

## **A.M. BEST RATES LAWYERS MUTUAL "VERY GOOD"**

Lawyers Mutual recently received its first formal rating by A.M. Best. We are delighted to report a Best's Rating of B++(Very Good). We were advised that to receive a "B" initial rating is considered good and an initial rating of B++ is quite unusual. Best explained that this high rating reflected our "company's conservative operating strategy, favorable loss development, satisfactory operating results and high quality balance sheet." You may be assured that we will continue the policies that have brought us so far so fast. With your support Lawyers Mutual will continue to grow and become an even more valuable benefit for Kentucky lawyers and the legal profession.

## **DIVORCE MALPRACTICE STYLE**

An extraordinary number of recent decisions concern divorce cases that have gone even more sour. What follows are samples of when inadequate advice has exposed lawyers to malpractice claims. They are offered in the hope that you can stay off the bleeding edge of this escalating malpractice risk:

In Wyoming a divorce decree provided for \$20,000 annual alimony during the wife's lifetime. When the husband predeceased the wife the alimony payments ended as is the usual case. The wife sued the estate, but lost her claim at the trial level. The Wyoming Supreme Court, however, ruled that she was entitled to continued alimony from the estate by interpreting the lifetime alimony provision as an express agreement that payments would continue after the husband's death. *Oedekoven v. Oedekoven*, 920 P.2d 649 (Wyo.1996)

- Lesson Learned: Be specific when alimony terminates in divorce decrees.

In a California divorce action the wife was awarded a share of the husband's retirement pay upon his future retirement. She then learned to her and her lawyer's chagrin that "retirement pay" did not include an \$83,000 early retirement bonus her husband received when he accepted early retirement after the divorce. *In Re Marriage of Frahm*, 53 Cal. Repr.2d 31 (Cal.App. 4 Dist.1996)

- Lesson Learned: Investigate the employment status of a spouse for any indication of possible extra retirement benefits. Cover elective retirement, termination benefits, and other options that could increase alimony or a property settlement. Also consider the financial stability of any pension plan and what happens if the plan goes bankrupt before the spouse retires.

In a Georgia divorce the wife got the condominium, but the husband had to make the mortgage payments. When the wife sold the condo and paid off the mortgage the question came up whether the husband now had to make payments to the wife. The Georgia Supreme Court sided with the wife and required the husband to make "mortgage payments" to her. *Bryant v. Cole*, 468 S.E.2d 361 (Ga.1996)

- Lesson Learned: Cover in the decree what happens if property is sold, refinanced, or used in a manner not contemplated by the property settlement intent. In this case the tax consequences of paying the wife if the property is sold instead of paying mortgage principal and interest should have been explained as well.

The Ninth Circuit recently ruled that a husband who moved out of the matrimonial home before the divorce and before the home was sold as part of the property settlement cannot roll over his share of the capital gain when he buys a new home. *Perry v. C.I.R.*, 91 F.3d 82 (9th Cir.1996)

- Lesson Learned: Explain carefully to the client the tax consequences of "moving out." Timing is everything and intentions regarding principal residence need to be substantiated.

### **COLLECTING DEBTS? WATCH OUT FOR THE FAIR DEBT COLLECTION PRACTICES ACT!**

Since the US Supreme Court ruled in 1995 that the Fair Debt Collection Practices Act (15 U.S.C. Sec. 1692) applies to lawyers, a boomlet in suits against debt collecting lawyers is underway. An example is a recent 7th Circuit case. The court held that a lawyer must be directly and personally involved in any debt collection letters sent out by the firm for clients and upheld an award of \$104,000 for failing to do so.

The case involved a captive two lawyer firm whose only practice was debt collection for one client. Thirty five "legal assistant collectors" cranked out annually 270,000 form dunning letters on firm letterhead. A student loan debtor got three of these letters which included a 30 day debt verification notice required by the Fair Debt Collection Practices Act. They also included confusing language that the debtor might not be entitled to 30 days and if so pay up in 10. The student brought a class action suit for violation of the Act. The Circuit Court found that no lawyer in the firm reviewed a debtor's file, determined when a letter should be sent, approved the sending of specific letters, or knew the identity of the debtor. The Court found that this system violated 15 U.S.C. 1692e(3) by creating the impression that the letters were from an attorney when they were not in any professional sense. Without some lawyer involvement this practice amounted to nothing more than "wholesale licensing of a lawyer's name for commercial purposes." The Court cited ABA Ethics Opinion 68 for the rule that "... whatever correspondence purports to come from a lawyer in his official capacity must be at least passed upon and approved by him. He cannot delegate this duty of approval to one who has not been given the right to exercise the functions of lawyer." (*Avila v. Rubin*, 84 F.3d 222 (7th Cir. 1996))

This opinion raises the question of exactly how far the lawyer needs to get involved to avoid violation of the Act. Some commentators recommend that lawyers at a minimum review the debtor's file for regularity and assure that the outgoing letter is consistent with the file. In effect be personally involved to the extent necessary to apply professional judgment about the validity of the debt. Don't delegate this function to a nonlawyer. Don't overlook that some debtors may be represented by an attorney. Direct contact with represented debtors by a creditor's lawyer violates the Act and Kentucky Rule of Professional Conduct 4.2. Communication With Person Represented By Counsel. There is now speculation that the Fair Debt Collection Practices Act may spill over to mortgage foreclosures, landlord/tenant matters, and representation of secured creditors.

Finally, the Department of Defense Appropriation Act, 1997 (P.L. 104-208, effective 12/29/96) amends the Fair Debt Collection Practices Act (15 U.S.C. 1692e(11)) by excluding pleadings from the requirement to disclose "that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose." The amendment does not define "pleadings" so be sure to include the disclosure in any document that would not be considered a pleading under the rules of civil procedure. Under the amendment failure to repeat the required disclosure after the initial contact in "subsequent communications that the communication is from a debt collector" is a violation of the Act. When in doubt, strict compliance with the Act is the best way to risk manage this developing area of lawyer liability.