable laws; costs incurred to investigate or verify that a release has taken place; costs arising out of the reconstruction, repair, replacement, or upgrading of a tank system, site improvements or enhancements, or routine maintenance costs. In addition, other costs that arise from a covered release, but do not constitute cleanup costs, are not eligible for reimbursement from the Fund.

In some circumstances, multiple releases from the same tank are treated as a single claim, and in other circumstances, multiple releases from the same tank are treated as separate claims. However, if an owner of a tank is a different entity than the operator of the tank, they cannot each make separate claims arising out of the same release. Finally, claims may be assigned or sold to third parties in connection with the sale of the property where the tank is located.

Overall, the creation of the Fund should eventually help to reduce the cost of maintaining financial assurance for refined petroleum underground storage tank systems. Please call your Miller Johnson environmental law attorney if you have any questions regarding this new legislation.

A Resurgence in Internal Revenue Code Section 1031 Exchanges

By: Cynthia P. Ortega; ortegac@millerjohnson.com; 269.226.2959

Now that the commercial real estate market has rebounded, it is a good time to remember the benefits of structuring a sale as a Section 1031 exchange. For several years, since commercial real estate values were depressed, sellers did not need to think about how to shelter the gain on a sale. While it is true that certain members of Congress have been considering limiting exchanges to a $1,000,000 deferral or a complete repeal of Section 1031, we do not expect either of those two options to pass in 2015.

Basic Rule

The basic rule is: *No gain or loss will be recognized on the exchange of property held for productive use in a trade or business or for investment if such property is exchanged solely for property of like-kind which is to be held either for productive use in a trade or business or for investment.* This mechanism results in a deferral of your gain on sale, not a complete elimination of the gain. However, when coupled with certain estate planning techniques, you may be able to accomplish a complete avoidance of tax on all gains that have accumulated in your real estate investments.

So what does all of this mean? It means that if you have been holding onto investment property, you are now considering selling that investment, and you do not need the cash that will be generated by the sale, you should consider reinvesting the sales proceeds in another real estate investment in order to take advantage of the tax deferral afforded by structuring the sale as a Section 1031 exchange.

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Section 1031 Exchanges, *continued*

Held for Productive Use or For Investment

Let's break down the pieces. First, what does it mean for a real estate investment to be held for productive use in a trade or business or for investment? The test as to whether or not the property fits this definition is made at the time of the exchange. The owner's intent is the key. Housing inventory held by a home builder does not qualify. Neither your personal residence nor your vacation home will qualify with one exception. If there has been a change in use, such as, a vacation home that has been converted to a rental property, you can qualify that property for a Section 1031 Exchange if it was actually rented at fair market value for not less than 14 days per year for each 12 month period preceding the sale. And the personal use by the taxpayer cannot exceed more than 14 days or 10 percent of the time that the property was actually rented.

"It is a good time to remember the benefits of structuring a sale as a Section 1031 exchange."

Like-Kind

Next, what does the term "like-kind" mean? It does not mean that the new investment must be the exact same kind of investment as your current investment. In other words, if you sell an apartment complex, you need not buy another apartment complex. But you must buy some other investment type of real estate. Like-kind property can include retail property, commercial property, industrial property, condominiums, duplexes, apartments, single family homes (if not your personal residence) and raw land. However, an interest in a partnership does not qualify as a like-kind investment.

The Process

Oftentimes, the seller is not prepared to simultaneously close on the purchase of a new property when it sells its sale property. That is fine. In those instances, however, the seller cannot touch the sales proceeds. Instead, they must be given directly to a "Qualified Intermediary" who holds the funds until you are ready to close on the replacement property.

If you decide to take advantage of the Section 1031 gain deferral, you need to strictly follow certain deadlines.

- You must identify the replacement property, in writing, within 45 days of closing on the sale property. That identification can include up to three properties of any value or more than three properties if the total fair market value of the multiple properties does not exceed 200 percent of the fair market value of the sale property; and

- You must close on the purchase of the replacement property within 180 days of the closing on the sale property.

There are many nuances to these basic rules, such as those related to underlying debt on the sale property and the replacement property; exchanges between related parties; how depreciation factors into the calculations; who may act as a Qualified Intermediary; and how a raw land/new build property can be used in an exchange. Those matters are far too complicated to explain in this article.

Suffice it to say, if you are a candidate for a Section 1031 Exchange, you should contact your Miller Johnson real estate attorney before you sign a sales agreement. We can work with you to make sure all the required specialized language related to the intended Section 1031 Exchange is included in the sales agreement. You may also contact the author for any questions on this article.

Impact of Supreme Court's Decision on False Claims Act Cases

By: Timothy C. Gutwald; gutwaldt@millerjohnson.com; 616.831.1727

On May 26, 2015, the United States Supreme Court handed down its decision in *Kellogg Brown & Root Servs., Inc. et al. v United States ex rel. Carter, 575 U.S.*_____. The Supreme Court's decision had been heavily anticipated by health care providers who face qui tam actions brought under the False Claims Act (FCA).

In the wake of the unanimous decision, much of the attention focused on the Supreme Court's refusal to apply the Wartime Suspension of Limitations Act to civil fraud claims under the FCA. While that holding was significant, the Supreme Court's interpretation of the FCA's first-to-file bar and the simple phrase "pending action" may have a bigger and more lasting impact.

In affirming the Fourth Circuit's first-to-file ruling, the Supreme Court adopted a narrow interpretation of the first-to-file bar. The Supreme Court held that the phrase "no person other than the Government may intervene or bring a related action based on the facts underlying the pending action" was unambiguous and applied only when the prior FCA remains pending in court. Once the case has been dismissed, whether following a settlement or a motion to dismiss, it is no longer pending and the first-to-file bar does not preclude a subsequently filed qui tam case.

The Supreme Court was sympathetic to the chilling effect the holding may have on settlement efforts noting that "defendants may be reluctant to settle such actions for the full amount that they would accept if there were no prospect of subsequent suits asserting the same claims." However, the Supreme Court's hands were tied by the unambiguous language and the Justices were unable to make the provisions of the FCA "operate together smoothly like a finely tuned machine."

The practical impact is that any defendant seeking to settle an FCA case must now attempt to get the government to dismiss the case with prejudice; something the government has been reticent to do. In exchange for such terms, the government will most likely seek to extract more in settlement; either in money or through the imposition of a corporate integrity agreement. Failure to negotiate a dismissal with prejudice puts the defendant at risk of facing a second qui tam suit based on the same conduct. In short, qui tam cases just became harder to settle.

Should you have any questions regarding this case or the False Claims Act please contact Matthew Vicari, Timothy Gutwald or your regular Miller Johnson attorney.

The **False Claims Act** (FCA) involves actions informally called "whistleblowing." The Act provides a legal tool for individuals with inside knowledge to thwart fraudulent billings to the Federal Government. The false claims typically involve federal contractors in health care, military, or other government spending programs.

Qui Tam is part of the FCA. An informed private individual (whistleblower) brings a lawsuit on the government's behalf charging the contractor filed false claims for financial gain. After filing, the whistleblower is protected from harassment and retaliation including being fired.

The ABLE Act

How Useful is the New Option for Special Needs Planning

By: Kathleen H. Aguilar; aguilark@millerjohnson.com; 616.831.1763

The ABLE (Achieving a Better Life Experience) Act creates a new option for some people with disabilities and their families to save for future disability related expenses. With certain limitations, funds held in an ABLE account do not interfere with eligibility for public benefits. ABLE accounts are created by federal law and approved for states implementation this year.

Not Available In Michigan

Because Michigan has not yet passed enabling legislation, ABLE accounts are NOT available in this state. There are many questions about how useful these accounts will be to people with disabilities and their families when Michigan makes ABLE accounts available to its residents. We will only get answers as Michigan passes enabling legislation and the federal government provides more detail about what will qualify as "disability related expenses."

Drawbacks and Limitations

It is already clear that ABLE accounts are subject to many restrictions and will only provide benefits in limited situations. Some drawbacks and limitations of ABLE accounts are:

- Only people who became disabled before age 26 and who meet Social Security's definition of disabled can have an ABLE account.
- Amounts remaining in the ABLE account at the beneficiary's death must first be used to repay the State of Michigan for Medicaid provided to the beneficiary.
- Each beneficiary can only have one ABLE account.
- Total annual contributions to the ABLE account from ALL sources are limited to $14,000.
- Aggregate contributions cannot exceed the state limit for 529 contributions.
- When applying for a Social Security benefit known as Supplemental Security Income (SSI), only the first $100,000 is excluded. Any amount over $100,000 is countable.
- If the ABLE account balance exceeds $100,000, SSI benefits are suspended. SSI will automatically resume when the ABLE account balance dips below $100,000.
- The account balance and withdrawals from the account are excluded assets for Medicaid and other benefits programs, but ONLY if used for qualified "disability related expenses." It is unclear what qualifies as a disability related expense.

Practical Implications

Because ABLE accounts are subject to many restrictions, their usefulness for special needs planning will likely be limited. ABLE accounts will generally be useful for situations where the contributions will be small and the cost of setting up a first or third party special needs trust are prohibitive. An ABLE account may be appropriate for someone whose circumstances suggest that they will not require Medicaid, but who may need to access other means tested benefits. It may be appropriate for a beneficiary who has trouble keeping their assets below the threshold amount but will not be contributing large sums.

Families should consider using third party and first party special needs trusts in lieu of ABLE accounts. Special needs trusts offer more flexibility than ABLE accounts in many ways. Special needs trusts do not have contribution or balance restrictions and can be used for beneficiaries who become disabled later in life or who do not meet Social Security's definition of disabled. Distributions from special needs trusts are not limited to "qualified disability related expenses." Contributions to a third party special needs trust are not subject to Medicaid payback.

We will continue to monitor the progress on this. If you have any questions, please contact the author or another member of Miller Johnson's Elder Law and Disability Planning Group.

Welcome New Miller Johnson Attorneys

Kevin Battle, Jr. is an Associate in the Grand Rapids office. He is beginning his legal practice in the areas of employment and labor and litigation. Mr. Battle received his Juris Doctorate from the University of Notre Dame Law School and his B.B.A. from Grand Valley State University.

Jonathan Beer joined the firm's trust, estate and elder law practice group and the taxation and international practice areas. He was a tax associate with a firm in Virginia before coming to Miller Johnson. Mr. Beer earned his LL.M. in Taxation from Northwestern University School of Law and his J.D. from Brigham Young University—J. Reuben Clark Law School. He received a B.A. from the University of Illinois at Chicago. He was a judicial intern with the District Court of Nevada and an extern with the Office of Chief Counsel at the Internal Revenue Service.

Brittany Harden works on various transactions including those related to corporate finance as well as mergers and acquisitions. Prior to coming to Miller Johnson, she worked both at a large national law firm and in a corporate legal setting. Ms. Harden earned her J.D. from Thomas M. Cooley Law School and graduated from Grand Valley State University with her B.S. She interned in the United States Senate.

Jeff Muth is a Member in the Grand Rapids office continuing his complex commercial litigation and corporate counseling practice. His experience extends also to alternative dispute resolution including arbitration and mediation. He is a graduate of DePaul University College of Law and Kalamazoo College. He is listed in "Best Lawyers in America" for Commercial Litigation and Michigan Super Lawyers in Business Litigation and Insurance Coverage. He has an AV® rating by Martindale-Hubbell. Mr. Muth is active with several bar association committees as well as the Grand Rapids Ballet Company and Broadway Grand Rapids.

Neil Williams joined Miller Johnson's business section. He has significant experience in advising both privately held and publicly traded companies on the tax aspects of mergers, acquisitions, restructurings and divestitures. Mr. Williams earned his J.D. from Wayne State University Law School and a LL.M. in Taxation from Loyola Law School, Los Angeles. He also received a B.A. and a M.S. in Accounting from Michigan State University. Prior to joining Miller Johnson, Mr. Williams was with the Transaction Advisory Services Practice of Ernst & Young LLP in Chicago. While in law school, he interned with the Internal Revenue Service, Office of Chief Counsel in Detroit.

In the News

TJ Ackert presented at the Institute of Continuing Legal Education's (ICLE) Entrepreneurial Law Institute in Detroit, May 28 – 29 on the topic Understanding Marketing, Branding, E-Commerce and Naming a Business.

Katie Aguilar was selected to co-edit ICLE's Michigan Estate Planning Handbook. She is the chair of the Grand Rapids Bar Association Probate Steering Committee. Katie will also be presenting on "Caregiver Agreements" at ICLE's Elder Law Institute on September 11.

Katie Aguilar, Raj Malviya and **Jon Beer** were "Seminar Stage Headliners" at the Cottage & Lakefront Living Show on March 27 and 28 at DeVos Place.

Jeff Ammon did a presentation titled "Tips, Traps, and What You Can Stop Doing That You've Been Doing" focused on non-profits at a Beene Garter seminar on April 21. He spoke on "Corporate / LLC Do's & Don'ts: Meetings, Minutes & Bylaws – Oh My!" for a Rehmann seminar on June 2. Jeff also presented "Start-Up Success: Forming a Small Business" at ICLE's Upper Michigan Institute on June 12.

Mary Bauman presented to the Lakeshore Human Resources Management Association on May 28 regarding Employer 6055/6056 Reporting Requirements under the ACA. She also spoke to the West Michigan Certified Employee Benefit Specialist chapter on May 28 on Recent Legal Developments Regarding Wellness Plans.

Max Barnes is part of the mentor network for Start Garden's Seamless Coalition and Accelerator.

Justin Bratt is serving on the board of directors for Camp Roger.

Dustin Daniels was a judge for the Association for Corporate Growth (ACG) competition February 21. The ACG Cup 2015 had over 105 student competitors from 9 area colleges and universities.

Tim Gutwald presented "Krusac V. Covenant: What's Old is New Again" to the Health Care Law Section of the State Bar of Michigan. The webinar was on May 28.

Boyd Henderson was recognized at the Grand Rapids Bar Association May 1 event celebrating Law Day. He has been in practice for 50 years.

Ken Hofman's article "Major revisions to Michigan Nonprofit Corporation Act" was in the *Grand Rapids Business Journal* on February 2.

Raj Malviya moderated "Cross Border Investment in Financial Assets: Structuring and Compliance Considerations" at the ABA Section of Real Property, Trust and Estate Law's Spring Symposia CLE Meeting. The conference was held April 30 and May 1 at the Capital Hilton in Washington, D.C.

Laurie Murphy was a presenter at the seminar "Honoring Your Mother and Father. The Human and Financial Costs of Elder Care" on March 3 in Grand Rapids.

Sara Nicholson was interviewed for the "A corporate makeover" article in the April 6 issue of *Michigan Lawyer's Weekly*.

Dan Olson was elected as the youngest serving President of the Michigan Chapter of Safari Club International.

Cindy Ortega will be on a panel for the session "Bridging the Gap: Financing Alternatives to Traditional Bank Lending" and she will represent the MSHDA – Developer Perspective. This will be at the State Bar of Michigan Real Property Law Section Summer Conference July 15-18 at the Grand Hotel on Mackinac Island.

John Piggins was interviewed for the article "The asset protection toolbox. Legitimate legal services vs. overzealous strategies." in the May 4 issue of *Michigan Lawyers Weekly*.

Julie Sullivan is a Trustee with the Girl Scouts Heart of Michigan and was a host at the Girl Scout Cookie Bake-off Benefit in February.

Connie Thacker passed the examinations to be recognized as a Certified Divorce Financial Analyst (CDFA) by the Institute for Divorce Financial Analysts. She was a co-presenter with Jay Kaplan "LGBT Equality in Michigan: Conversation Continued" on March 18.

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Any of the lawyers listed can also put you in contact with Miller Johnson attorneys who practice in the areas of Banking, Construction, Economic Development, Health Care, Health Professionals, Immigration, Manufacturing and Small Business.

Miller Johnson is a member of Meritas, a global alliance of over 7,000 lawyers serving in more than 170 full-service law firms across more than 70 countries. For direct access to locally-based legal expertise worldwide, please visit the Meritas website at www.meritas.org.

U.S. News Media Group and Best Lawyers awarded Miller Johnson with top rankings for 25 practice areas in Grand Rapids and 8 in Kalamazoo as part of their 2015 "Best Law Firms" report. Achieving a high ranking is a special distinction that signals a unique combination of excellence and breadth of expertise according to the report. Services ranked as Tier 1 include employee benefits, bankruptcy and creditor/debtor rights, corporate law, labor and employment, mergers and acquisitions, banking and finance, litigation, mediation, real estate, tax law, trusts and estates, and family law.