

## Leaving a Legacy

In the fall of 2009, Koley Jessen founder and firm patriarch Jim Koley made the decision to move to Houston, Texas to be closer to his family. This decision did not come easily for Jim, a lifelong resident of Omaha. However, the last of his four children relocated in 2009, and Jim decided he wanted to be closer to his children and grandchildren. Though he officially retired in 2006, Jim maintained an office at Koley Jessen and came in nearly every day he was in Omaha.

Jim's contributions to the legal community, the nonprofit community, and the business world are significant. Although he practiced in a law firm setting for most of his legal career, Jim also served early in his career as Secretary of Peter Kiewit Sons', Inc. and as Vice President, Secretary, and Director of its 37 subsidiaries for over ten years. Jim served as a Director for seven public companies and nine private companies, and served as Chairman of the Board of Dover Corporation (NYSE: DOV) where he supervised the company's restructuring.

One of Jim's most significant achievements has had a lasting impact on First Amendment law. In 1976, Jim was part of a group of attorneys who received a landmark ruling from the U.S. Supreme Court that changed the way court cases can be reported by the media. The case came as a result of Judge Hugh Stuart's move to prohibit reporters from publishing or broadcasting the information disclosed at a 1975 pretrial hearing for Erwin Charles Simants. Simants was later convicted of killing six members of a Sutherland, Nebraska family. The judge said that Simants could not get a fair trial if the pretrial hearing was publicized. The U.S. Supreme Court ruled against Judge Stuart, stating that: "Prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." For his work in defending Nebraska's media, Jim was recognized in 2003 by the Omaha World-Herald, Koley Jessen P.C., L.L.O., and the Creighton University School of Law, through the James L. Koley '54 Professorship in Constitutional Law and the James L. Koley '54 Scholarship in Constitutional Law.



Koley Jessen President, **Paul Jessen**, with retired founder, **Jim Koley**, at the 2008 Koley Lecture at Creighton University.

The entire Koley Jessen organization paid tribute to Jim at our annual employee luncheon on February 4, 2010. In addition to an impromptu roast by fellow firm founders Paul Jessen, Mike Hupp, and Shaun McGaughey, Jim was presented with a very special gift. The firm purchased a votive candle stand to be placed in the Patricia J. Koley Adoration Chapel at Christ the King Church in Omaha. Jim and his family were longtime parishioners at Christ the King and the chapel was dedicated in memory of Jim's late wife, Patricia, in 2008.

Jim said a few words at the meeting, sharing a few stories and memories. However, what resonated most with the employees gathered that day was the message Jim delivered regarding his, and the Firm's, long-held philosophy of client service. Jim told a captivated audience that he always "made my clients' problems my problem." He spoke of his desire and ability to put his clients' minds at ease so that when they left his office, they knew he was going to do whatever it took to solve their problem or maximize their opportunity. Even though Jim no longer has a physical presence at the Koley Jessen offices in Omaha, his dedication to client service lives on within each of our employees every day. Thank you, Jim, and continued best wishes for a happy and healthy retirement. ■

## Health Care Reform Bill

One of the most controversial pieces of legislation to ever reach Capitol Hill, the Health Care Reform Bill, was passed by the House of Representatives on Sunday, March 21, 2010, by a narrow margin. President Obama then signed the Bill into law on Tuesday, March 23rd. The Senate passed a related health care “fixes” bill on Thursday, March 25th and that bill was then passed by the House and signed into law by President Obama on March 30th. The “fixes” bill made changes to the overall health care reform bill.

Since the initial Bill was passed on March 21st, clients have reported being inundated with information, newsletters, and event invitations surrounding health care reform and how the changes will affect their lives and their businesses. We want to assure you that we are thoroughly studying the bill, monitoring new developments as they happen, and determining how best to serve our various client audiences.

Our team of attorneys would be happy to answer any questions you may have on health care reform and how it impacts you as well as take your ideas and suggestions on how best to serve you as the details and long term effects of the bill continue to develop.

## Investment Review and Planning

by Thomas F. Ackley

### Introduction

Many individuals have an opportunity to diversify their investment portfolio by investing in real estate. In a typical scenario, an individual will be contacted by a friend or family member who is putting together a group of people to raise the minimum equity necessary to purchase a real estate investment, with the remainder of the purchase price financed by a traditional lender. The real estate investment is then structured so that cash flow arising from the property will cover any financing costs and operating costs in the future, which means each investor anticipates that they’ll make a one-time investment of capital and then watch their equity grow each year as the outstanding loan balance is paid off and the fair market value of the property increases.

Unfortunately, many real estate investors have discovered since 2008 that their investment properties are no longer cash flowing and capital calls have been instituted to cover any cash shortfalls. When the underlying investment was undeveloped real estate, the capital calls may arise to meet debt service, tax payments and other operating expenses that cannot be met through land sales or lease income. In the case of buildings that were purchased with the expectation that tenants would pay rent to cover all expenses of the investment, recent months have seen an increasing number of tenants closing their businesses, requesting rent reductions, or filing for bankruptcy.

If you are an investor in a real estate project, you should review the underlying investment documents to anticipate some potential issues that may arise if your project no longer cash flows.

### Typical Issues

**1. Capital Calls** If a project does not generate enough cash to cover debt service and operating costs, there are usually provisions that allow the owners or managers of the project to request (or require) additional capital contributions to provide the necessary funds to keep current on bills. These provisions generally fall into two categories:

**a. Optional** The first category provides for optional, rather than mandatory, capital calls. Thus, if capital is needed for a project and not all owners provide their pro-rata share, then the non-contributing owner could face dilution of his ownership interests. In the alternative, capital received from other owners could be categorized as loans to the company, which would mean the contributing owners could get their additional capital (plus interest) back in the future and without impacting a non-contributing owner’s ownership percentage. (Note: Treating injections of capital as loans can sometimes be challenged by unsecured creditors if the loans from owners get paid prior to claims by unsecured creditors.)

**b. Mandatory** The second category makes additional capital contributions mandatory; however, in the event that any owner does not contribute capital, the result is often the same as with optional capital calls (*i.e.*, the non-

contributing owner is either diluted or sees the company receive loans from the other owners).

Regardless of whether capital calls are optional or mandatory, the reality is that some owners may not have the ability or the desire to make additional capital contributions when asked. In those circumstances, the other owners will need to either make up for any non-contributing owner's shortfalls to keep the project afloat, or consider alternatives such as (i) bringing in new investors, (ii) selling the project, (iii) letting the project go into foreclosure, or (iv) filing for bankruptcy. Depending upon factors such as the amount of outstanding loans, the current fair market value of the project, the current market conditions for selling the project, and whether and to what extent owners personally guaranteed the loans on the project, consideration of new investors, a sale, foreclosure, or bankruptcy will need to be carefully weighed.

**2. Problems with Co-Investor** For some investment groups, problems can arise when one of the owners begins to have personal financial issues. The impact this can have on other owners of the investment group includes:

**a. Shortfalls** In the event that capital calls are needed for the project, a non-contributing owner will leave the other owners in the position of having to make up for the additional capital shortfalls to keep the project afloat. This means that a 20% owner may now see his share of capital calls at 25% if he has to make up for a pro-rata share of a non-contributing owner. Any capital shortfalls bring greater financial pressure to the other owners who do elect to comply with the capital call requirements.

**b. Bankruptcy** If an owner's personal financial issues are severe enough, bankruptcy may be an option for such owner. In that case, the other owners will likely be working with a bankruptcy trustee who steps in to manage the bankrupt owner's financial affairs. In those circumstances, the other owners may discover that the bankruptcy trustee desires to sell the bankrupt owner's interest at fair market value to anyone who is willing to buy. The Company's governing documents may give the other owners an opportunity to buy out the bankrupt owner's interest before an outside investor would be allowed to buy in, but this could still cause issues

if the other owners are unable to buy out the interests of the bankrupt owner.

**c. Ownership Transfers** Depending upon the amount of equity that may have built up in a real estate project (if any), some owners are willing to let a co-owner sign over his interests to the other owners in exchange for a release (or indemnity) on any further financial liability to the project. However, if the project is worth less than the current outstanding balance of any loan, it may not be in the best interests of the other owners to let a co-owner walk away without further liability because it could cause all of the other owners to take on additional risks. Also, caution should be taken before transferring any ownership interests among owners without first examining all potential legal ramifications that may arise. For example, there could be tax ramifications for all involved and, in the event that the transferring owner later files for bankruptcy, there could be a preference claim or fraudulent transfer claim under the applicable federal and state laws if less than fair market value was received in exchange for the ownership interest transfer.

**3. Personal Guaranties** In many real estate investment projects, personal guaranties serve as part of the "collateral" to secure the lender's loan. Depending upon how the guaranties are structured (recourse vs. non-recourse; unlimited vs. limited), each owner could be faced with additional financial ramifications if one or more of his co-owners is having financial difficulties and is unable to support capital calls for a project that no longer cash flows. Accordingly, knowing what kind of personal guaranty may be in place on a project is a prime consideration when determining whether to make additional capital contributions to a project.

## Conclusion

Each real estate investment is unique with regard to the particular assets involved, the loan structure, the financial wherewithal of owners, and the overall status of the project. It is beyond the scope of this article to address all legal ramifications that could be involved with a particular real estate investment. If you have questions about any real estate investment that you're involved in, please contact a member of our Real Estate, Environmental and Natural Resources Law Practice Group. ■

## False Alarms: Trademark Scams and Scare Tactics

by David A. Goeschel

We frequently receive calls from our clients about official-looking “notices” they have received that suggest particular actions be taken to protect their trademarks. We see two types of notices most frequently. The first type is a letter that appears to be from a governmental agency, and is sent to clients who have a pending federal trademark application or a federally registered trademark. This letter often contains the name of the mark and the number assigned to the mark by the United States Patent and Trademark Office (“USPTO”). It requests a fee for trademark monitoring or for making a time-sensitive filing required by the USPTO (in the latter instance, this fee is usually twice or more the amount that is actually due the USPTO for such filing).

If you have engaged our Firm to apply for a federal trademark registration or to maintain your registration, we will receive all communications from the USPTO on your behalf. The USPTO does not separately contact you. If you apply for or maintain your own trademarks, you should only respond to communications that come directly from the USPTO. The USPTO does not provide trademark monitoring services and cannot charge in excess of the amount of any filing fee that is required by law.

The second type of notice is an email that purports to be from a company located in an Asian country, usually China, Taiwan, or Hong Kong. This email “notifies” the recipient that an unspecified third party is applying to register the recipient’s trademark as part of an Asian domain name. For example, our Firm might receive a notice that someone is attempting to register [www.koleyjessen.hk](http://www.koleyjessen.hk), a Hong Kong domain name. The email requests an immediate response if the trademark owner is concerned and wants to prevent the registration. Responding to the email will likely result in an offer by the email sender to register the domain name on behalf of the trademark owner for a fee. Because the email sender is purportedly located overseas, the quickest and easiest means of payment would be a credit card.

Rather than responding to the email sender, you should use notices such as this as a reminder to conduct a review of the domain names you have already registered. You should also conduct a search

to see whether others have registered domain names incorporating your trademark. If you find that you do not have all the domain names you want and need, but that such domain names have not yet been registered by others, you can obtain the registrations without engaging a company from a foreign country to assist you. Alternatively, if you find that the domain names you want have already been registered by others, there may be a means by which you can obtain those domain names from their current owners. You should consult legal counsel for additional information.

If you receive any unsolicited communications regarding your trademarks or business names and remain uncertain as to how or whether to respond, we can review them and advise you. Typically, however, the only action you will need to take is to find the nearest shredder or to transfer the email to your “deleted items” folder. ■

## Estate Planning Update

by Alexander J. Wolf

The unthinkable has occurred. As of January 1, 2010, the federal estate and generation-skipping transfer taxes were repealed (the “Repeal”). The Repeal was the direct result of legislation implemented in 2001 (the “2001 Act”), which was designed to provide relief from estate and generation-skipping transfer taxes. The 2001 Act increased the estate tax “Exclusion” (i.e., the amount each individual could pass free of estate tax at death) from \$675,000 in 2001 to \$3,500,000 in 2009, increased the generation-skipping transfer tax “Exemption” (i.e., the amount each individual could pass free of generation-skipping transfer tax at death) from \$1,060,000 in 2001 to \$3,500,000 in 2009, and reduced the maximum rate of those taxes from 55% in 2001 to 45% in 2009.

In addition, the 2001 Act contained a provision that repealed the estate and generation-skipping transfer taxes altogether as of January 1, 2010. Thus, under current law, for decedents dying in 2010, there will be no estate or generation-skipping transfer tax due, regardless of the value of the decedent’s estate, unless these taxes are (if they can be) reinstated retroactively. The issues surrounding a retroactive reinstatement are, of course, an entirely separate subject of debate!

Virtually all estate planners and tax practitioners expected Congress to act before the end of 2009 to continue the tax regimes as they existed in 2009, especially since President Obama and key members of Congress had indicated support for that approach. However, Congress failed to act and the Repeal became effective as of January 1, 2010, creating tremendous uncertainty for estate planners and their clients.

The 2001 Act is scheduled to expire on December 31, 2010. If Congress fails to act by the end of this year, the expiration will result in the reinstatement of the federal estate and generation-skipping transfer taxes on January 1, 2011, based on laws as they existed prior to enactment of the 2001 Act (meaning an Exclusion of \$1,000,000, an Exemption of \$1,000,000 indexed for inflation since 1997, and maximum tax rates of 55%). The significantly reduced Exclusion and Exemption could have a substantial impact on many Americans.

Most practitioners speculate that Congress will take action sometime this year to reintroduce the federal estate and generation-skipping transfer taxes in substantially the same form as they existed in 2009 (*i.e.*, an Exclusion and Exemption of \$3,500,000 and a maximum tax rate of 45%). Whether Congress would make the reintroduction of the taxes retroactive to January 1, 2010 is not clear, nor is it clear that retroactive application would be constitutional.

Our Estate Planning Practice Group continues to closely monitor Congressional activity on this issue, and will communicate with our clients as significant developments occur. If you have any questions in the meantime, please feel free to contact one of the attorneys in our Estate Planning Practice Group. ■

## What about Title III?

by Julie A. Schultz

Consider a disabled customer or client who visits your business. Are there properly designated parking stalls in the parking lot? Are the interior, exterior, and restroom doors wide enough to accommodate a wheelchair? Could a customer using a walker or cane reach the towel and soap dispenser in the restroom?

Are portions of your facility accessible only by stairs? Are the counters and shelves for your products at the correct height? As the owner of a building that is open to the public, or a business operating within such building, you are likely required to comply with Title III of the Americans With Disabilities Act ("Title III"). Many employers are familiar with their obligations pursuant to Title I of the ADA with respect to disabled employees and applicants for employment. However, employers and business owners/operators may not be familiar with their obligations under Title III.

Title III prohibits discrimination based on disability by private entities in places of public accommodation. Specifically, Title III states that "no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases, or operates a place of public accommodation." Generally, any company or individual that owns, operates, or leases space in a facility to operate a business providing goods or services to the public should understand and comply with Title III.

Title III requires that facilities built on or after January 26, 1993 must meet or exceed minimum design standards. This express requirement, however, has fueled a common misperception that facilities constructed before January 26, 1993 are "grandfathered" or otherwise exempt from the requirements of Title III. This is simply not true. To the contrary, regardless of the date the facility was built, the owners and users of such facilities have an obligation to remove structural barriers once such removal is "readily achievable." This is true even if no alterations or building renovations are planned.

A big question for older facilities is whether (or when) the removal of an existing physical barrier is "readily achievable" (*i.e.*, accomplished without much difficulty or expense). This question, much like the business itself, is not static. This is an ongoing obligation. What is not readily achievable in the start-up stage of the business might be readily achievable a few years later when the business has more operating capital. As such, this issue should be readdressed periodically.

Generally, the following factors will be considered to determine if the removal of an existing barrier is readily achievable:

1. the nature and cost of the removal action;
2. the overall financial resources of the site or sites involved; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements necessary for safe operation, including crime prevention measures; or any other impact of the action on the operation of the site;
3. the geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;
4. if applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number type and location of its facility; and
5. if applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

Violating Title III may be costly. In recent months, lawsuits have been filed in numerous states, including Nebraska, against restaurants, shopping centers, and other locations open to the public, claiming violations of Title III. In such lawsuits, the plaintiff (or a class of plaintiffs) claimed discrimination on the basis that the business denied the plaintiff access to and the full enjoyment of the facility by failing to remove certain physical barriers as required by Title III. In preparation for such lawsuits, a disabled individual, commonly referred to as a “tester,” may enter a target business for the sole purpose of determining compliance with Title III. As such, if a lawsuit is filed, the plaintiff may have already accumulated evidence documenting that the business violated Title III. Such lawsuits may request that the court impose an injunction against the business, which may include a request that a business be shut down in its entirety until any Title III violations are corrected. Also, such lawsuits typically request that the court impose

penalties and award attorney’s fees to plaintiffs who file such actions. Although the tester’s methods may seem somewhat underhanded, and/or the work product of “hungry plaintiffs lawyers,” the truth is that Title III is real and merits compliance.

To ensure compliance with Title III, you (if you are the owner or operator of the business) should first consider having a “compliance audit” conducted with respect to your business. Such an audit involves the physical inspection of the facility to determine whether the facility is accessible to disabled individuals and otherwise in compliance with Title III. If potential violations of Title III are discovered, preemptive steps can be taken to remove physical barriers if such removal is “readily achievable.” In the alternative, appropriate evidence should be retained that supports the conclusion that the removal of such barriers is not readily achievable. Periodic reviews of this determination should take place and should also be documented. Second, you should examine your current policies and procedures with respect to serving individuals with disabilities to ensure that those policies and procedures are clear and in compliance with applicable law. Finally, you should ensure that your employees, including management, receive regular training with respect to the appropriate treatment of individuals with disabilities. Such preventative, preemptive steps are not only good business, but may protect you and your business in the event you are subjected to claims that you are in violation of Title III. ■

## Real Estate Tax Protests

by Max J. Burbach

As many of you may have already experienced, current economic conditions have wreaked havoc on property values. Although real estate markets in the Midwest in general, and perhaps in the Omaha metropolitan area in particular, may be somewhat less volatile than on the coasts or in bigger markets, values of some properties have in fact declined. Because commercial and residential real estate values remain depressed, a valuation adjustment may be warranted, which may in turn reduce your future real estate taxes.

By June 1, 2010, Nebraska's county assessors will mail notices of changes in property valuation to all Nebraska real estate owners. You may protest the assessed value (whether such value is changed or remains flat) by filing the appropriate protest documents with the county assessor's office on or before June 30, 2010. Each county has different procedures and evidentiary requirements for filing protests. If you anticipate filing any tax protests this year, we recommend starting the process as early as possible, perhaps even prior to the county assessor's completion of your property's assessment. Koley Jessen can assist you throughout the real estate valuation protest and appeal process, and can help you maximize your opportunity to lower your real estate taxes. If you have questions or would like assistance with your protests, please contact a member of our Real Estate, Environmental and Natural Resources Law Practice Group. ■

## Safe Harbor for Plan Assets

by Joan M. Cannon

The U.S. Department of Labor ("DOL") issued final regulations on January 14, 2010, governing the timeframe in which an employer must deposit an employee's contribution to employer-sponsored pension and welfare plans. The general rule, which applies to both pension plans and welfare benefit plans, is that any employee contribution or loan payment must be deposited by the earliest date on which such contributions or repayments can reasonably be segregated from the employer's general assets. This timing rule determines when general assets of the employer become plan assets governed by ERISA.

Historically, the absolute deadline for depositing employee contributions and loan payments into a pension plan has been the 15th business day of the month following the day of withholding or receipt of a loan payment. Nonetheless, the DOL has always made clear that holding such contributions or payments until the 15th business day may not be in compliance with the law, and may in fact be a prohibited transaction subjecting the employer to excise taxes and other penalties. Under the final rule, the DOL created a safe harbor for plans with less than

100 participants. That safe harbor provides that if employee contributions or repayments are deposited with the plan not later than the seventh business day following the day on which the amount is received by the employer or would otherwise have been payable to the employee in cash, then the contribution or payment is deemed to have been lawfully contributed or repaid. In other words, seven business days is "the earliest date" such contributions or payments can be segregated from the employer's general assets.

The safe harbor does not apply to employers with 100 or more participants. The DOL provides an example for such large employers, which provides that "the earliest date" for segregating contributions and payments may be a much shorter timeframe, such as two or three business days. The rationale given for the different rules is the likelihood of the employer's use of sophisticated payroll systems or outside payroll service providers. Absent a safe harbor for large pension plans, there are a few other deadlines to keep in mind. The absolute deadline for welfare benefit plans has always been 90 days after the withholding or receipt by the employer of such contributions and for SIMPLE IRAs, it's the 30th calendar day following the month in which the employee contribution would otherwise be payable to the employee in cash.

The final regulations are effective immediately. We encourage all employers with less than 100 participants in a plan to review their payroll practices and make sure that these rules are followed. We recommend that employers with 100 or more participants in a plan review their payroll practices and ensure that they are depositing any employee contributions or payments "the earliest date" possible for their payroll system. If you find a late deposit, we recommend that you correct the mistake using the DOL's compliance program as soon as possible and make any necessary changes to prevent any additional late deposits. You can use the DOL's website ([www.dol.gov](http://www.dol.gov)) to correct such mistakes, or we can walk you through the steps. In any case, it is something that the DOL takes very seriously, so you will want to be sure to promptly address any issues. ■

**Would you rather receive this newsletter via email?**

Please send an email to Jessica Kinnersley:  
[jessica.kinnersley@koleyjessen.com](mailto:jessica.kinnersley@koleyjessen.com)

## ANNOUNCEMENTS

## Sustainability in Operations

Koley Jessen's Sustainability in Operations Committee has reported that for 2009 Koley Jessen recycled 13,745 tons of paper, resulting in the saving of 233.66 trees, 56,354.50 Kilowatt hours of energy, 96,215 gallons of water, 45.36 cubic yards of landfill, and 824.70 pounds of air pollution.

## Community

**Margaret C. Hershiser** has joined the Board of Directors of Camp Fire USA Midlands Council.

**David M. Dvorak** has joined the Board of Directors of the Fontenelle Nature Association.

**Michael S. Mostek** was recently appointed by Governor Dave Heineman to a third three-year term on the Keep Nebraska Beautiful Board of Directors. He was then elected Chairman of the Board by his fellow directors.

**Thomas F. Ackley** was recently re-elected as Chair of the Bellevue Planning Commission.

**Daniel J. Fischer** was recently elected to another three-year term on the Children's Cancer Camps of Nebraska, Inc. (Camp CoHoLo) Board of Directors.

## Young Professionals Choice Award

Koley Jessen was once again the proud sponsor of the Young Professionals Choice Award, which was presented to Omaha Public Power District on March 4, 2010, at the Young Professionals Summit. The award is an initiative of the Young Professionals Council of the Greater Omaha Chamber of Commerce. The purpose of the award is to recognize Omaha companies who have excelled at attracting and retaining young professionals. Nominated companies were rated in five different areas including opportunity, leadership, community involvement,

work-life balance, and inclusiveness. **Margaret C. Hershiser**, chair of Koley Jessen's Employment, Labor, and Benefits Practice Group, presented the award to OPPD Chairman Gary Gates during the Young Professionals Summit keynote luncheon. This year's keynote speaker was Blake Mycoskie, founder of TOMS Shoes, which donates a pair of shoes to a child in need for every pair sold.

## Upcoming Events

Koley Jessen is a sponsor of the Commercial Real Estate Workshop (CREW Midwest) to be held at the Qwest Center on April 16, 2010. **Max J. Burbach** serves on the Steering Committee for the event and will be presenting during one of the workshop sessions. **Thomas F. Ackley** will also be presenting at one of the workshop sessions.

**Mary A. Donovan** will be presenting at the Creighton University School of Law Annual Law Review Symposium on April 16, 2010. The topic of this year's symposium is "Estate Planning: Moral, Ethical and Religious Perspectives."

## KOLEY ■ JESSEN

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