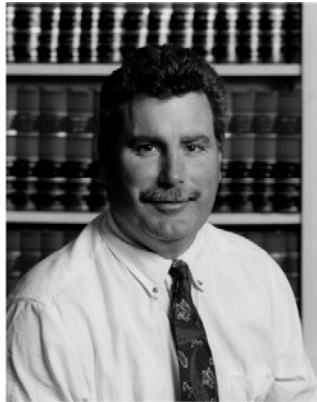




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# REPORT FROM COUNSEL

*Second Quarter 2009*

## **Beauchat & Beauchat, LLC Unique Solutions for Unique Clients**

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## **ROTH 401(K)S**

It has become more common for employers to offer not only conventional 401(k) retirement plans, but,

since they became available in 2006, also Roth 401(k) plans. For 2009, an employee can put away a total of up to \$16,500 in a 401(k) plan. If the employee is at least 50 years old or will be before the end of the year, the maximum contribution rises to \$22,000 because of a “catch-up” contribution of up to \$5,500. The total contribution may be allocated between 401(k) and Roth 401(k) accounts. In fact, the prevailing view is that it is a good idea to have some money in both types of plans because doing so will yield benefits from a diversified exposure to taxes. From an income tax standpoint, a 401(k) and a Roth 401(k) are mirror images. Contributions to a traditional 401(k) come from pretax earnings, and tax is deferred on that money and the income earned by the account until money is withdrawn. By contrast, a Roth 401(k) is funded up front with taxable earnings, but then all withdrawals are tax-free after the account exists for 5 years and the account holder reaches the age of

59-1/2. If the tax bracket were to stay constant throughout a taxpayer’s working life and into retirement, there would be little or no financial advantage of one plan over the other. In most cases though, either through changes in the Tax Code or due to changing income levels, or both, over the years a taxpayer moves among the various tax brackets. The direction in which the taxpayer is headed on this scale largely determines whether a conventional 401(k) or a Roth 401(k) makes more sense. If you anticipate that your tax rate is now higher than it will be in the future, a traditional 401(k) is probably the right choice. A typical example involves the person nearing retirement who is currently in the last few peak earning years, but who soon expects to have lower income during retirement. On the other hand, a young adult worker just getting started may well be in higher tax brackets in later years, making the Roth 401(k) more attractive. For that individual, the future tax-free withdrawals from the Roth 401(k) will bring greater benefits.

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## **E-MAILS CAN MODIFY CONTRACTS**

We send e-mails so casually and with such informality, even in the business

environment, that it is easy to forget that they may carry significant legal consequences. It is only prudent to bear in mind that even e-mails written in the most conversational style may create legal obligations no less binding than a more conventional written agreement laden with legalese and signed with all formalities. If a business wants to entirely avoid the possibility of having e-mails treated as binding amendments to existing contracts, the best approach is to be as clear and direct as possible on the subject by including language in contracts to the effect that e-mails do not count as signed writings for purposes of any contract amendments.

### *Cautionary Case*

A recent cautionary case on point involved an individual who sold his public relations firm to a global communications company. The deal included an employment contract under which the seller was to continue as chairman and CEO of the new company for three years. Soon, the new company was losing money and the seller was presented with the option of either leaving or taking on new responsibilities. E-mail then entered the picture when an employee of the communications company sent yet another option to the seller in an e-mail that spelled out how the seller would allocate his time.

The seller replied by e-mail that he enthusiastically accepted that proposal. For his part, the representative of the communications company replied by e-mail that he was thrilled with the seller's decision to accept the new offer. In both e-mails the sender had typed his name after the message. The seller later had a change of heart and sued to enforce the terms of the original employment agreement. An appellate court ruled against him on the ground that the exchange of e-mails on the new employment proposal constituted a binding amendment to the employment agreement. This was so even though the original agreement required that any changes had to be in the form of signed writings. The court reasoned that the e-mails effectively were signed writings because the parties' names appeared at the end of the e-mails, signifying an intent to authenticate the preceding contents of the messages. Likewise, the e-mails also were signed writings for purposes of the Statute of Frauds, which requires certain contracts to be in writing in order to be enforceable. In short, when the seller and his e-mail correspondent clicked "send" and "reply," they were sealing a new deal that the seller could not avoid even though it was in an electronic form.



## **E** STATE PLANNING FOR VACATION HOMES

Whether it is a palatial estate where Rockefellers and

Vanderbilts would feel at home or a rustic cabin in the woods complete with an outhouse, a family vacation home often carries sentimental value that doesn't show up on financial ledgers. That is all the more reason why owners of such homes should plan for the orderly transfer of the home for future generations. With the help of some professional guidance, owners can choose from a variety of options tailored to particular situations and priorities.

- Outright sale of the property to a third party is simplest, but be prepared for substantial capital gains if the property has been in the family long enough to appreciate in value.
- A simple bequest can be used to keep the home in the family, but, by itself, it may not address issues such as use and maintenance.
- A trust, in particular a Qualified Personal Residence Trust, has some tax benefits. The grantor gifts the property but retains a right to use it for a definite term. The value of the gift is calculated as the value of the property, less the retained interest.

However, if the grantor does not outlive the retained term, the property will be included in the grantor's estate.

- A limited liability company (LLC) has the benefit of protecting assets generally. If someone is injured on the property, the owner's liability would be confined to the ownership interest in the property.
- A partnership has the advantage of a formal structure, but each partner would have to contribute.

The issues that arise most often for second and subsequent generations concern how to allocate both the benefits and the burdens of the vacation home, that is, the use of the home and the expenses of the home, including maintenance, insurance, and taxes. The benefits and burdens can be spelled out in writing in as much detail as is desired, but it is not advisable to leave these matters to chance. There is the potential for discord and bruised feelings in even the most congenial families if, for example, one sibling is left out of the prime vacation times while shouldering more than his or her share of costs for maintenance and repair. Parents might head off at least some of these issues by setting up an endowment to cover ongoing expenses for the home. Looking a

bit farther down the road, whatever legal forms are used should provide a means by which one or more of the family members can sell his or her interest in the home to the remaining family members. Considering that there may be honest disagreement as to the property's value, it makes sense to look for consensus by using two separate appraisals, one arranged for by the selling family member and one by the remaining owner or owners.

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## **NEW IDENTITY THEFT RULES AFFECT BUSINESSES**

Faced with the reality that identity theft continues to cause billions of dollars in losses for individuals and businesses each year, the Federal Trade Commission (FTC) has issued "Red Flag Rules" that are intended to fight the problem by requiring businesses to implement procedures designed to detect and respond to identity theft.

### ***Covered Accounts***

The rules apply to financial institutions and creditors with "covered accounts." The category of financial institutions includes entities such as banks, savings and loans,

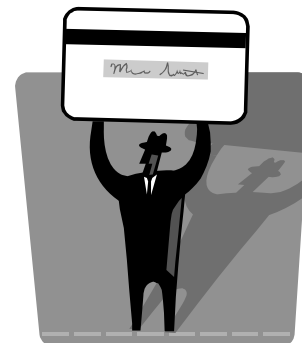
and credit unions holding "transactional accounts," meaning a deposit or other account from which the owner makes payments or transfers. The creditor category has raised some eyebrows because it embraces some businesses that in everyday parlance may not have been considered to be creditors. Basically, a "creditor" is broadly defined as any entity that regularly extends, renews, or continues credit. For example, this means finance companies, automobile dealers, mortgage brokers, and utilities, but it also means nonprofits and governmental entities that defer payment for goods or services. An account is a "covered account" for purposes of coverage of the new rules if it is used mostly for personal, family, or household purposes, or if it is an account for which there is a foreseeable risk of identity theft, such as small business and sole proprietorship accounts. Entities subject to the rules must develop a written policy to identify and detect the warning signs—the "red flags" of identity theft. Detection should involve the regular review of accounts, at a minimum. The plan must describe appropriate responses to prevent or mitigate the effects of the crime. There also must be training for staff members, oversight for any service providers, and overarching management of the plan by the

board of directors or senior employees of the financial institution or creditor. How extensive a plan must be will vary depending on the size of the entity and the kind of credit accounts it maintains. The new rules also mandate an annual update of the plan.

### ***Red Flags***

So just what are those red flags for possible identity theft? An exhaustive list may not be possible, but a supplement to the Red Flag Rules identifies and describes 26 separate red flags. They fall into five broader categories: (1) alerts, notifications, or warnings from a consumer reporting agency; (2) suspicious documents, including any that have signs of having been altered or forged; (3) suspicious personal identifying information, such as personal information that does not match information from external sources; (4) unusual use of, or suspicious activity relating to, a covered account, such as the use of an account that

has been inactive for a long time or, more generally, any sudden and unexplained change in the patterns of activity for an account; and (5) notices from customers, victims of identity theft, law enforcement authorities, or other businesses about possible identity theft in connection with covered accounts. The consequences for not complying with the Red Flag Rules are significant. The FTC itself has provided for the potential imposition of monetary sanctions and an FTC enforcement proceeding. An even more far-reaching incentive for compliance is not to be found in the fine print of the rules but is no less real: The Red Flag Rules are likely to become the prevailing standard of care for what preventive measures companies are expected to take if they hope to be able to defend themselves successfully in civil lawsuits arising out of identity theft.



## ***NEWS ABOUT OUR FIRM***

### **OFFICE PARTICIPATES IN RELAY FOR LIFE**

Beauchat & Beauchat, LLC sponsored a team for the third year in a row in the American Cancer Society Relay for Life. The Relay took place on May 15<sup>th</sup> and May 16<sup>th</sup>, 2009 at Oakside Community Park in Biglerville, PA. All pledges and donations from the event go towards helping the American Cancer Society with its various programs and research funds. If you would like more information about this great event and how you can participate please visit: [www.cancer.org](http://www.cancer.org)

### ***Our Firm Provides the Following Services:***

- ❖ Estate and Trust Planning
- ❖ Estate and Trust Administration
- ❖ Divorce and Domestic Relations Law
- ❖ Bankruptcy and Financial Reorganization
- ❖ Business Organization and Commercial Related Matters
- ❖ Real Estate Settlements and Title Insurance
- ❖ Landlord/Tenant Matters

**Our office is located at 63 West High Street, Gettysburg, Pennsylvania 17325**

***Phone: (717) 334-4515***  
***General Fax: (717) 337-2009***  
***Real Estate Department Fax: (717) 334-2399***

***Hours: Monday thru Friday***  
***8:30a.m.-4:30p.m.***

(Our office is open during the lunch hour, except for Monday's when we hold office meetings)

***Upcoming Holidays: our office will be closed July 3<sup>rd</sup> in honor of Independence Day.***

