

## Building Green – Tax Breaks and New Ideas Encourage Energy Efficiency

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**Tax  
incentives  
in effect  
for 2007**

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By John E. Price

Many businesses and individuals shudder when new governmental initiatives for environmental protection are proposed. Past experience with red tape, overwhelming paperwork and penalty driven enforcement leaves many people apprehensive of new programs. “Green Building” initiatives are a welcome change. There are already a number of tax incentives, in effect for 2007, that encourage building green. And, inventive programs from federal, state and local governments are developing around the country that make building green an increasingly attractive option.

Federal tax incentives already exist to “go green.” The Energy Policy Act of 2005 (EPACT 2005) created \$14 billion of tax incentives for new commercial and residential construction, and to retrofit existing buildings and homes with energy efficient components and appliances. Section 1331 of EPACT creates a tax deduction for new energy efficient commercial buildings. If the interior lighting systems, heating, cooling, ventilation and hot water systems of the building use energy efficient components that achieve a 50% or more reduction in energy requirements, the owner can obtain tax deductions of up to \$1.80 per square foot. Lesser per square foot deductions are available for properties that meet lower percentage energy savings. The deductions are allowed in the tax year when the property is placed in service, and are available for buildings put in service prior to January 1, 2008. For energy efficient commercial buildings owned by a government entity, including schools, the deduction is allocated to the

person primarily responsible for designing the building, such as the architect.

Section 1332 of EPACT creates a tax credit for constructing new energy efficient homes. To qualify, the home must be certified under standards of the 2003 International Energy Conservation Code to achieve a 50% reduction in energy usage compared with traditional residential construction methods. Homes meeting the 50% energy conservation standard qualify for a \$2,000 tax credit, provided 1/5th of the energy savings comes from the building envelope (including insulation, windows, doors and duct sealing.) This credit applies to homes completed or purchased after December 1, 2005, and prior to January 1, 2008.

Owners of existing homes can also benefit under Section 1333 of EPACT. Section 1333 creates a tax credit for purchasing energy efficiency improvements for existing homes. The credits are available for the installation of building envelope components, electric or geothermal heat pumps, gas, propane or oil furnaces, or air circulating fans, which meet certain energy savings thresholds. The credit is equal to 10% of the purchase price of building envelope components, and full credit for the purchase price of heating system improvements, up to a maximum credit of \$500. This credit also applies to property placed in service after December 31, 2005 and prior to January 1, 2008. A credit is also provided under Section 1335 of EPACT for the purchase of qualified solar powered water heaters and solar cells that generate electricity for a residence. For both items, the credit is equal to 30% of the qualifying expenditures for the system, up to a maximum

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## Who Really Owns Your Software?



J. Craig Preston



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### *Business may not “own software”*

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In order to maximize profits and to ease the stress of doing business, many business owners are finding it beneficial to have computer programs created and customized for their business or are using very industry specific software. However, many businesses fail to recognize that they may not “own” the software and overlook the potential pitfalls of copyright infringement. Without the ownership label, businesses are exposed to potential liability for copying, modifying, or even simply using software even if customized for their business.

One typically believes, and rightly so, that they are the owner of products they purchase. But, this may not necessarily be the case in the realm of software design. Software development has become a booming business, and there are many companies here in the Ozarks that specialize in the creation of customizable software. But, assuming you hire one of these companies, who owns the copyrights to the software?

Copyright law cares little about an individual’s perception that they are a purchaser and does not necessarily deem the buyer the owner. Rather, in most situations the end user is just a licensee. Initially, before a programmer or designer can claim a copyrightable work, they must first show that their program is original, and that they were the author of the program or some part thereof. A widespread misconception is that the creator must apply for and receive a copyright prior to enforcing his rights. However, this is not the case, as copyright protection begins immediately upon publication of the creation.

In a customized work, the creator’s or hiring business’ rights in the software generally turn on whether the creator of the software is considered an employee or independent contractor. Among the many factors courts consider to determine a particular person’s status as either an employee

or independent contractor are: (1) the hiring party’s right to control the manner and means by which the product is accomplished; (2) the skill required; (3) the source of the instrumentalities and tools; (4) the location of the work; (5) the duration of the relationship between the parties; (6) whether the hiring party has the right to assign additional projects to the hired party; (7) the extent of the hired party’s discretion over when and how long to work; (8) the method of payment; (9) the hired party’s role in hiring and paying assistants; (10) whether the work is part of the regular business of the hiring party; (11) whether the hiring party is in business; (12) the provision of employee benefits; and (13) the tax treatment of the hired party.

Generally, an independent contractor owns the copyright for all software they design and fabricate. This is the case even if the item is customized for the businesses’ specific needs. Therefore, they have the ability to regulate its future modification, copying, and potentially even the use. Any copying or modification of the program, especially for sale to others, could lead to a copyright infringement lawsuit allowing for the recovery of additional payments or the lost business revenue.

On the other hand, employers generally own the copyrights to the creations of their employees. But, an employee’s invention must generally fit within his normal job duty or description. An employer would then have the rights to use or modify the program in any way it deems fit.

Like most readers know, there are exceptions to every rule, and prior to assuming you have the copyrights to a program, the facts and circumstances of each transaction must be weighed. An astute program design firm or business will lessen the likelihood of potential liability or the need to clarify each party’s rights at a later court hearing by setting forth the guidelines for the use of the program and having a license agreement executed. But, like in most transactions, the terms of the agreement should be reviewed by an attorney familiar with copyright laws to ensure each party understands their rights especially where they want to guarantee they have the right to copy the item and to guarantee the agreement does not favor one party.

# Piercing The LLC Veil

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## Related-party Transactions Must Be Properly Documented

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By John M. Carnahan, III

**H**istorically in the corporate law arena, there has been a doctrine known as “Piercing the Corporate Veil.” This is the belief that you can go through or pierce the corporation, and look to the shareholders or related entities for liability for claims or damages. The doctrine is used to go after a sister-corporation in a brother/sister arrangement, or go to a parent entity in a parent/subsidiary arrangement, and even against individual shareholders. Basically, it involves the theory that you cannot take advantage of the limited liability provided by a corporation if you fail to follow the basic rules involving organizing and acting like a corporation.

With the advent of limited liability companies, this is the new hot area of the law. When deals go bad, loans or accounts are not paid, or when there is a liability claim in excess of insurance, the plaintiff is always seeking ways to get to the deeper pocket. Therefore, plaintiffs are now filing lawsuits against limited liability companies and their owners or affiliates, seeking to “Pierce the LLC Veil.” While the majority of decisions hold in favor of the defendant and do not allow application of the doctrine in either the LLC or the corporate arena, a recent Connecticut decision serves as an excellent example of how not to own and operate an LLC.

The basic facts of *Tzvolos v. Wiseman*<sup>1</sup> are as follows:

In August of 2003, Mr. and Mrs. Tzvolos sold kitchen equipment to Seawind, LLC for a new restaurant opening in Woodbridge, Connecticut. The price of the equipment was \$35,000, \$10,000 down and the balance to be paid via promissory note and security agreement. The initial \$10,000 check from the LLC was really an endorsed check for \$10,000 from Mr. Hartmann. The note was executed by Mr. Wiseman who was also the Manager of the LLC, individually and not in the name of the LLC. Therefore, the Bill of Sale for the restaurant equipment and the UCC filed were in the individual name of the Manager, Mr. Wiseman. Mr. Wiseman, on behalf of the LLC, entered into a lease for the restaurant location. The Hartmann family put the majority of capital into the LLC for purposes of funding its purchases

commenced renovations of the restaurant facilities, and building permits were obtained identifying Mr. Hartmann’s corporation as the owner. There was no contract between the LLC and Mr. Hartmann’s corporation with regard to the construction work. The final bill presented was in excess of \$100,000.

The trial court concluded that the records documenting the services and work depict a confusing and contradictory collection of invoices, some marked “paid,” some duplicate and some with conflicting dates. By late 2003, the restaurant was not making any money and, in fact, had defaulted on rent and the payments on the note. In January of 2004, Mr. Hartmann, concerned about the construction cost payments, obtained a note and security agreement from the LLC. Unfortunately, the note was to an LLC owned by Mr. Hartmann and not his construction corporation.

The Plaintiffs, the Tzvolos, ended up suing the LLC, Mr. Hartmann and Mr. Hartmann’s corporation and LLC, in an attempt to collect on the original purchase price note and looking to Mr. Hartmann and his entities under the “Piercing the LLC Veil” doctrine.

The Court found in favor of the Plaintiffs, Mr. and Mrs. Tzvolos, and against the Defendants, including Mr. Hartmann and his business entities. The Court noted that Connecticut law recognizes two theories under which it will permit the corporate veil to be pierced and the protection of the corporate structure to be set aside. Those theories are:

a. “Instrumentality Rule” wherein it is shown that one entity had control and complete domination of the finances, policies and business practices of the entity and that the control was used to commit fraud and to perpetrate the violation of a statutory or other legal duty, and that the aforesaid control and breach of duty must approximately cause the injury to the plaintiff.

b. The second theory is the “Identity Rule” wherein there is such a unity of interest and ownership that the independence of the corporation’s “business entities” had, in effect, ceased or never begun and the business entities are, in reality, controlled as one enterprise because of the existence of common ownership, officers,

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## Meet our Super Lawyers® for 2007

Each year, *Law & Politics* Magazine mails over 23,000 ballots to Missouri and Kansas lawyers, asking them to nominate the best lawyers they've personally observed in action. Research is then conducted on each candidate, dividing them into more than 60 practice areas. A panel of preeminent peers in each practice area then evaluates each candidate. From the original pool of candidates, only 5% of Missouri and Kansas attorneys are selected as Super Lawyers®. While we feel all of our attorneys at CECB are *super lawyers*, here are the three named by *Law & Politics* as Super Lawyers® for 2007:



*John M. Carnahan, III, John E. Price, Clifford S. Brown*

**Cliff Brown** is a member of the Estate Planning Practice Group and concentrates his practice in the areas of estate planning, probate and trust litigation.

The Supreme Court appointed Cliff to the Board of Law Examiners in 2003. As a Board member, Cliff's role involves the investigation and determination of the character and fitness of individuals seeking admission to the bar, determining the qualifications of practicing attorneys from other states seeking to be admitted to the Missouri Bar, and in developing, administering, and grading the examinations of new applicants seeking admission to the bar.

A graduate of the University of Missouri-Columbia (B.S., with honors, in 1965 and J.D. in 1968), Cliff has served as an educator and speaker on behalf of the Supreme Court of the State of Missouri, the Missouri Bar Association, the University of Missouri – Columbia School of Law, and other organizations to provide continuing legal education to members of the legal profession.

Cliff's community involvement includes presently serving as a Member of the Board for Community Foundation of the Ozarks and he has served as a Member of the Developmental Center of the Ozarks as well as the Burrell Center.

**John Carnahan** is a member of both the Transactional and Estate Planning Practice Groups of CECB. He concentrates his practice in the areas of tax planning, corporate transactions, estate planning, and business succession planning for family-owned businesses, which also includes providing advice and assistance in real estate acquisitions and development, financial institution organization and compliance, business and estate planning, and the acquisition and sale of businesses.

John received his bachelor's degree from Missouri State University in 1971 and his law degree, cum laude, in 1974 from the University of Missouri-Columbia. In 1975, John received his LL.M. in Taxation from the University of Miami.

In 2005, John was appointed by Governor Matt Blunt to serve on the University Of Missouri Board Of Curators, a nine-person governing body of a four-campus system, which includes the University of Missouri-Columbia, the University of Missouri-Kansas City, the University of Missouri-Rolla, and the University of Missouri-St. Louis. John has also been selected as a Fellow of the American College of Tax Counsel, American Bar Foundation and the Missouri Bar Foundation.

As a member of the Litigation Practice Group, **John Price** concentrates his practice in the areas of real estate, environmental law, commercial litigation and appellate practice.

John received his bachelor's degree from the University of Northern Iowa, with honors, in 1975 and his law degree, cum laude, in 1979 from the University of Missouri-Columbia (Member of Order of the Coif, and Note and Comment Editor of the *Missouri Law Review*).

John has served on the Boards of the Wilson's Creek National Battlefield Foundation, the Visiting Nurse Association, and Project Parkway in Springfield. Additionally, Mr. Price is currently serving on the Springfield Sister Cities Association Board of Directors. He is a member of the Springfield Metropolitan and American Bar Associations (Natural Resources Law Section), as well as the Missouri Bar (District 16 Representative, Young Lawyers Section Counsel, 1983-1988; Young Lawyer representative to the American Bar Association House of Delegates, 1984-1986; Energy and Environmental Law Committee).

## Sued In Timbuk Tu: *How Your Website Can Take You To A Place Far, Far Away Against Your Will*

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***Don't be surprised if you receive a summons for a lawsuit in a distant state.***

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By J. Craig Preston

In today's day and age, many businesses find it a must to have a widely visited and prosperous website. Generally, companies focus on how to get their website listed first on the various search engines, or at the very least, install a counter that indirectly boasts of the popularity of their site. With the low overhead and transactional costs, the sky's the limit...or is it?

Before the Internet boom, if your company found itself in the unfortunate position of being named as the defendant in the lawsuit, you could at least expect the suit to be filed in your home court. This is because of the legal term known as personal jurisdiction. Under most laws, companies can only be sued in states where they have a presence, location, or purposefully seek business. For example, say your company has one physical location in Springfield, Missouri with no website, and a disgruntled California resident visits your store and purchases your product. Generally, if the California resident wants to file a lawsuit, he must do so in Springfield, Missouri.

But, instead of personally visiting your store, say the California resident purchases your product through your website. Can he sue in California? The answer to this question has been the topic of a recent explosion of cases throughout United States. The general approach is to categorize a website into one of three categories: active, passive, or interactive.

**Active:** These are the websites that offer their products over the Internet. Their visitors can purchase their products from any state, or even nation. The general consensus among courts is to subject these companies to personal jurisdiction in any state. This means that companies with active sites can be forced to defend lawsuits in any of the 50 states, or worse yet, possibly anywhere in the world.

**Passive:** These websites generally only offer information, with no opportunity to purchase products and with little to no means of the visitor posting information on the site. Courts have, for the most part, refused to find personal jurisdiction in this instance, meaning that a customer must still file suit in your home court.

**Interactive:** These websites fall somewhere in between active and passive sites. They generally provide information, but also allow the visitor to solicit help, post messages, or even establish a relationship with the host provider to later enter into a business relationship. Courts generally look at the various factors of the site and weigh those factors on an individual basis to determine if the business will be subject to personal jurisdiction in the state where the lawsuit is initiated.

Therefore, if your company has an active, or even interactive website, don't be surprised when you receive a summons for a lawsuit filed in a distant state. And remember, juries and judges tend to be biased in favor of a hometown plaintiff over an out-of-state company, so you are already fighting an uphill battle. There are various measures a business can take to attempt to limit this far away jurisdiction which include warnings, provisions in the agreement, and pop-up boxes, each of which should be tailored to the specific business and website. ■

*Piercing the LLC Veil  
Continued from Page 3*

directors or share-holders because of the lack of observance of corporate formalities between the various entities.

The Court concluded that the Plaintiff had satisfied both theories and held the Hartmanns and their entities responsible.

The moral of this story is that so many times we set up LLCs and there are what are known as related-party transactions. These transactions must be properly documented. In the corporate world, we maintain corporate minute books containing actions ratifying and affirming related-party transactions, whether they be loans, security agreements, leases, construction contracts, etc. and that there be actual contracts between related parties. The same reasons we do this in the corporate arena, should also be followed in the LLC world.

<sup>1</sup>*Tzvolos v. Wiseman* - 2007 WL 1532760

# Little Known Statutes Which Impact Your Business and Life

## Volunteers protected against liability

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By John M. Carnahan, III

The revised Statutes of Missouri, and their annotated format with summaries of all applicable cases and history, take up approximately 18 linear feet of library shelves. The unannotated Statutes are over 7,500 fine print pages comprised of five Volumes plus Supplements. Contained within these revised statutes in Missouri, are the Constitution of the State and the Statutes enacted by the Missouri Legislature and signed by the Governor, since 1821 and still in effect, covering all aspects of our life from the Criminal Code, Sales and Income Taxes, Uniform Commercial Code, corporate laws, procedures for civil lawsuits, and too many other topics to count. The purpose of this column is just to pick out one small statute and bring it to the reader's attention, in the hopes that they can use it to their benefit at some point in their business and personal life.

This Newsletter's column deals with Section 537.118 RSMo. entitled Volunteers, Limited Personal Liability. Have you ever been asked to serve on a Board of Directors of a Not-for-Profit Corporation? Or do you help your church Sunday school by offering to drive the junior high class to a hayride event. Then an accident happens, no one intended it, and the lawsuits start flying. Thankfully under the provisions of Missouri law, if you are a volunteer, defined as "... an individual performing services for a not-for-profit organization or governmental entity who is not compensated for his services or salary or prorated equivalent basis". Not-for-Profit organizations are organizations which operate under the standards of Section 501 (c) of the Internal Revenue Code and that would be such things as churches, Boy Scouts, and other equivalent type not-for-profit organizations. The statute specifically provides that:

"Any volunteer of a not for profit organization or governmental entity shall be immune for personal liability for any admission resulting in damage or injury to any person intended to receive benefit from such volunteer service if:

1. The volunteer acted in good faith and within the scope of his official function and duties; and
2. ... the damage or injury was not caused by the intentional or malicious conduct or by the negligence of such volunteer."

Therefore be careful when you volunteer, you are protected up to a point, but not if you personally are negligent or act in an intentional manner. Make sure that you have personal liability insurance including an umbrella liability policy and any organization that you are volunteering services for, has good liability insurance in place. Finally, if you are going to volunteer, then don't even accept token compensation. ■

## Firm News



Carnahan, Evans, Cantwell & Brown, P.C. salute Cliff Brown on being recognized as one of the most distinguished and respected Trust and Estate attorneys in the 2007 edition of The Best Lawyers in America. This year marks the 13th consecutive year that Cliff has been acknowledged in Best Lawyers. When it comes to estate planning, trusts, probate and related tax matters, trust Cliff and the team at Carnahan, Evans, Cantwell & Brown, P.C.

We are pleased to announce that Richard T. Ashe has joined the firm as an Associate Attorney.

Ric, a Missouri native, joins the firm after practicing for five years at a respected Portland, Oregon firm. Ric concentrates his practice on a wide variety of business litigation matters, including the resolution of disputes occurring in all stages of the manufacture, distribution and sale of goods, shareholder disputes, non-competition agreements and trade secrets, trademarks and copyrights, construction contracts and other real estate matters, as well as general business matters.



## IRS Issues 2007

### Allowable Living Expenses Standards



By Frank C. Carnahan

The new standards are effective October 1, 2007. The IRS standards are used to determine installment and offer in compromise amounts. The standards have been redesigned to:

- add a new category for per person out of pocket health care expense with separate limits for those under and over age 65 (documentation only required if the amount claimed exceeds the standard)
- eliminate income ranges for national standards for food, clothing and other items
- provide a single nationwide national standard expense table, eliminating separate tables for Alaska and Hawaii
- expand the number of household categories for housing and utilities
- add an allowance for cell phone costs in housing and utilities
- provide equal allowances for the 1st and 2nd vehicles under transportation expenses rather than a reduced amount for the 2nd vehicle
- provide fewer Metropolitan Statistical Areas for vehicle operating costs
- separate the nationwide public transportation allowance

If the amount claimed is more than allowed by the national standards, the taxpayer must provide documentation to substantiate those expenses are necessary living expenses. For more information see <http://carnahalaw.com/IRS/collectionstd.html>.

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#### *Building Green* *Continued from Page 1*

credit of \$2,000. Again, the credit applies to property placed in service after December 31, 2005 and prior to January 1, 2008.

2007 therefore presents an opportunity for people building new homes, or retrofitting existing homes, to obtain tax savings while building green.

More expansive and innovative programs are developing around the country to encourage the true "green building" – a structure designed using recycled materials, that eliminates sources of indoor air pollution and achieves the highest level of energy efficiency. The industry standard for this new construction technique is the Leadership in Energy and Environmental Design (LEED) Green Building Rating System. The LEED system measures not only energy efficiency, but building sustainability – it has been described as the best way to demonstrate that a building project is truly "green." The LEED rating system was developed, and is administered by the US Green Building Council, a non-profit coalition of building industry leaders. The LEED system is intended to promote building design and construction practices that increase profitability, but reduce the environmental impacts and improve the health and well being of building occupants. The USGBC can award a certified, silver, gold, or platinum LEED certification depending on the overall rating the design and construction achieves.

LEED certified buildings have already demonstrated that they have lower operating costs, less occupant complaints of indoor air pollution, reduced construction waste sent to landfills, and conserve energy and water and reduce harmful greenhouse gas emissions. Government entities around the country are getting "on board" with LEED certification in a number of ways.

A number of federal agencies have adopted policies that required new buildings, or major renovations of government buildings to achieve LEED silver certification. The US departments of Agriculture, Health and Human Services, the State Department, the EPA, the General Services Administration

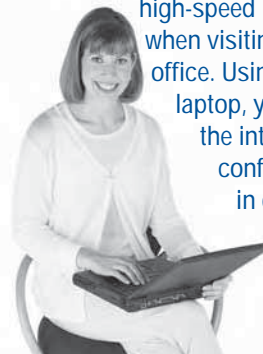
and the Military Services have all adopted programs requiring LEED certifications on new buildings. While Missouri has not yet acted, many states including Arkansas and Illinois, have adopted programs encouraging or requiring newly constructed state buildings to achieve LEED silver status.

On the municipal government level, a number of cities have adopted not only tax-based incentives, but other inventive zoning and permitting perks for green buildings. For example, LEED silver certification may allow development of sites at a higher density than conventional projects, or "front-of-the-line" zoning, permitting and plan review. In September 2006, the City of Clayton, Missouri passed a resolution requiring new construction and renovations of city buildings over 5,000 square feet to meet LEED silver certification. Since 2004, Kansas City has required new city buildings to achieve LEED silver status. Other cities have allowed utility cost rebates, administrative fee waivers and municipal grants to encourage green buildings.

Green building initiatives around the country demonstrate a new, partnership approach to environmental regulation by government, developers, and concerned citizens. As the economic, environmental and health benefits of green buildings become more apparent, we will see green building programs in our state and communities.

## For Your Convenience...

Please feel free to utilize our wireless high-speed internet capabilities when visiting our Springfield office. Using your own personal laptop, you can connect to the internet in any of our conference rooms or in our reception area.





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## Holiday Hours

**We will be closed  
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observance of  
upcoming holidays:**

**Thursday, November 22nd and  
Friday, November 23rd.**

**Monday, December 24th and  
Tuesday, December 25th**

**Tuesday, January 1st**

Founded in 1979, the law firm of Carnahan, Evans, Cantwell & Brown, P.C. has offices in Springfield and Branson, Missouri. An "A-V Rated" preeminent law firm by Martindale-Hubbell, our attorneys are engaged in the general business practice of law with an emphasis the following areas:

- Business Organization and Planning
- Corporate
- Estate Planning
- Probate
- Trust Administration
- Employee Benefits
- Labor & Development
- Banking
- Commercial Litigation and Dispute Resolution
- Environmental
- Land Development
- Intellectual Property
- Arbitration and Mediation
- Franchise
- Mechanics' Liens & Foreclosures
- Collections

## Attorneys at Law

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