2Q Newsletter · 2013

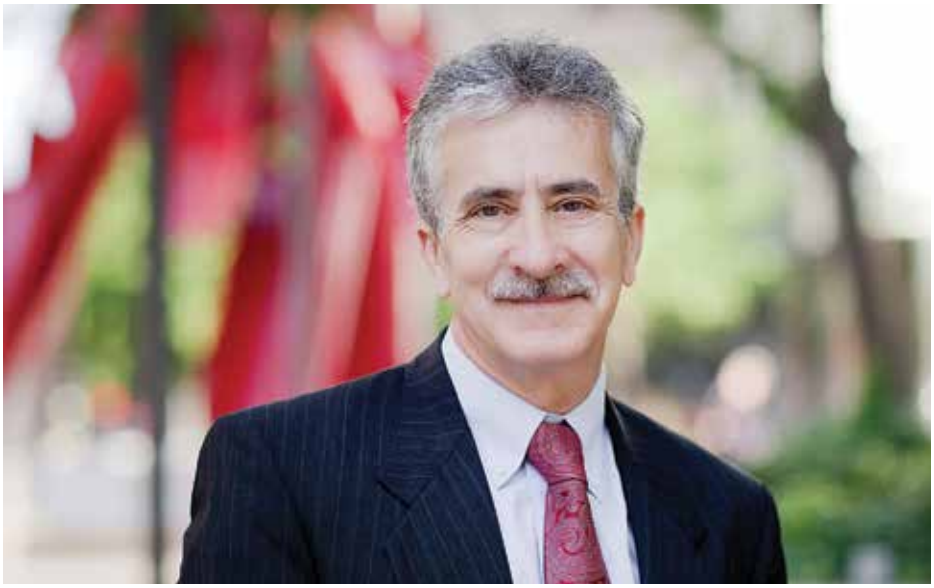
GABLE GOTWALS
COUNSEL

RAISING THE BAR

Recent Awards

- *Casinos and Gambling Law Firm of the Year--USA by Finance Monthly*
- *Firm named among Best Places to Work fourth year in a row by okcBiz*
- *Chambers USA names nine GableGotwals attorneys "Leaders In Their Field"*
- *GableGotwals selected as Go-To Law Firm for Fortune 500 companies*
- *Thirty-seven attorneys named as 2013 Oklahoma's Top Rated Lawyers*
- *Robert J. Getchell appointed to Oklahoma Abstractors Board*
- *Dean Luthey honored as one of three winners of the inaugural Hargrave Prize given for the three top papers published by the Sovereignty Symposium*
- *David Bryant awarded the 2013 Power Attorney distinction by the Tulsa Business Journal*
- *Ron Ricketts inducted into Academy of Court Appointed Masters*
- *Erin Dailey named to the 2013 Class of Outstanding Young Professionals by Oklahoma Magazine*
- *2013 Best Law Firm by Oklahoma Magazine*
- *Litigation Law Firm of the Year—Oklahoma by Acquisition International M & A Awards*

Dean Couch Joins OKC as Of Counsel Attorney



Dean Couch joins GableGotwals as a new Of Counsel attorney in the firm's Oklahoma City office. Dean's practice will focus on water law and the complex issues surrounding rights, access and management of this natural resource.

Dean served for almost 30 years as the general counsel for the Oklahoma Water Resources Board and is widely known for his expertise and experience with complex issues including interstate and tribal compacts, water rights, water quality standards, property rights and floodplain and wastewater management.

Dean received his J.D. from the University of Oklahoma College of Law in 1982 and his B.A. from Central State University in 1976.

Contact Dean:
(405) 235-5500
dcouch@gablelaw.com

Oklahoma Capital Gains Update

The Oklahoma Court of Civil Appeals has clarified its previous opinion, issued January 17, 2013, which held the Oklahoma capital gains deduction is unconstitutional. The court has now specifically ruled that its decision the statute is unconstitutional is to be given retroactive effect. The court held that the ruling will apply in all cases still open on direct review and as to all events that are not time-barred (capable of being litigated) regardless of whether they predate or postdate the entry of the court's opinion. Thus, other taxpayers in circumstances with capital gains similar to CDR Systems Corporation may also be entitled to claim and receive a refund of Oklahoma income tax paid in a prior year. The court's opinion overruled an Oklahoma Tax Commission decision denying a capital gains deduction for sale of Oklahoma assets of an out-of-state business. The court held the Oklahoma law enacted in 2005 as an economic and business development incentive violated the Commerce Clause of the U.S. Constitution by facially discriminating against out-of-state businesses.

Taxpayer Appeal Rights Expanded in Oklahoma

The Oklahoma Uniform Tax Procedure Code has recently been amended to provide an important alternative right of appeal to taxpayers from Oklahoma Tax Commission (OTC) decisions assessing a tax or additional tax or denying a claim for refund. A taxpayer shall have the right to either (1) appeal to the Supreme Court of Oklahoma, or (2) opt to file an appeal for trial de novo in the district court of Oklahoma County or the county in which the taxpayer resides. Under each alternative the taxpayer must file an appeal within thirty (30) days after the date of mailing to the taxpayer of the OTC on order being appealed. If the taxpayer files an appeal for trial de novo in district court and the amount in dispute exceeds $10,000, the trial de novo must be heard by a district or associate district judge sitting without a jury. If the amount in dispute does not exceed $10,000, the trial de novo may be heard by a special judge sitting without a jury. An order resulting from trial de novo in district court shall be appealable to the Supreme Court of Oklahoma by either party (the taxpayer or OTC). In an appeal of an OTC decision to the Supreme Court, or for trial de novo in district court, the party appealing shall not be required to give bond. A taxpayer will no longer be subject to possibly being required to pay the amount of disputed tax assessed, penalty or interest as a condition precedent to the right to prosecute an appeal. In the case of an appeal of the denial of a claim for refund, if a refund is allowed, the taxpayer will be entitled to interest on the refunded taxes at the rate of one and one-quarter percent (1¼%) per month. The enhanced taxpayer appeal procedure is effective January 1, 2014. Senate Bill 864; amending 68 O.S. 2011, § 225.

The Oklahoma income tax capital gains deduction favoring in-state businesses, 68 O.S. § 2358(D), has been held to be unconstitutional by the Oklahoma Court of Civil Appeals. CDR Systems Corp. v. Okla. Tax Comm'n, Case No. 109,886 (Okla. App. June 12, 2013).

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Read more about the update by clicking the icon.

If you have questions about either article, please contact Sheppard F. Miers, Jr. at 918-595-4834.

Oklahoma Supreme Court Strikes Down Tort Reform

The Oklahoma Supreme Court handed down two decisions on June 4, 2013 with respect to the constitutionality of the Comprehensive Lawsuit Reform Act of 2009 ("Tort Reform Act" or "Act"). The first opinion, Wall v. Marouk, 2013 WL 2407160 (Okla. June 4, 2013), declared one section of the Act unconstitutional. More importantly, the second opinion, Douglas v. Cox Retirement Properties, Inc., 2013 WL 2407169 (Okla. June 4, 2013), declared the entire act unconstitutional and void because it violates "the single-subject rule" of Article 5, section 57 of the Oklahoma Constitution.

SUMMARY OF THE OPINIONS

Wall found section 19 of the Act (12 O.S. § 19) unconstitutional as violative of Article 5, section 46 of the Oklahoma Constitution and Article 2, section 6 of the Oklahoma Constitution. Section 19 provides that "in civil actions for professional negligence, the plaintiff must attach an expert's affidavit." The Court held that section 19 constituted a special law in violation of Article 5, section 46 of the Oklahoma Constitution. "A special law confers some right or imposes some duty on some but not all of the class of those who stand upon the same footing and same relation to the subject of the law." Oklahoma City v. Griffin, 1965 OK 76, ¶ 8, 403 P.2d 463. The Court additionally held that section 19 violates Article 2, section 6 of the Oklahoma Constitution because it "creates a monetary barrier to access the court system, and then applies that barrier only to a specific subclass of potential tort victims, those who are the victims of professional negligence."

The second case, Douglas, held that "H.B. 1603 violates the single-subject rule of Article 5, section 57 of the Oklahoma Constitution and is unconstitutional and void in its entirety." That section of the Oklahoma Constitution provides: "Every act of the Legislature shall embrace but one subject, which shall be clearly expressed in its title..." The single-subject rule attempts to prevent "logrolling," which is "the practice of ensuring the passage of a law by creating one choice in which a legislator or voter is forced to assent to an unfavorable provision to secure passage of a favorable one, or conversely, forced to vote against a favorable provision to ensure an unfavorable provision is not enacted." Nova Health Sys. v. Edmondson, 2010 OK 21, 233 P.3d 380. To determine whether a law constitutes logrolling, Oklahoma adheres to the germaneness test, which asks "whether a voter, or legislator, is able to make a choice without being misled and is not forced to choose between two unrelated provisions contained in one measure." Thomas v. Henry, 2011 OK 53, 8, 260 P.3d 1251, 1254.

The Court held in Douglas that the Act is "unconstitutional logrolling in violation of the single-subject rule...." The Court found that the Act contains 90 sections which address a variety of subjects that "do not reflect a common, closely akin theme or purpose." Although the legislature stated that the Act covered the single topic of lawsuit reform, the Court found that this topic is too broad, and that designating the law as lawsuit reform does not "cure the bill's single-subject defects." Essentially, according to the Court, voters and/or legislators are faced with an "all or nothing" choice with respect to the bill and the multiple subjects it addresses.

The Court also found that because the Act encompasses so many differing subjects, severance of the offending sections is not an option. In summary, the Court stated: "We do not doubt that tort reform is an important issue for the Legislature. But the constitutional infirmity of logrolling, which is the basis of this opinion, can only be corrected by the Legislature by considering the acts within the CLRA of 2009 separately."

Read more by clicking the icon.

If you have questions, please contact Tim Carney at 918-595-4810.

Top 10 Considerations for Oil and Gas Asset Transfers

1. Asset Descriptions. Early in the negotiation of the PSA, care should be taken by both Buyers and Sellers to ensure that the PSA accurately and completely describes the assets being transferred—either through disclosures in the body of the PSA itself or in the accompanying exhibits and schedules. While this may seem obvious, ancillary assets can easily slip through the minds of management as negotiations on other issues progress, only to be discovered at the eleventh hour before closing.

2. Contract Assignability. While not often on the minds of Buyers and Sellers at the time of executing a letter of intent, there are usually rights under several agreements relating to the Seller's use, maintenance and operation of the subject assets that the Buyer will want to acquire through the transaction. These agreements should be reviewed by counsel early on with an eye toward assignment and change of control provisions.

3. Preferential Rights to Purchase. Both Buyers and Sellers should examine any rights of first refusal, tag along or other preferential rights that third parties may own with respect to the subject assets. In oil and gas related assets, these rights are often included in operating, participation and joint venture agreements.

4. Environmental Liabilities. Given the risk of significant liability, the PSA should provide a clear mechanism of risk allocation between the Buyer and Seller with regard to environmental defects (or claims) arising out of, or relating to, the oil and gas assets—both before and after closing.

5. Governmental Approvals. Given the highly regulated nature of oil and gas assets, both Buyers and Sellers should consult with counsel regarding any regulatory approvals necessary to complete a transaction. Additionally, transactions involving assets located on tribal lands may require special approvals from tribal authorities.

6. Taxes. The parties should be aware that the purchase and sale of certain assets in Oklahoma could subject the Buyer to liability for the payment of sales tax, which would be derived from the purchase price for the affected assets. The parties should independently seek advice from their counsel and accountants in order to best address these sales tax concerns.

7. Title. For mineral interests and real estate assets (including easements), the parties should determine the level of title that the Seller will warrant to the Buyer. Under Oklahoma law, "marketable title" is often considered the gold standard; however, it is more often the case that the Buyer will consider the lower standard of "defensible title" as sufficient. Because Oklahoma law does not define "defensible title," the parties are left to define the types of title defects that will rise to an indemnifiable claim under the PSA.

8. Royalty Litigation Settlements. With the increase in litigation between royalty owners and producers, we have seen an increase in concern by Buyers of E&P assets that the obligations imposed on Sellers by virtue of these settlement agreements will "run with the assets." Any such settlement agreements should be reviewed by Buyer's counsel early on in negotiations in order to determine if the obligations therein would, in fact, impose obligations on the Buyer (as the successor in interest to the assets).

9. Employees. As part of the transaction, the Buyer may desire to acquire the right to offer employment to one or more of the Seller's employees who have historically operated and maintained the assets. Including these employees in the underlying transaction allows the Seller to avoid relocating or reassigning employees to other projects post-closing who were previously dedicated to servicing the transferred asset. It also allows the Buyer to obtain the benefit of the knowledge gained by these individuals as employees of the Seller and reduces the risk of problems associated with the transfer and operation of the assets by the Buyer post-closing.

10. Transition Services. Often, at the time of closing an oil and gas transaction, the Buyer will not have the resources necessary to immediately operate the assets in the way previously operated by the Seller prior to closing. This is often the case when the Buyer does not retain any (or few) of the Seller's employees post-closing. In order to allow the Buyer to get "up to speed" in its operation of the assets, Buyers will often request that the parties enter into a Transition Services Agreement, contemporaneous with the closing of the underlying asset transfer.

As the market heats up this summer, we compiled a "Top 10" list of common issues that we recently have encountered in representing Buyers and Sellers in transfers of oil and gas related assets in Oklahoma. While this list does not reflect every issue that might be considered in negotiating and drafting a Purchase and Sale Agreement ("PSA"), it should serve as a useful guide for parties contemplating transactions this deal season.

Click the icon to read more. If you have any questions about this article, please contact one of the authors listed below or the GableGotwals lawyer with whom you usually consult.

John R. Barker · 918.595.4815
jbarker@gablelaw.com

Richard M. Carson · 918.595.4833
rcarson@gablelaw.com

Brandon M. Watson · 918.595.4867
bwatson@gablelaw.com

PPACA/HIPAA Wellness Programs and Rewards Final Regulations Issued

The Treasury Department, Department of Labor, and Department of Health and Human Services issued final regulations on wellness programs and rewards for group health plans on May 29, 2013. The regulations implement provisions of the Patient Protection and Affordable Care Act of 1996 (PPACA) and amend guidance previously issued under the Health Insurance Portability and Accountability Act (HIPAA).

Background

HIPAA generally prohibits group health plans (insured or self-insured) from discriminating against participants and beneficiaries with respect to eligibility, benefits, premiums or contributions based on eight specified "health factors" (i.e., health status, medical condition, claim experience, receipt of health care, medical history, genetic information, evidence of insurability and disability). However, HIPAA makes an exception to this general prohibition for plan provisions that vary benefits (including copayments, deductibles or coinsurance) or the premium or contributions for similarly situated individuals in connection with programs of health promotion or disease prevention (wellness programs). The PPACA includes a provision that extends the HIPAA nondiscrimination protections to the individual market and also increases the permissible wellness-related financial rewards from the amount previously established under HIPAA rules.

Summary

The regulations apply to insured and self-insured group plans, both grandfathered and non-grandfathered, for plan years beginning on or after January 1, 2014. This is intended to summarize certain key features of the regulations, not to serve as a comprehensive outline of all of the regulations.

Types of Wellness Programs

ARTICLE I. Participatory Wellness Programs

Participatory Wellness program rewards are based only on participation, not on meeting specific health standards. There are no limits on the rewards that may be offered for

Participatory Wellness programs. Therefore, any rewards provided in connection with a participatory wellness program do not count toward the maximum permissible reward thresholds (discussed below). Also, participatory wellness programs are not required to meet the five special requirements applicable to health-contingent wellness programs (discussed below). Also, reasonable alternative standards (discussed below) need not be made available under participatory wellness programs.

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ARTICLE II. Health-Contingent Wellness Programs

Health-Contingent Wellness programs are those that require individuals to meet a "health standard" or to participate in a health program to receive a reward. Every individual eligible for the program must be given an opportunity to qualify for the reward once a year.

Health-Contingent programs are of two types:

(a) Activity-Only Wellness Programs

(b) Outcome-Based Wellness Programs

If an individual does not qualify for a Health-Contingent reward, a reasonable alternative standard or waiver must be available.

Five Requirements for Health-Contingent Wellness Programs

As under current HIPAA rules, health-contingent wellness programs will be permitted in a group health plan only if they satisfy all five requirements, as revised in the final regulations. The five special requirements are:

1. Frequency of opportunity to qualify
2. Size of reward
3. Reasonable design
4. Uniform availability and reasonable alternative standards
5. Notice of availability of reasonable alternative standards

Accordingly, employers and issuers need to keep this in mind when drafting and implementing, or revising, wellness programs. Although the regulations do not go into effect until January 1, 2014, employers should begin reviewing their plans now.

Read more by clicking the icon.
If you have questions, please contact Tim Carney at 918-595-4810.

About Us

GableGotwals is a full-service law firm of over 70 attorneys representing a diversified client base across the nation. Though Oklahoma-based, our connections and reach are global. Fortune 500 corporations, entrepreneurs, privately owned companies, foundations and individuals entrust us every day with the stewardship and strategic management of their legal challenges. GableGotwals is well known for its high quality legal services provided by a highly experienced group of litigators and transactional attorneys who have been recognized by Chambers USA, Best Lawyers In America, Oklahoma Super Lawyers and a number of federal, state and county bar associations.

gablelaw.com Connect with us:

Oklahoma City One Leadership Square, 15th Floor · 211 N. Robinson · Oklahoma City, OK 73102 · (405) 235-5500
Tulsa 1100 ONEOK Plaza · 100 W. Fifth Street · Tulsa, OK 74103 · (918) 595-4800