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**Critical Update on Planning with
Family Limited Partnerships and LLCs****By Dean I. Friedman, Esq.**

While the historic business and income tax savings use of *family limited partnerships* (“FLPs”) is well documented, their organization and the formation of its more recent iteration, the *family limited liability company*, for estate planning purposes has significantly increased. Nevertheless, the matter of FLP implementation and operation remains complex, even arcane. Accordingly, FLPs deserve careful attention, whether existing or contemplated entities. Tax lawyers, accountants and financial planners play an important and necessary role in the process, largely because the IRS continues to challenge this planning technique with very recent litigation successes of troubling dimension.

Recent legal decisions mandate immediate review of FLPs because they find property contributed there to be included in the deceased donor’s gross estate under certain circumstances, a clearly unintended and costly outcome. In the usual FLP set-up, parents transfer business assets or rental real properties (sometimes with other holdings such as traded securities) to the FLP, taking back partnership interests and “gifting” some of those interests to their children using valuation discounting as part of an estate and gift tax reduction program. The gift tax cost of doing so is minimized; income taxes may be shifted away from the parents reducing the tax burden of the family as a whole (by maximizing the absorption of marginal brackets). Appreciation in the value of the gifted interests is removed from the estate tax later on.

The estate tax “pull back” is a new wrinkle, however. Court rulings in *Strangi* (discussed below) and *Kimbell* (not reviewed here) do just that, reversing favorable FLP planning to an adverse result. Clearly, most of the litigation the IRS pursued involved taxpayers with “bad facts,” poor planning and circumstances unlikely to achieve success

even with the best reading. Still, the most recent decisions of the U.S. Tax Court portend that even “good fact” cases may be caught.

In *Strangi*, a father granted his son-in-law (a tax and estate planning lawyer) a power of attorney whereby an FLP was established using a corporation as general partner. The father acquired 47% of the corporate general partner and his four children purchased the balance of its shares, transferring 1% to an unrelated charity. The father also acquired 99% of the limited partnership interests (1% issued to the corporate general partner) in exchange for contributing to the FLP most of

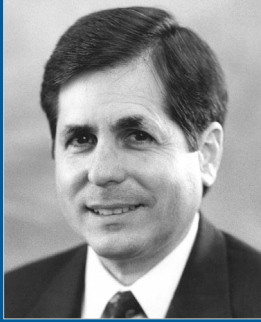
Continued on page 4**Dean I. Friedman****Executive Development Sessions**

In July 2003, Clark & Trevithick and Higgins, Marcus & Lovett collaborated with Hinton, Kreditor & Gronroos to present an Executive Development Series on “Advanced Strategies for Maximizing the Benefits of Limited Partnerships and LLCs.” Dean I. Friedman of the Clark & Trevithick Tax Department and Mark C. Higgins, president of Higgins, Marcus & Lovett, have combined forces again to launch a three-hour Executive Development program that builds on the success of the July partnership seminar. The resulting program, “Critical Update On Planning With Family Limited Partnerships and LLC Series,” offers an in-depth look at Family Limited Partnerships and LLCs, from a tax and valuation perspective.

If you are interested in learning more about Family Limited Partnerships and Family Limited Liability Companies, consider attending either the November 6, 2003 morning strategy session at the Hilton in Pasadena or the January 29, 2004 morning strategy session at the Grand Long Beach Event Center. The cost to attend one session is \$40 per person and the program is designed to give managing partners, business owners, investment bankers, real estate professionals, attorneys, accountants, insurance brokers and other executives the latest practical information about valuation and tax saving strategies related to Family Limited Partnerships and LLCs in California.

To learn more about the Executive Development Series or other professional education seminars, contact Elizabeth Anderson of Clark & Trevithick at (213) 341-1340 or eanderson@clarktrev.com.

Business Alert



Leslie R. Horowitz

Beware of Sending Unsolicited Advertisements by Fax

By Leslie R. Horowitz

In 1991, Congress passed the Telephone Consumer Protection Act of 1991, commonly known as the TCPA, to prohibit unsolicited advertisement by telephone and fax machines. While many businesses are familiar with the restrictions the TCPA has placed on telemarketers' telephone solicitations to consumers, many are not aware of the restrictions imposed by the TCPA on unsolicited advertisements sent through telephone facsimile machines. Some businesses have unknowingly created substantial liability to themselves by sending such faxes.

Protect your business from liability.

First, assess the content of any promotional material your business sends unsolicited by fax. If it qualifies as an unsolicited advertisement under the TCPA, don't send it. The TCPA defines an unsolicited advertisement as any material advertising the commercial availability or quality of any property, goods or services. Three exceptions to this definition are:

1. when the sender has a prior express invitation or permission to fax the material,
2. when the sender has an established business relationship with the recipient, or
3. when the sender is a tax exempt nonprofit organization.

What Constitutes an Established Business Relationship?

An established business relationship exists:

1. when a purchase has occurred within the prior eighteen months or
2. on the basis of the subscriber's inquiry

or application regarding products or services offered by the sender within three months immediately preceding the date of the facsimile, unless the relationship has been previously terminated.

New Legislation Will Redefine an Established Business Relationship in 2005.

New legislation that modifies this definition will take effect on January 1, 2005. Starting on that date, the recipient must expressly invite the fax or grant permission in writing to have it sent. Such an invitation or written permission must include the recipient's signature, regardless of a prior business relationship.

What Are the Consequences of Violating TCPA?

The TCPA provides \$500.00 in damages to each recipient and, if it is determined that the unsolicited advertisement was sent "willfully or knowingly", the damages may be as high as \$1,500.00. This may not seem very high except that some jurisdictions, including California, have certified class action lawsuits to pursue the remedy for multiple recipients. This can add up to millions of dollars.

What About E-mail Solicitations?

The TCPA does not seem to address e-mail solicitations, however there are no reported cases and it is recommended that companies not send e-mails to potential customers without the customers' prior written consent.

How Can Businesses That Send Fax Advertisements Comply With the TCPA?

Your company should have written guidelines for its sales and marketing personnel to make sure that it has permission, in writing and signed by the recipient, before it sends out advertising solicitations by fax machine.

Would you like to receive *Legal Issues* by email? Registration is just a click away. Visit our Web site at www.clarktrev.com and select the newsletter registration link.

Clark & Trevithick Welcomes New Corporate Associate

Clark & Trevithick is pleased to welcome **Peter R. Hurm** to its Corporate Department.

Peter Hurm's practice focuses on corporate transactional, securities, and general business matters representing both companies and individuals in a variety of industries, including media, entertainment, high technology, and manufacturing. Peter structures, negotiates, and drafts business transactions related to every phase of a company's life cycle from the formation and financing of business start-ups to mergers and acquisitions. He also handles limited liability company and partnership related business matters.

Prior to joining Clark & Trevithick, Peter

Hurm practiced corporate and tax law. He graduated from the University of Southern California in 1996 with a Bachelor of Arts degree in Philosophy and a minor in Economics. He received his law degree from the University of San Diego in 1999, where he was a member of the Appellate Moot Court Board.

Estate Planning Alert

The Federal estate tax applicable credit amount will increase on January 1, 2004 to \$1.5 million from the present level of \$1 million. The federal generation-skipping tax exclusion will also increase January 1, 2004 to \$1.5 million, up from the present level of \$1,120,000. The federal gift tax applicable credit *will not* increase, the total lifetime applicable credit will remain at \$1 million.

The next edition of *Legal Issues* (Winter 2004) will contain an article explaining the impact of these changes on estate plans. If you have questions about this area prior to January 1, please contact **Dean Friedman** or **Robert DeMeter** at (213) 629-5700.

Announcements

John A. Lapinski was elected Vice Chair of the Commercial Law & Bankruptcy Section of the Los Angeles County Bar Association for the current year. Mr. Lapinski also spoke about "Alternatives to Bankruptcy" at the 2003 Bankruptcy Conference for the California CPA Education Foundation in San Francisco on September 16, 2003.

Dean I. Friedman will lead a break-out session on "Current Developments: Family Limited Partnerships" at the 2003 Annual Tax Night at the Los Angeles Marriott Hotel downtown on Tuesday, November 4, 2003. Tax Night is sponsored by the California CPA Society, LA Chapter Taxation Committee and the Los Angeles County Bar Association, Taxation Section.

Leslie R. Horowitz spoke on "The Role of the CPA in Chapter 7 and 11" to CPAs and other financial professionals at the 2003 Bankruptcy Conference for the California CPA Education Foundation in San Francisco on September 16, 2003.

Did You Know...

Clark & Trevithick is a member of Legal Netlink Alliance, an international organization that is comprised of more than 80 law offices worldwide, including some 1,500 lawyers and a wide range of specialties.

Legal Netlink Alliance law firms are linked to provide integrated, cost effective, high quality, personalized service to their clients whenever they need it. The network law firms are independent so the clients' interests always come first.

Critical Update on Planning with Family Limited Partnerships and LLCs

Continued from page 1

his holdings including his personal residence (which he used rent-free after the transfer). The father died two months after the FLP was established. On remand from an appeal by the IRS of its initial loss, the Tax Court, though recognizing that FLP formalities had been observed, nevertheless found an “implied agreement” between the father and his children for the father’s retained enjoyment of the transferred assets sufficient to include them in his gross estate and levy federal estate taxes. That the father theoretically owed fiduciary duties to the other partners (and, therefore, as argued by his estate, did not retain enforceable, ascertainable (and unfettered) rights to control enjoyment and income of the contributed properties without a breach-of-duty claim or action by the other partners) was rejected as legally and factually unsupported.

In recent weeks I have presented assembled groups of attorneys and accountants critical updates and suggestions for dealing with what some consider an estate planning crisis. Our suggestion to professionals and clients is that anyone who has organized and operated an FLP of size, or is toying with the idea of forming one, consider the renewed risks and benefits, likelihood of “tax success” and state of laws affecting this technique. In some cases, developing an “exit” strategy may be the most prudent path. We extend this same admonition to our *Legal Issues* readers. Feel free to contact us to discuss these important issues, or request us to review your estate plan in light of the ongoing phase-in of estate tax repeal legislation. ▲

Upcoming Continuing Education Seminars:

Tuesday, October 28, 2003 8:00 a.m. to 10:00 a.m. *A Practical Guide to Estate Planning in the Environment of an Uncertain Estate Tax Law* presented by Clark & Trevithick, ADP and Union Bank of California. Union Bank of California, Century City, CA. No charge for admission.

Thursday, November 6, 2003 8:00 a.m. to 11:00 a.m. *Critical Update On Planning With Family Limited Partnerships and LLCs** presented by Clark & Trevithick and Higgins, Marcus & Lovett, Inc. Hilton Pasadena, Pasadena, CA. \$40 per person admission.

Thursday, January 29, 2004 8:00 a.m. to 11:00 a.m. *Critical Update On Planning With Family Limited Partnerships and LLCs** presented by Clark & Trevithick and Higgins, Marcus & Lovett, Inc. The Grand Long Beach Event Center, Long Beach, CA. \$40 per person admission.

Clark & Trevithick presents continuing education seminars for CPAs and attorneys. To find out more about these upcoming events or register to attend, log onto our web site at www.clarktrev.com and click on the seminars link or call Elizabeth Anderson at (213) 341-1340.

*This seminar is part of Clark & Trevithick’s Executive Development Series.

Coming in the next *Legal Issues*!

Changes in the Law Update for 2004

CLARK & TREVITHICK

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Legal Issues is published by the law firm of Clark & Trevithick as a service to our clients and friends. Articles should be viewed as only a general summary of the law and not as a substitute for legal advice in a particular matter.

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Feedback/Faxback

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