

# Report From Counsel

Insights and Developments in the Law

Summer 2010

## What Is an S Corporation?

An S corporation is a form of business classified for federal income tax purposes as a corporation that has elected to be taxed as a pass-through entity, in a manner similar to a partnership or sole proprietor. Unlike a regular corporation, or C corporation, an S corporation (both names derive from

they pay taxes as if they were partners or sole proprietors. In addition, when the corporation eventually is sold, there can be reduced taxable gains, as compared with the sale of a business operating as a C corporation.

On the downside, the limitation on classes of stock in an S corporation provides less control over the company and the value of its stock. Potential

outside investors likely will not be attracted by the pass-through tax characteristics of an S corporation, nor by the limit on the number of shareholders. Although corporate taxes are avoided, there is still a requirement for filing an informational tax return every year for a corporation with more than one

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sections of the Internal Revenue Code) generally is not subject to federal income tax. Instead, its income is reported on the tax returns of its shareholders, and they have the responsibility for paying the tax. If there are losses suffered by the corporation, they also pass through and are reported on the shareholders' income tax returns.

Because only the shareholders, and not the corporation, are taxed, S corporations avoid the problem of double taxation associated with C corporations. This is the biggest draw for creating an S corporation, particularly for closely held corporations.

Shareholders in an S corporation, like shareholders in a C corporation, generally have limited liability arising from corporate matters, even though

In separate cases, two public school students used MySpace to post disparaging comments about each of their principals. Each of the students was punished with a suspension from school, and each made a federal case out of it, literally, by suing on the basis of alleged infringement of the right of free speech. Both cases arose in the same state, and the same federal appellate court decided appeals in the cases on the same day. The parallels end there, however, because one student succeeded in his First Amendment argument while the other student did not.

The explanation for the different outcomes in the cases boils down to different conclusions as to whether the speech engaged in by the students had at least the potential to be substantially disruptive of school activities, even

though both forms of speech occurred off of school grounds. No doubt, in both cases, the targeted principals had bruised feelings, at the very least, but that was not the pivotal consideration.

### Profile Goes Too Far

In the unsuccessful case, an eighth grader's suspension was upheld after she created a personal "profile" of her principal in which she went so far as to suggest that he was a pedophile and a sex addict. The court acknowledged that criticisms of school officials, even when in bad taste, are not to be censored. However, more than simply being critical or disrespectful, the language used by the student was highly offensive, potentially very damaging

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## MySpace, Students, and Free Speech

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## Tax Credits for Historic Preservation

For over 30 years, the federal government has been using tax incentives to help preserve historic buildings. Originally, federal law allowed accelerated depreciation on rehabilitated buildings, but subsequent changes have made preservation and revitalization efforts even more attractive to taxpayers.

Today, there is a general business credit equal to 20% of qualified rehabilitation expenses for a certified historic structure, or a 10% tax credit for the qualified rehabilitation of nonhistoric, nonresidential buildings first placed into service before 1936. Eligibility for the tax incentives is determined by the National Park Service.

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Tax credits are often more beneficial to taxpayers than deductions are, since every dollar of a tax credit reduces the amount of income tax owed by one dollar.

The 20% credit for the rehabilitation of a certified historic structure applies to commercial, industrial, agricultural, rental, or residential properties, but not to properties used exclusively as the owner's private residence. A certified historic structure must be a building as opposed to another type of structure. To have the required historic status, the building must be either listed individually in the National Register of Historic Places or located in a registered historic district and certified as being of historic significance to the district.

Eligibility for the 20% credit also depends on meeting some additional requirements. For example, the build-

ing must be depreciable, that is, used in a trade or business or held to produce income. The rehabilitation must be substantial, generally defined as entailing expenditures exceeding the adjusted basis of the building and its structural components. Generally, this requirement must be met within two years or within five years for a project completed in multiple phases.

Qualified rehabilitation expenses include such items as architectural and engineering fees, site survey and development fees, legal expenses, and other construction-related costs, so long as they are added to the basis of the property, are reasonable, and are related to services performed.

The owner of the rehabilitated building must hold it for five years after completion of the rehabilitation

or else pay back all or part of the 20% credit. A sale in the first year means that the entire credit is recaptured. The recapture amount is reduced by 20% per year for properties held between one and five years.

The 10% credit for nonhistoric buildings constructed before 1936 shares some of the requirements for the 20% credit, such as that the rehabilitation be substantial and the property be depreciable. However, only buildings rehabilitated for nonresidential uses qualify for the 10% credit. In addition, so that the identity of the original building is not lost in the process, projects undertaken for the 10% credit must meet specific tests based on retention of minimum percentages of the building's walls and internal structural framework.

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## Sculptor Slays Government Goliath

Some 20 years ago, a World War II veteran and prominent sculptor won a government competition to sculpt a memorial to Korean War veterans in Washington, D.C. His creation depicts a platoon of stainless steel, larger-than-life foot soldiers arranged in what has come to be called "The Column." Five years later, another veteran, an amateur photographer, took photographs of the memorial. One of these photographs eventually was used by the federal government on a widely distributed postage stamp, for which the government paid the photographer \$1,500.

As for the sculptor, he had not been informed of the stamp in advance, nor had anyone sought his permission for it or paid him anything for it. He sued the government for copyright infringement. Certainly, there were principles at stake, but there was also potentially a lot of money in play. The Postal

Service received more than \$17 million from sales of the stamp, not to mention additional income from the use of the stamp on retail goods such as commemorative panels and framed art. The sculptor wanted a share of that money.

At a trial before the Court of Federal Claims, the court determined that the sculptor was the sole copyright owner of "The Column," rather than a joint owner with the government, and that "The Column" did not qualify for an exclusion from copyright infringement liability as an architectural work under the Architectural Works Copyright Protection Act. However, the court also determined that the government was not liable for copyright infringement because the government's use of "The Column" was a fair use.

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# Choosing an Executor for Your Will

The designation of an executor for a will is one of the critical steps in effective estate planning. The executor will be the individual responsible for the administration of the estate. He or she must execute the necessary documents to submit the will for probate. Then the executor must gather all of the testator's (person who makes the will) assets and distribute them in accordance with the terms of the will. Good recordkeeping will be essential because an accounting will have to be filed. Creditors' claims will have to be dealt with, and estate tax returns may have to be filed.

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In short, the job of the executor is a substantial responsibility and can be very time-consuming, especially when it comes to large or complicated estates. So that a suitable candidate can be named, the testator should take into account a variety of factors. These include the trustworthiness, sound judgment, financial acumen, age, and physical and mental capacity of the proposed executor. More than one executor can be named by the testator, and these coexecutors can share the duties of administering the estate.

In the case of married couples, the first instinct may be simply to name the other spouse as the executor and be done with it. While this may work just

fine in some cases, the decision deserves more thought as to all of the ramifications of choosing one's spouse as the executor. Will the mourning, surviving spouse be up to fulfilling all of the executor's responsibilities so soon after suffering such a loss? If the spouses are about the same age, will the surviving spouse be too frail, physically or mentally, to do the job when the time comes, perhaps many years after the executor has been named? All in all, a better choice may be an adult son or daughter, a sibling, niece, or nephew, or a close and trusted friend.

The job of executor will be substantially easier if the testator has first done his or her job by keeping complete and accurate records of the assets that will comprise the estate. Upon naming the executor, the testator should review this information with the executor in

detail. Another seemingly obvious matter that is often overlooked is simply making sure that the executor knows the location of all of the important papers relating to the estate.

As for payment for the executor's services, if the estate is very simple, and especially if the executor is also a major beneficiary of the estate, additional compensation may not be necessary. Otherwise, the will may provide for a fee for the executor, which may be calculated as a flat fee, an hourly fee, or a percentage of the estate assets.

A testator should not forget an even more elementary first step: asking for the consent of the prospective executor, no matter how close a relationship there may be between the individuals. For the benefit of all concerned, the executor must be willing, not just able, to carry out the important responsibilities that come with this job.

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## Sculptor

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The fair use doctrine requires courts to avoid rigid application of the copyright statute when it would stifle the very creativity that the law is designed to foster.

On appeal, a federal appellate court reversed on the pivotal issue of fair use, and sent the case back to the court below for consideration of the sculptor's damages. The Postal Service's stamp containing an image of the soldier sculptures did not "transform" the character of the sculptures so as to support a finding of fair use under es-

tablished copyright law. Rather, both the stamp and the sculptures shared the common purpose of honoring veterans of the Korean War.

While the stamp altered the appearance of the sculptures by adding snow and muting the color, those alterations did not impart a different character to the work. In addition, although the stamp did not harm the market for derivative works, which is another consideration in fair use analysis, the appellate court concluded that allowing the government to commercially exploit a creative and expressive work would not have advanced the purposes of copyright in this particular case.

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*Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.*

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# Overtime Pay Update

Under the federal Fair Labor Standards Act (FLSA), employers must pay an employee an overtime rate of at least one and one-half times the regular pay rate for any hours in excess of 40 hours a week. There are exemptions from this requirement for several types of employees, including employees in executive, administrative, or professional capacities.

Two recent decisions by federal appellate courts illustrate the fine distinctions that are sometimes made between employees who are deemed entitled to overtime and those who are not because they are employed in an “administrative” capacity.

Under the FLSA and its regulations, an employee earning at least a threshold amount per week is an administrative employee if his or her primary duties consist of the performance of office or nonmanual work directly related to the management policies or general business operations of the employer or the employer’s customers and if the work requires the exercise of discretion and independent judgment.

## Insurance Adjusters Exempt

In the first case, the primary duty of an insurance company’s automobile damage adjusters consisted of the assessment, negotiation, and settlement of automobile damage claims, making the adjusters exempt from the FLSA overtime pay provision. The fact that the adjusters engaged in total-loss negotiations 20 times per year demonstrated that their duty included the exercise of discretion and independent judgment.

The adjusters also worked in the absence of immediate supervision the majority of the time and made decisions that were reviewed only after the estimate had been written and the claim had been paid. They had full authority to settle claims within their limits of \$10,000 or \$15,000, as long as they could justify their decision on the facts of each claim, thereby binding their employer financially.

## Saleswoman Entitled to OT

By contrast, in the second case, an advertising saleswoman for a magazine publisher, who was also compensated weekly above the threshold amount, was not an “administrative employee” for the purposes of the FLSA, and thus was entitled to overtime pay.

The employer pointed out that the employee’s responsibilities included developing new clients, with the goal

of increasing sales generally, and that this task concerned general management and business operations. That was true as far as it went, but the fact remained that the employee’s primary duty, meaning the duty that consumed a major part, or over 50%, of her time, was simply to sell specific advertising space to clients. Since, in the court’s view, the employee was “plainly a salesperson,” she had to receive overtime pay whenever it was earned.

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## MySpace

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to the principal and the school, and maybe even illegal. The insinuations, even if made in jest, went right to the heart of whether the principal was fit to serve in his position, undermining his authority within the school.

## Parody May Be Allowed

By contrast, the same court found that a school had gone too far when it suspended a high school student after he created a profile of his principal on MySpace, using his grandmother’s home computer. In this case, the content of the posting could be described as a parody, as it made fun of the principal because of his large size. The parody used some offensive language, but on the whole it did not disrupt, or have the potential to disrupt, the student’s school, even though it was highly embarrassing for the principal.

It bears emphasizing that in both cases the students enjoyed much more freedom of expression, although not without limits, than they would have had while at school or in school-sponsored activities. In those settings, as the court noted in one of the cases, there is no First Amendment protection for

lewd, vulgar, indecent, and plainly offensive speech, and school officials do not offend the First Amendment by exercising editorial control over student speech so long as their actions are reasonably related to legitimate pedagogical concerns. In short, the lesson for students from these cases could be not only “don’t try this at home,” but also, and more emphatically, “never try this at school.”

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## S Corporation

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owner. Finally, if avoiding formalities is an important consideration, it should be noted that, like any other corporation, an S corporation must follow the requirements for having regular meetings and keeping company minutes.

The balancing of the advantages and drawbacks of S corporation status in any given case is sufficiently complex that it is advisable to seek professional advice before making this important choice.