STRAUSS & TROY
A Legal Professional Association

IMPACT

An Overview of Current Legal Events of Concern and Interest

From the Attorneys of Strauss & Troy, Cincinnati, Ohio, and Northern Kentucky

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Year 2000: "Millennium Bug" Can Pack A Legal Bite

By: Charles H. Melville

Chances are you already know about the Millennium Bug. Briefly, most computer software in use today identifies years by the last two digits, and is programmed to assume that all dates entered are in the 20th century. On January 1, 2000, computer systems that have not been cleared of this "bug" will "think" it's January 1, 1900. The effect on your system could be anything from lost or faulty data to a complete crash.

Predictions of disastrous consequences abound - as well as predictions of the litigation are sure to follow. We're going to assume (and hope) that you already understand the problem and have a plan to make your computer systems "Year 2000 Compliant."

But you may want to start planning for the circumstances in which you could be faced with Year 2000 litigation - in either the pursuit or the defense of a lawsuit. For example:

- What is your liability if you don't achieve compliance in time, or if you miss something?
- How can you recover the cost of compliance - or losses caused by a system failure?
- Even if your system is fine, what if your suppliers or customers shut down?

With these questions in mind, here's a brief summary of some of the legal issues that are expected to rear their ugly heads as the clock ticks down to Year 2000.

The Potential Liabilities

The Millennium Bug presents the rare circumstance where it may be equally as likely that you will be sued as that you will sue someone else. The potential liabilities arising from non-compliance are endless, but some of the major ones are:

- personal injury and property damage caused by malfunctioning computers.
- tax penalties for failure to calculate taxes correctly or pay them on time.
- fines for violating pension and other benefit plan provisions.
- lost profits from the shutdown of business operations.
- breach of contract claims by customers for your company's failure to meet delivery or performance obligations.
- breach of contract claims against suppliers for their failure to meet delivery or performance obligations to you.

Potential Methods of Recouping Losses

So if you experience any losses, who can you sue? Although it is still too early to predict the litigation that will flow from companies' failures to become Year 2000 Compliant, here are some of the targets that many companies will look to as potential sources of recovering their losses:

Hardware and software manufacturers. Existing law on express and implied product warranties, breach of contract, negligence, and fraud could provide a basis for recovering the cost of Year 2000 Compliance from hardware and software manufacturers.

Insurance. Companies should consider whether they have insurance that might cover some of their liabilities. Some liabilities - such as personal injuries - are more likely to be covered than others - such as compliance costs.

Tax deductions. It is generally believed that the cost of compliance will be considered a deductible business expense.

Suppliers and customers. Even if your system is compliant, you could suffer losses if your suppliers and customers are unable to meet their obligations to you because of their Year 2000 problems. You may have breach of contract claims against them - the same as they would against you if your non-compliance prevented you from satisfying your contractual obligations to them.

Corporate officers and directors. Officers and directors may be liable to the corporation - or to shareholders

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- for losses caused by their failure to anticipate Year 2000 problems, such as by failing to become Year 2000 compliant or to investigate whether suppliers and customers are Year 2000 complaint.

In addition, it is generally believed that the cost of paying Year 2000 specialists to correct the bug will dramatically increase as the Millennium approaches and the demand for their services skyrockets. Officers and directors may be liable for such increased costs of compliance. Fortunately, they might also have insurance to cover their liabilities.

As the Millennium approaches, more and more companies are certain to be confronted head on with the prospect of major losses due to their own or other companies' Year 2000 compliance problems. If you need more information about the legal issues that are expected to arise, feel free to contact Charlie Melville at Strauss & Troy.

Buy-Sell Agreements: A Primer for the Business Owner

By: James G. Heldman

A buy-sell agreement can be an effective planning tool for business owners. It enables the owners to plan ahead for an owner's departure from the business by structuring the terms of a sale or purchase of the owner's interest in the business before that time comes. Thus, it allows the owners to plan for future events - most often, the death, retirement, or disability of an owner - so that there is minimum disruption to the business and so that maximum control over the future of the business is given to the remaining owners.

Although buy-sell agreements will vary depending on the structure of the business (whether it be a partnership, limited liability company, or closely held corporation), the basic characteristics of such agreements have several things in common. With buy-sell agreements, business owners can establish the value of the ownership interest, identify the new owner or owners, and structure the terms of the sale. For example, three business owners could plan for the future departure of any one of the owners by entering into an agreement that:

- specifies how an owner's interest will be valued,
- gives each of the remaining owners the first opportunity to buy that interest (or makes such purchase mandatory), and
- details how the purchase will be financed.

What Are the Different Types of Agreements?

Buy-sell agreements fall into two general categories. Under a *cross-purchase agreement*, the owners agree that they will buy out the interest of a departing owner. Under an *entity purchase or redemption agreement*, the business itself buys the departing owner's interest.

Businesses should consider several factors in choosing the type of agreement, including the tax consequences of the choice and the number of owners involved. As a general rule of thumb, businesses that only have a few owners will find a cross-purchase plan desirable. A business with more owners is often best served by an entity purchase agreement.

Consider a situation where a buy-sell agreement contemplates the purchase of life insurance to fund the purchase of a deceased owner's interest. This type of funding is discussed in more detail below. If the business has only a few owners, arranging for each owner to take out life insurance on the other owners to fund the buy-out - as would be the case under a cross-purchase agreement - may be cost effective. But when there are numerous owners, an arrangement requiring each owner to pay insurance premiums would be financially burdensome. In that event, having the business itself pay the premiums - as would be the case under an entity purchase agreement - may make better financial sense.

What are the Advantages of a Buy-Sell Agreement?

Buy-sell agreements have several advantages for business owners who want to ensure predictability and flexibility in their future business situation and relationships. Perhaps the primary benefit that these agreements provide for business owners is *control*.

From the perspective of departing owners, a buy-sell agreement can provide a ready market for ownership interests on terms and conditions agreed to by the owners themselves before the need arises. Where estate planning is a concern, a buy-sell agreement can provide the family of a deceased owner with liquid assets that generate income immediately. And, if properly structured, buy-sell agreements can set the value of a deceased owner's business interest for purposes of estate taxes.

From the perspective of remaining owners, a buy-sell agreement can avoid any hiatus in business operations upon the departure of an owner, allowing uninterrupted efficiency in making business decisions. If desirable, the agreement can ensure that outsiders will not come into ownership by limiting the terms of a co-owner's disposition of his or her ownership interest. Also, the owners can design the agreement to safeguard against having one of them abandon the business and establish a competing one.

How is a Price Set on the Departing Owner's Interests?

Buy-sell agreements are particularly appealing to business owners because they can provide for a realistic method of valuing ownership interests. Some owners rely on a formula to set the price, such as a multiple of the gross revenues or net earnings of the business. Another way for a buy-sell agreement to value a business is to require one or more independent appraisals. In some cases, the owners themselves may simply periodically agree on a fair market value of the business interests.

Any one or a combination of ways to fix the purchase price may be used, depending on the nature of the business and the desires of the owners.

How is the Buy-out Funded?

Deciding how to fund a buy-out is another issue that a buy-sell agreement should address. Some businesses or owners may be in a position to make a cash purchase. But if owners are concerned about their ability to make a cash purchase of a departing owner's interest, it may be wise to plan a buy-out with insurance proceeds.

Several issues arise when considering insurance funding, including whether the owners or business should carry the insurance policies, the tax implications of insurance funding, and the age and health of the owners. There may be disincentives to insurance funding if one or more owners are too old to purchase insurance at a reasonable cost, have pre-existing health conditions, or if the owners' ages differ significantly.

As an alternative to insurance funding, the owners could arrange for the business to set aside a specified amount in a reserve fund to pay for a buy-out.

Buy-sell agreements can be an important tool for businesses that want to provide some added certainty in their future operations. If you would like more information or you need advice about a particular situation, feel free to contact James G. Heldman at Strauss & Troy.

The Pros and Cons of Living Trusts

by Thomas C. Rink

You've probably heard the hype - that a living trust can save your estate huge amounts of money, time, and trouble after you die by avoiding probate. Well, as the old saying goes, all that glitters is not gold. While a living trust can indeed be a valuable estate planning tool, it is like any other tool - it has both advantages and disadvantages. In deciding whether to include a living trust in your estate plan, it may be helpful to take a closer look at what a living trust can and cannot do.

What Is Probate?

Before going further, it is necessary that you understand what "probate" is, and why people want to avoid it. Probate is simply the legal process of paying your estate's debts and taxes, and distributing your assets after death. Probate is required regardless of whether you have a will. If you have a will, your assets are distributed in accordance with the will's terms. If you do not have a will, your assets are distributed according to state law.

Probate is court-supervised, and attorneys are usually involved. Therefore, the probate process involves court costs and legal fees. Depending on the complexity of your estate, probate can last from only a few months to several years. For these reasons, many people seek to avoid probate through the use of living trusts.

What Is a Living Trust?

A living trust is a legal device by which legal title to property is transferred by the owner of the property - the "grantor"- to the trust, according to the terms of a trust agreement. The trust property is then owned by the trust, and is managed and controlled by a "trustee" for the benefit of the "beneficiary." The grantor, trustee and beneficiary can be the same person. The trust agreement also names a successor trustee, who handles the trust after your death by transferring ownership of the trust property to the beneficiaries you named in the trust.

The trust agreement sets up the terms by which the trust property will be managed and used, and specifies how the property eventually will be distributed when the trust terminates. Living trusts established for the purpose of avoiding probate are usually revocable, meaning that the terms of the trust can be changed during the lifetime of the grantor. The living trust becomes irrevocable, or unchangeable, after the death of the grantor.

The type of living trust set up by persons seeking to avoid probate usually follows this scenario: The owner of property, the grantor, transfers all of his assets into the trust, and names himself the beneficiary and the trustee, thus retaining control over the property for his benefit during his lifetime. The trust agreement names a person to be the successor trustee. After the death of the grantor/trustee, the successor trustee takes control of the trust property, pays any debts and taxes owed, and distributes the trust property according to the terms of the trust agreement. This is essentially the same process that takes place in probate, but without the necessity of court supervision and the related court costs and legal fees.

The Downside of a Living Trust

As pointed out earlier, any estate planning tool has advantages and disadvantages, and a living trust is no exception. Here are some of the disadvantages:

Property must be owned by the trust in order to be managed and controlled according to the terms of the trust agreement. Of course, when the trust is established, all property then owned by the grantor can be transferred into the trust. That's not too hard. But any property (such as homes, cars, etc.) purchased by the grantor after establishment of the trust must be acquired by the grantor in his or her capacity as trustee or be legally transferred to the trust following the purchase. Therefore, the grantor/trustee must be constantly vigilant when acquiring new property. For some people, this is just too much trouble.

- ✓ A living trust does not completely eliminate the need for a will. Just in case the grantor/trustee fails to transfer some assets to the trust during his or her lifetime, a will is needed to direct that any assets not owned by the trust be distributed to the trust for administration after the grantor/trustee dies. This is called a "pourover" will. Of course, this will does not have to be probated unless, after the death of the grantor/trustee, assets are discovered that are not owned by the trust.
- ✓ A living trust will avoid probate court costs, but may not eliminate attorney's fees. There is always the possibility that legal issues requiring the advice and assistance of an attorney will arise when the successor trustee goes through the process of paying debts and taxes and distributing the trust assets.
- ✓ Any estate or death tax savings offered by a living trust can be accomplished by other means. Other estate planning tools that accomplish the same tax benefits as a living trust include having a properly drafted will or owning property jointly (with right of survivorship) with a spouse.
- ✓ Establishing a living trust does not necessarily cost less than probate proceedings. Some advertising pitches have touted living trusts as costing far less than probate. While it is true that living trusts can cost less in some cases, in many situations it is difficult to tell whether the costs of a living trust would be significantly lower. Most of the cost associated with a living trust consists of the legal expenses of transferring assets into the trust when the trust is established. Obviously, with probate, costs are incurred after the person's death (except, of course, the cost of having a will drafted, which is usually far less than the cost of setting up a living trust). The costs of setting up a living trust may seem less simply because they are incurred before the grantor dies.

The Advantages of a Living Trust

Despite the drawbacks, living trusts do have distinct advantages that make them very attractive to many people. Here are just a few of those advantages:

- ✓ Assets are usually distributed more quickly when a person dies with a living trust than when the estate has to go through a probate proceeding. This is generally true because distribution of assets under a living trust does not require court supervision, which can cause significant delays.
- ✓ A living trust provides more privacy for your personal affairs. When a will is probated, it becomes a public document and may be inspected by anyone who wishes to see it. This is not the case with a living trust.
- ✓ Living trusts avoid the requirement of going through probate in multiple states. If you own real estate in more than one state, your estate may have to go through probate in each state where such property is located. If you have a living trust, all such probate proceedings can be avoided (unless there is a pourover will that needs to be probated).

✓ With a living trust, you can direct that the successor trustee manage and control your assets in the event of your death or incapacity. A will, of course, is only effective when probated at death. Thus, having a living trust can help avoid the necessity of a court-supervised conservatorship or guardianship should you become disabled or incapacitated.

✓ While not completely immune to legal attack, a living trust is less likely to be contested than a will. The usual grounds for challenging a will or trust are that the person who signed the document was incompetent or the victim of undue influence. The extensive paperwork required to set up a living trust and act as its trustee tends to show that you were firmly in control of your affairs when you created the trust.

Carefully considered, a living trust can be an essential component of an effective estate plan. If you choose to establish a living trust as part of yours, be sure to seek the assistance of a competent attorney. Under no circumstances do we recommend the use of a one-size-fits-all, do-it-yourself living trust form that, in all likelihood, is not tailored to the requirements of state law or to your particular situation. If you have any questions about living trusts or other estate planning tools, feel free to contact Tom Rink at Strauss & Troy.

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ATTORNEYS ON THE MOVE

Strauss & Troy is pleased to announce that **Thomas P. Glass** has become an associate with the firm and will practice in the Litigation Department. Mr. Glass received his B.A. degree from Wright State University in 1989 and his Juris Doctorate degree from the University of Dayton in 1993. Mr. Glass has experience in the areas of tort and insurance law and recently co-presented a legal liability seminar for the Archdiocesan Office of Youth Ministry on topics including personnel and insurance issues and tort liability.

Thomas P. Glass

Steven F. Stuhlbarg, a graduate of the Cincinnati Academy of Leadership for Lawyers (CALL), and the other CALL graduates recently made a presentation on civility and professional issues at the Cincinnati Bar Association. Mr. Stuhlbarg was also recently named Chairperson of the Cincinnati Bar Association's Unauthorized Practice of Law Committee. The committee is charged with protecting clients from persons who are not licensed to practice law.

Steven F. Stuhlbarg

James G. Heldman was recently appointed Secretary of Inner City Youth Opportunities, replacing **Mitchell B. Goldberg**, who remains on the organization's advisory board. In addition to his work with ICYO, Mr. Heldman serves as a member of the Board of Overseers of Hebrew Union College, is chairman-elect of the Cincinnati Associates of the Hebrew Union College, is a member of the Board of the Cincinnati Chapter of the American Jewish Committee, serves as chairman of the Lawyer's Division of the Jewish Federation of Cincinnati and member of the Schools Committee of the Harvard Club of Cincinnati, as well as serving as president of the Losantiville Country Club.

Mitchell B. Goldberg

James G. Heldman

Joseph J. Braun, a Summer Associate with Strauss & Troy for 1996 and 1997, received his Juris Doctorate degree from the University of Toledo College of Law in May 1998 and will work with the Litigation Department while preparing for the Bar examination.

Claudia Allen recently served on the faculty of the National Business Institute Seminar *"Counseling the Small Business Client."* Ms. Allen spoke on the subject of Employee Benefits.

Claudia Allen

Paul Calico, a member of the Strauss & Troy Litigation Department and President of the Volunteer Lawyers Foundation, spoke at the annual meeting of the Cincinnati Bar Association, presenting the award for the Volunteer Lawyer of the Year. Mr. Calico was also appointed to the Board of Trustees of the Collaborative Law Institute, a new organization devoted to alternative dispute resolution.

Paul Calico

A feature article authored by **Charles Melville** titled *"Cyberspace: Pitfalls and Policies"* appeared in the March 1998 edition of *Agency Sales*- the marketing magazine for manufacturers' agencies and their principals. The article reviewed some of the dangers of a company's failure to put in place a policy for business-related use of the Internet.

Charles Melvills

As a result of **Pete Smith's** organization of and work with the Community Home Land Trust, Inc., he and Strauss & Troy were recognized for such efforts in CommHome News, Community Trust's newsletter.

Pete Smith

Thomas C. Rink, a member of the Board of Trustees of the Cincinnati Nature Center, was elected to the position of Chairman of the Board. His term will commence in June.

Thomas C. Rink

Strauss & Troy's Mad Team — Spring Projects

On April 8, Strauss & Troy's MAD (Make A Difference) Team hosted an Easter party at the Christ Child Day Care Center in Over-the-Rhine. Robert Harper, employed in our Facilities Management Center, dressed as the Easter Bunny to entertain the children. The kids were delighted - and delightful - full of anticipation and excitement. Colorful eggs filled with jellybeans were hidden for the Easter egg hunt, each child received an Easter basket and each had a photo taken with the Easter Bunny. Another successful endeavor for our MAD Team.

On April 9th the MAD Team joined with the Chemed Center and the PNC Center in sponsoring a blood drive for the Hoxworth Blood Center. The drive resulted in the donation of 68 units of blood.

Each year the MAD Team sponsors a group of children from the Inner City Youth Opportunities at Camp Ernst in Burlington, Kentucky. The first group of five is now enjoying the camp, and another group will attend each week for the next five weeks. The MAD Team's funds are generated through our weekly Dress Down Day, participation by our staff, and some generous donations from Riverfront Kiwanis. Each camper is provided with a sleeping bag, personal care items (tissue, shampoo, comb, toothbrush/paste, bug spray, sunblock, lotion), flashlight, disposable camera, a goodie bag (containing candy, writing home items, etc.), a Camp Mascot stuffed animal, Camp Ernst T-shirt, and a photo of themselves with everyone in the cabin.

Strauss & Troy is very proud of the generosity shown by its staff and the continuing year-long efforts of our hard-working MAD Team members - Darla Adelman, Marsha Bowen, Joe Braun, Marsha Butler, Marita Creech, Dorothy Elder, Elizabeth Mason, Karen Stegeman and Karen Wert.

Strauss Law Firm Signs Lease to Move Into Federal Reserve Site

By: Andy Hemmer, Courier Staff Reporter

Strauss & Troy, one of Cincinnati's largest law firms, is moving from the PNC Center to larger space in the Federal Reserve Bank building on Fourth Street.

Strauss & Troy, one of the Tri-State's largest law firms, has concluded a two-year site search for a downtown office with a lease at the Federal Reserve Bank building on Fourth Street.

Real estate sources estimate a lease value of $10 million.

Early next year, Strauss & Troy will take over the six-story bank's fourth floor, including about 20,000 square feet of the bank's executive suites/headquarters space. The bank is relocating its executive suites to the fifth floor, said Assistant Vice President Barbara Hertz.

Just about every landlord and broker in downtown Cincinnati has been trying to land the 45-year-old firm, which now rents 27,000 square feet on two floors at PNC Center on Fifth Street. Strauss & Troy has 47 attorneys and a total staff of 111, making it the seventh-largest law firm in the Tri-State, according to the Courier's most recent "Book of Business Lists." All of Strauss & Troy's lawyers are locally based.

The new lease is a 16-year deal for 43,000 square feet.

President Bill Strauss said the firm, expanding by 37 percent, chose the 25-year-old bank building based on a combination of factors: parking, amenities, "a superior, quality building" and the efficiency of a one-floor operation. Its lease at PNC Center expires in late 1999.

"The bank building meets our needs for the near term, plus we have some expansion rights for future growth," Strauss said.

The Federal Reserve Building has 80,000 square feet of class A office space, of which 30,000 square feet is available. That wasn't the intention when the facility was built in 1973; however, due to the "electronification" of the financial industry, Hertz said, the bank has been able to consolidate operations.

Commercial space has been available for 15 years. The bank uses about 208,000 square feet of the 288,000-square-foot facility and employs about 230.

Strauss & Troy has been growing at a "measured pace," Strauss said, adding two to three attorneys annually "with very little attrition." The firm's Covington office in RiverCenter will be unaffected.

The deal stipulates that the bank could, if necessary, hold its board meetings at its former executive suites. However, Hertz said that is unlikely, because the bank has already been holding the meetings elsewhere in the building at 150 E. Fourth Street. It convenes at offices in Cleveland, Pittsburgh, Columbus and Cincinnati on a rotating basis.

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