

Illinois Legal Update

Insights and Developments in the Law

Summer 2008

In This Issue

**Servicemembers
Civil Relief Act..... 1**

**Like-Kind
Exchanges..... 2**

**Life Itself Has
Value..... 2**

**Drunk Driver's
Widow Cannot
Recover Life
Insurance..... 3**

**Lawsuits by
Children..... 4**

Servicemembers Civil Relief Act

Protection for Those Who Serve

More members of the armed forces are being called to serve overseas, and Congress has recently updated a World War II-era law to better protect their interests. This law, called the Servicemembers Civil Relief Act (SCRA), is

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intended to prevent financial and other hardship that might result when a member of the military is called to active duty.

The SCRA affords a number of different kinds of protection for servicemembers and their families. One provision allows servicemembers to break leases for cars and residences if they are being deployed or otherwise permanently changing their duty station, freeing

servicemembers from the obligation to pay for a car or an apartment that is no longer needed. If they choose not to break their lease or give up the property, the SCRA also provides some protection against foreclosure and eviction, allowing the proceeding to be delayed or the event halted until the servicemember returns home.

Other provisions limit the liability of servicemembers for fines and penalties found in contracts they signed before their deployment, and can reduce the interest rate on loans while they are gone. Although the SCRA generally does not permit the complete cancellation of debts (and money that has been borrowed must usually be repaid), it often does allow those called to active service to delay repayment.

The SCRA allows servicemembers to delay court proceedings and even to have judgments taken against them set aside, if their military service prevents them from defending themselves in court. Similarly, the SCRA can extend the limitations period of claims the servicemembers may have until

Continued on page four.

Like-Kind Exchanges

Normally, capital gains are recognized and taxable upon the sale of property. The Tax Code provides an exception to this rule for certain exchanges of property. If all requirements are met, any gain from the exchange is not taxed, and any loss cannot be deducted. Gains or losses will not be recognized until the person who received property in the exchange sells or otherwise disposes of it. The most common type of nontaxable exchange is the exchange of property for the same kind of property, or a like-kind exchange.

Requirements

To qualify as a like-kind exchange, the property traded and the property received must be both (1) qualifying property and (2) like property. Qualifying property must be held either for investment or for productive use in a trade or business. Typical examples include machinery, buildings, land, trucks, and rental houses. Like property refers to the nature or character of the property. Characteristics relating to the grade or quality of the property are immaterial. All real estate is like-kind to all other real estate, whether or not one or both of the properties are improved. Similarly, an exchange of personal property for similar personal property is an exchange of like property.

Because a straight swap of property is often impractical, the Tax Code allows deferred like-kind exchanges. If the transaction is structured properly, a person can sell one property, have the proceeds held for a period of time, and then use the proceeds to buy new property. The seller must identify the replacement property within 45

days of selling the relinquished property. Also, acquisition of the replacement property must take place within 180 days of the sale of the relinquished property, or the due date of the taxpayer's return for that year, whichever is earlier.

Qualified Intermediary

It is common to use a qualified intermediary in making a deferred exchange of like property. A qualified intermediary is a person who enters into a written exchange agreement to acquire one party's property and transfer it to a second

party, and also to acquire replacement property from the second party and transfer it to the first party. The agreement must explicitly limit the first party's rights to obtain in any way the benefits of money or other property held by the intermediary. A qualified intermediary cannot be either an agent or a relative of the "exchanger."

There are special rules for like-kind exchanges between related persons. In this context, "related persons" include not only spouses,

Continued on page three.

Life Itself Has Value

Although most people would agree with the idea that a person's life is valuable, a recent decision allows injured persons who have their life expectancy cut short due to the negligence of another to recover this value.

The case involved a malpractice claim against a hospital that failed to diagnose a newborn with hypoglycemia, a failure that caused the child to suffer severe brain damage. At trial, experts testified that the brain damage would prevent the child from keeping in good health, and that he was likely to die from 10 to 20 years earlier than average.

The court awarded the child damages for this reduced life expectancy. It held that "life itself has value," and the hospital "should be required to pay damages for wrongful conduct that reduces [the child's] life expectancy." The hospital argued that if this is the case it should receive a "credit" for the medical care the child will not need because he will die before his time. The court rejected this claim, holding that the hospital "should not be allowed to benefit from a reduction in a plaintiff's damages due to decreased life expectancy when it was the defendant's wrongful conduct that caused the decreased life expectancy."

Drunk Driver's Widow Cannot Recover Life Insurance

According to a recent decision in federal court, those who survive a drunk driver may be unable to recover on the driver's life insurance.

The case involved a driver who was killed while fleeing a police officer who tried to pull him over. Toxicology reports showed that the driver's blood-alcohol level was more than three times the legal limit at the time he was killed.

The driver's wife made a claim on his life insurance policy, and the insurer refused to pay.

The driver's wife made a claim on his life insurance policy, and the insurer refused to pay. According to the insurer, it was not required to pay because the policy excluded coverage if the insured was killed during the "commission of a felony," and the fact that the driver had two prior DUI convictions made his third offense a felony under Illinois law.

The widow argued that this exclusion should not apply because her husband had not been convicted of DUI, and therefore there was no third offense and no felony.

The court agreed with the insurer, and ruled against coverage.

It held that, while the lack of a conviction would mean the driver would not be punished by the state, it did not mean that he was not committing a felony at the time of his death. Because the evidence showed the driver was drunk when he died and that he died as the result of a collision he caused when he drove drunk, the driver was committing a felony when he died and the exclusion from coverage applied.

The court also noted that accepting the widow's interpretation

of the policy would make the felony exclusion meaningless because the state does not prosecute a dead man for a crime, and so her interpretation would mean that there would be coverage for anyone who is killed while committing a felony.

Combining drinking and driving is to be avoided for so many reasons. The possibility that a drunk driver's death will deprive his family of the security that life insurance otherwise offers is just another reason to add to the list.

Like-Kind Exchanges

Continued from page two.

siblings, parents, and children, but also a corporation in which an individual has more than 50% ownership, and a partnership in which an individual owns over 50% of the capital or profits. For a like-kind exchange between related persons, the ability to postpone tax liability for the gain from the exchange is lost if either person disposes of the property within two years after the exchange.

An exchange of like-kind property is only partially nontaxable if the taxpayer also receives money or unlike property in an exchange that produces a capital gain. In that case, the gain is taxable, but only to

the extent of the money received and the fair market value of the unlike property.

Factors to Consider

In general, three basic factors may be considered in deciding whether a like-kind exchange will make sense. The exchanger should (1) receive property with a price equal to or greater than that of the relinquished property; (2) have as much, or more, debt in the acquired property as in the property given up; and (3) take no cash out of the transaction. While these are good general guidelines, they are not a substitute for sound advice from an attorney familiar with all of the requirements for a valid like-kind exchange.

Resolution of legal issues depends upon many factors, including variations of facts and interpretations of Illinois law. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.

Lawsuits by Children

Minor children do not have the legal capacity to bring a lawsuit on their own. Any time a lawsuit needs to be brought for injuries caused to a child, such as by a negligent doctor or driver, the suit must be filed by the child's parent or guardian. Although the attorney retained by the parent or guardian is ethically obligated to protect the child's interests, he or she is technically the lawyer for the adults. However, when the attorney or the involved adults think it appropriate, the court may be asked to appoint separate counsel to represent the child.

A person who has been appointed to represent the child is generally referred to as the child's "guardian ad litem."

A person who has been appointed to represent the child is generally referred to as the child's "guardian ad litem." A guardian ad litem is not hired by the parents but, rather, is appointed by the court to act on the child's behalf. Generally, the responsibilities of the guardian ad litem include investigating the child's claims, reporting back to the court about what this investigation reveals, and making sure that the child has an effective advocate.

Courts often appoint a guardian ad litem to represent the child when there is a conflict between the interests of the adults and the interests of the child, such as in automobile accident cases where both the parents and the child are injured but

the defendant has only limited insurance coverage.

Other kinds of cases where a guardian ad litem is regularly appointed include foster-care proceedings involving a child, some kinds of inheritance and contested custody cases, and cases where the child is being sued as a defendant.

Like all lawsuits, suits brought on behalf of children are subject to statutes of limitations, which are laws that limit how long you may wait before bringing a legal claim against another person. Generally, the statute of limitations in a personal injury case is 2 years, while the statute of limitations in contract cases is 5 or 10 years, depending on the type of contract.

Since children cannot file lawsuits on their own behalf, the statute of limitations on a child's claims is

"tolled" (suspended) while the child remains in the care of his or her parent or custodial guardian. In these cases, if the parent or guardian does not bring a suit on the child's behalf, the statute of limitations on the child's claim does not begin to run until the child becomes an adult at age 18. Thus, if a child is injured during his or her minority, he or she would have the right to file suit until he or she turned 20—2 years past the 18th birthday.

Beware

This is only the general rule, and some exceptions apply. For instance, in medical malpractice cases, a child only has eight years from the time of the discovery of the malpractice to bring a lawsuit, even if the child has not yet turned 18 years of age.

SCRA

Continued from page one.

their service is done, so they will not have to worry about filing suit while on active duty.

In addition to protecting persons actually serving in the military, the SCRA often also protects anyone else who is liable with them, including members of their immediate family. However, it is important to remember that the provisions of the SCRA are not "self-executing," that is, they usually require the servicemember or a family member to at least give notice that they are protected by the Act. This is because landlords,

banks, courts, etc., often have no way of knowing whether someone has or has not been called to active duty with the military.

The SCRA applies only to agreements that were signed before the servicemember received the orders calling him to active duty, and governs almost all civil proceedings, although not criminal cases.

Although sometimes complex and often requiring action or notice by certain deadlines, the SCRA represents an important legal protection for those who "answer their country's call." Details regarding the SCRA are available from the Judge Advocate General's Legal Assistance office at any military base.