

# IN BRIEF<sup>SM</sup>



## Free Choice Act - a Federal Bill to Watch *by: Scott M. Lepak*



Employers and employees should monitor a key piece of federal legislation this year called the Employee Free Choice Act. The 2008 Republican candidates for federal offices made this a key point in much of their advertising – showing “union bosses” as they questioned an employee on how he planned to vote in a union election. This bill would allow a union to bypass the traditional secret ballot election process and allow it to represent employees by obtaining authorization cards from a majority of the employees. Employers strongly oppose this legislation, arguing that secret ballot is the most fair form of selection. Employers also argue that there is little oversight of union organizers as they obtain these cards, and that organizers may utilize deception and pressure to get employees to sign the cards – often going to the employee’s home. Unions argue that this is an efficient means of obtaining representation. Unions allege that, if given prior

notice, employers can engage in active campaigns against the union. In the event that this legislation passes, employees should be aware that signing these cards means that they are voting for union representation. Employers may discover with little advance notice that their employees are now unionized.

A second piece of this proposed legislation has not received the same amount of coverage but is equally important. The law as proposed would require binding arbitration (called interest arbitration) to determine the pay, benefits and work rules in a first labor agreement if the union and the employer are not able to reach an agreement in 120 days. Under the current law, employers ultimately are able to decide what level of pay, benefits and work rules they will apply to unionized employees as long as negotiations are performed in good faith. Currently, employee groups who do not agree with the employer’s final position must strike in order to pressure the employer. Because workers in recent times are not able to function for a significant period without a paycheck, there have been few strikes in

recent years. Under the interest arbitration proposal, the employer will be subject to a binding decision by an outside third party arbitrator.

This interest arbitration process already exists in Minnesota for employee groups such as police officers and firefighters who are not permitted to strike. References to these groups show that, while strikes rarely occur in the public sector, interest arbitration is regularly utilized (22 times in the 12 month period September 2007 through August 2008 as reported by the State of Minnesota Bureau of Mediation Services). As someone who has represented employers for over 20 years in interest arbitrations, it is clear that in the event that this law passes with the interest arbitration provision, employers will be losing a significant amount of control over the labor relations process.

*Scott Lepak is a shareholder practicing in labor and employment law. Scott represented employers in over 20% of the Minnesota interest arbitration cases reported by the State of Minnesota Bureau of Mediation Services noted in this article.*

## Estate Taxes *by: William H. Huefner*



Effective January 1, 2009, the Federal estate tax exemption increased from \$2 million to \$3,500,000. This is the last increase in the estate tax exemption as a result of the 2001 changes in the estate tax laws. Pursuant to the 2001 change, next year the estate tax is scheduled to be phased out. However, in 2011, the estate tax is scheduled to come back at the level it was in 2001 which means a \$1 million exemption. This year, every individual is allowed to pass \$3.5 million free of Federal estate tax. A couple with a proper estate plan can pass \$7 million free of Federal estate tax. Any amount over the exclusion will be subject to a maximum tax rate of 45 percent.

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However, you should note that the Minnesota estate tax has not changed. Minnesota still has an exemption of \$1 million per person. There is no pending move to increase this amount.

As this edition of In Brief is going to print, there is talk that President Obama intends to keep the estate tax. It appears he will be moving to prevent the

estate tax from expiring in 2010. The current indication is that he would like to keep the exemption at its current level of \$3.5 million per person for 2010 and beyond.

*Bill Huefner is a shareholder in Estate/Tax Planning, Probate/Trust Administration. If you have questions regarding this article or estate tax planning in Minnesota, Bill can be reached at [whuefner@bgs.com](mailto:whuefner@bgs.com) or direct phone 763-783-5160.*

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ATTORNEYS AT LAW

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200 Coon Rapids Boulevard Minneapolis, MN 55433-5894  
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## New Laws for Drivers and Litigants by: John T. Buchman



The Minnesota legislature passed a number of laws in the recent session, as it normally does. Many of the new laws went into effect on August 1, 2008. This article summarizes two new laws and one new court rule. These laws affect all motorists as well as parties to litigation.

### I. No Texting While Driving

Minnesota Statute § 169.475 makes it illegal and subjects the violator to a fine and possible jail sentence for texting, emailing, accessing a web page, or similar actions. A driver can still make a phone call or use a hands free communication device. The statute reads, in part, "no person may operate a motor vehicle while using a wireless communication device to compose, read or send an electronic message, when the vehicle is in motion or a part of traffic." There are exceptions for emergency circumstances.

### II. Insurance Companies Must Act in Good Faith

Minnesota joined the other 49 states in passing a "Good Faith" bill that requires insurance companies to treat insureds in "good faith." Insurance companies must conduct a proper and thorough investigation and cannot deny claims without a reasonable basis. An insurance company must also neutrally evaluate the loss or value of the claim.

Costs may be awarded to the insured if she can show an absence of a reasonable basis for denying benefits of the insurance policy and the insurer knew of the lack of the reasonable basis to deny the

benefits or acted in a reckless disregard of the lack of a reasonable basis. Minnesota's new statute, Section 604.108 mirrors a similar law in Wisconsin.

The statute allows for the trial judge to award as costs one-half of the amount awarded by a jury that exceeds the amount offered by the insurance company to settle the case or \$250,000.00, whichever is less, as well as reasonable attorney's fees actually incurred to establish the insurer's violation. The statute strictly limits the award of attorney's fees to only those which are properly documented and were necessary to prove the violation and does not allow an award for fees to establish the remainder of the insured's claims. Also, an insured cannot claim a violation of the Good Faith statute in the initial complaint but must obtain court approval upon a proper showing after the lawsuit has started but before the trial begins.

The new statute works as follows: assume an insurance company denied a hail damage claim for your company's roof without properly investigating the claim and even though all the evidence indicated the amount of the repairs would exceed the amount of insurance coverage. Assume further that it costs \$100,000.00 to repair the roof and the policy limits for such repairs were \$50,000.00. However, the insurance company only offers \$30,000.00 and a jury awards \$100,000.00. The difference between what the jury awarded (\$100,000.00) and what the insurance company offered (\$30,000.00) is \$70,000.00. The insurance company would have to pay the \$50,000.00 limits as well as an additional \$35,000.00 (one-half of the \$70,000.00 difference). Additionally, the judge, at

her discretion, could award some additional attorney's fees for the time spent to prove the lack of reasonable investigation and valuation.

### III. "Offer of Judgment" Now Benefits Both Plaintiffs and Defendants

Minnesota has long had a rule that allows parties to make an "offer of judgment" in an effort to encourage settlement. Rule 68 of the Minnesota Rules of Civil Procedure had been previously used by defendants to recover some of its litigation costs (not attorney's fees) from the plaintiff (party who brought the lawsuit) even if the plaintiff won at trial. The defendant could recover some of its costs if it made a written offer of judgment and the plaintiff's verdict, while favorable to the plaintiff, was less than defendant's offer of judgment. However, the rule had little value to plaintiffs since they would usually recover their costs if they had a favorable verdict regardless of the size of the verdict.

Minnesota, again borrowing from Wisconsin law, now allows the plaintiff to recover double the amount of costs that she spends after a written offer of judgment is made if that offer is less than the verdict that the plaintiff ultimately receives. Now, there is an incentive to both sides to realistically evaluate claims and attempt to settle them before going to trial. Defendants are still able to make the same offers of judgment allowed by the earlier rule.

*John Buchman is a shareholder and practices in Personal Injury law. If you have questions regarding these new laws or related to a personal injury, please call John directly at 763-783-5121. John can also be reached at [jbuchman@bgs.com](mailto:jbuchman@bgs.com).*

## You and Your Credit Report by: Susan E. Sheely



Chances are you regularly find your mailbox overflowing with envelopes promising fast and easy, "Pre-Approved" credit. Although they are designed to tempt the credit consumer, often they tempt the identity thief instead. "New account" fraud occurs when a thief obtains another

person's identifying information and uses that information to open new credit accounts in that person's name. The thief runs up the balances on the accounts and then fails to pay the bills. But, because the accounts were opened in the name of the victim, it is the victim, not the thief, who bears the brunt of the resulting collection actions. The resulting damage to a victim's credit report can take months, or even years, to repair.

What can you do to protect yourself from this type of fraud? First and foremost, check your credit report regularly. Although there are many companies who advertise credit monitoring for a fee, consumers are entitled to receive one free credit report from each of the three major credit reporting agencies each year. The three major reporting agencies are: TransUnion, Equifax and Experian. Checking your credit report

regularly allows you to quickly identify errors or unauthorized activity and report those matters to the appropriate agency. More information on obtaining your free credit reports can be found on the website: [www.annualcreditreport.com](http://www.annualcreditreport.com) or by calling 1-877-322-8228.

Another tool to protect yourself is to put your credit report "on ice." Minnesota Statute Section 13C.016 enables any Minnesota state resident to "freeze" their credit report indefinitely either with, or without, cause. Freezing prevents the release of information contained within a consumer's credit report by a credit reporting agency to a third party for the purposes of opening a new account. This is intended to effectively prevent creditors from issuing any further credit in the name of that consumer without that individual's express consent.

Victims of identity theft can freeze their credit reports without charge. People who have not been victimized by an identity thief but who want to proactively protect their credit can freeze their credit reports for a nominal fee (\$5.00). After the freeze request is processed (within three days) the credit agency issues a Personal Identification Number (PIN) to the consumer. The PIN number is used by the consumer to authorize credit inquiries by particular creditors or to remove the freeze for a

specified period of time. Again, for non-victims, there may be a \$5.00 charge for removing the freeze. In order to be effective, a freeze report must be filed with each of the three major reporting agencies.

It is important to note that this statute applies to the opening of new accounts only and other exceptions are listed in Minn. Stat. § 13C.016, subd. 6. And, finally this statute does not prevent current creditors, government entities, or private collection agencies acting under subpoena, court order or warrant from obtaining credit information.

Although identity theft is on the rise, state and federal consumer protection laws afford consumers the ability to take affirmative steps to protect themselves. Regularly reviewing your credit card statements, checking and freezing your credit report, and shredding those "pre-approved" offers are simple steps that can reduce your risk of becoming a victim of identity theft.

*Susan Sheely is an associate in the Employment Law/Commercial Litigation practice area at Barna, Guzy & Steffen Ltd. If you have questions related to this article she can be contacted at 763-783-5171 or [ssheely@bgs.com](mailto:ssheely@bgs.com).*

## Collection of Your Accounts Receivable by: Joan M. Quade



In these tough economic times, companies find that payments on their accounts receivable are delayed and diminished. More and more of their customers cannot pay on time. Some cannot pay the invoices in their entirety and have resorted to smaller, drawn out payments for services and goods and others have not been able to pay at all.

Money is less plentiful but if your customers do not pay, it affects your ability to meet your company's obligations. In years past, most companies could afford some nonpaying and slow paying customers, but when many of your customers are having financial difficulties, your company must take action to ensure your own company's survival. You have supplied the goods and services and you should be paid for those efforts. Ignoring your mounting accounts receivable could lead to your own company's damage or demise.

Every company should adopt a procedure for collection of accounts receivable. Such a procedure should be in place during thriving economic times as

*Ignoring your mounting accounts receivable could lead to your own company's damage or demise.*

well as during the tough economic times so that corporate value is not being lost through inconsistent and ineffective collection procedures.

To work effectively, a collection procedure should be in writing and adopted by the company's management team. Training should be done for staff who will implement the collection procedures so as to provide consistent and effective application of the collection procedure. There are many considerations in developing such a procedure, including preserving customer relationships.

The collection process should be progressive in that the initial actions to collect will consist of mild prodding reminders and then should progress to the most aggressive forms of collection. The mildest reminders may include card or letter reminders, followed by phone calls from staff. If that is unsuccessful it may be followed by more aggressively worded correspondence and a call from the collection manager. These efforts will be enough with many customers. However, in this economic climate, more

and more customers must be taken to the next level. If the progressive collection efforts do not work, the company must decide whether to involve their legal counsel, who could send a collection letter, make a call and/or sue to collect the account. If the account is small (less than \$7,500) the company may want to sue in conciliation court. Conciliation court provides a less expensive and quicker way to obtain a judgment for the amount owed. The filing fee is only \$50 - \$70 depending on the county, and most courts will schedule a hearing within six months. If the amount is greater than \$7,500, the company must sue in regular district court. The filing fee in most counties is \$250, and it can take a year to get to trial, if the defendant disputes the claim. Many defendants who are in collection do not dispute the amount and a default judgment can be obtained fairly quickly without waiting an entire year. Once a judgment is obtained, then collection on the judgment must start by finding what assets the defendant may own. If the defendant has assets, then there are ways to determine what those assets are and how to collect them. Some assets are exempt under Minnesota law. Others are collectable to satisfy the judgment.

This article gives only a brief overview of the collection process. Before attempting collection you should seek legal advice regarding the specific laws related to collection and litigation. We have assisted our clients in developing a progressive collection procedure and in sending collection letters and making calls for our clients to help them collect their accounts receivable. This has helped to optimize their own value and maintain their revenues even in a tough economy. We can assist in bringing conciliation court actions or district court lawsuits for small as well as very large collection matters. If you need assistance in setting up a progressive collection procedure or in collecting your accounts receivable, we would be happy to assist you in your efforts. We can advise or partner with you to optimize your efforts. Give us a call to discuss how we may be able to assist you in your business.

*Joan Quade is the head of the litigation department at BGS. She has practiced law for over 20 years. Her team can assist you in all types of litigation, including collection law. If you have questions regarding this article, please contact Joan at [jquade@bgs.com](mailto:jquade@bgs.com) or 763-783-5138.*

## BGS Attorney Directory

Kristin N. Blenkush	763-783-5116 <a href="mailto:kblenkush@bgs.com">kblenkush@bgs.com</a>
John T. Buchman	763-783-5121 <a href="mailto:jbuchman@bgs.com">jbuchman@bgs.com</a>
Russell H. Crowder	763-783-5143 <a href="mailto:rcrowder@bgs.com">rcrowder@bgs.com</a>
Douglas J. Dehn	763-783-5128 <a href="mailto:ddehn@bgs.com">ddehn@bgs.com</a>
Beverly K. Dodge	763-783-5142 <a href="mailto:bdodge@bgs.com">bdodge@bgs.com</a>
Timothy D. Erb	763-783-5126 <a href="mailto:terb@bgs.com">terb@bgs.com</a>
Jon P. Erickson	763-783-5145 <a href="mailto:jerickson@bgs.com">jerickson@bgs.com</a>
Daniel D. Ganter Jr.	763-783-5127 <a href="mailto:dganter@bgs.com">dganter@bgs.com</a>
James D. Hoelt	763-783-5122 <a href="mailto:jhoelt@bgs.com">jhoelt@bgs.com</a>
William F. Huefner	763-783-5160 <a href="mailto:whuefner@bgs.com">whuefner@bgs.com</a>
Michael F. Hurley	763-783-5117 <a href="mailto:mhurley@bgs.com">mhurley@bgs.com</a>
Darrell A. Jensen	763-783-5136 <a href="mailto:djensen@bgs.com">djensen@bgs.com</a>
Jeffrey S. Johnson	763-783-5120 <a href="mailto:jjohnson@bgs.com">jjohnson@bgs.com</a>
Thomas J. Kettleson	763-783-5159 <a href="mailto:tkettleson@bgs.com">tkettleson@bgs.com</a>
Bradley A. Kletscher	763-783-5113 <a href="mailto:bkletscher@bgs.com">bkletscher@bgs.com</a>
Karen K. Kurth	763-783-5168 <a href="mailto:kkurth@bgs.com">kkurth@bgs.com</a>
Scott M. Lepak	763-783-5129 <a href="mailto:slepak@bgs.com">slepak@bgs.com</a>
Thomas P. Malone	763-783-5134 <a href="mailto:tmalone@bgs.com">tmalone@bgs.com</a>
Richard A. Merrill	763-783-5115 <a href="mailto:rmerrill@bgs.com">rmerrill@bgs.com</a>
Kip R. Peterson	763-783-5179 <a href="mailto:kpeterson@bgs.com">kpeterson@bgs.com</a>
Joan M. Quade	763-783-5138 <a href="mailto:jquade@bgs.com">jquade@bgs.com</a>
Kristi R. Riley	763-783-5140 <a href="mailto:kriley@bgs.com">kriley@bgs.com</a>
Angela M. Samec	763-783-5119 <a href="mailto:asamec@bgs.com">asamec@bgs.com</a>
Douglas G. Sauter	763-783-5158 <a href="mailto:dsauter@bgs.com">dsauter@bgs.com</a>
Elizabeth A. Schading	763-783-5144 <a href="mailto:eschading@bgs.com">eschading@bgs.com</a>
Tammy J. Schemmel	763-783-5162 <a href="mailto:tschemmel@bgs.com">tschemmel@bgs.com</a>
Charles M. Seykora	763-783-5118 <a href="mailto:cseykora@bgs.com">cseykora@bgs.com</a>
Susan E. Sheely	763-783-5171 <a href="mailto:ssheely@bgs.com">ssheely@bgs.com</a>
William D. Siegel	763-783-5148 <a href="mailto:wsiegel@bgs.com">wsiegel@bgs.com</a>
Herman L. Talle	763-783-5114 <a href="mailto:htalle@bgs.com">htalle@bgs.com</a>
Susan E. Tegt	763-783-5156 <a href="mailto:stegt@bgs.com">stegt@bgs.com</a>
Steven G. Thorson	763-783-5124 <a href="mailto:sthorson@bgs.com">sthorson@bgs.com</a>
Adriel B. Villarreal	763-783-5177 <a href="mailto:avillarreal@bgs.com">avillarreal@bgs.com</a>