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A newsletter for the clients and friends of Weiss Berzowski Brady LLP

Inside this issue

Estate Planning

Real estate issues in estate planning: Cohabitation may pose challenges

By Caitlyn A. Beaudry

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Now that the first-time home buyer credit is making it easier and more affordable for more individuals to buy real estate, there is a new trend of groups of friends and young unmarried couples buying houses and investment property together. All individuals living together outside of a marriage, same sex or not, in an intimate relationship, or just friends, should consider a Cohabitation or Tenancy Agreement when holding real estate together.

Plan for Relationship's End

Most people do not consider what happens when the relationship breaks down, the friendship ends, or when one party is simply ready to move on. An agreement in these situations is crucial because it provides an understanding between the parties as to how they will manage, control, acquire and dispose of their assets in the event that the relationship terminates. Cohabitation agreements, when properly drawn, will reduce the stresses that would normally be involved when it is time for the parties to go their separate ways. These agreements will clearly identify each party's intent and provide a pre-set plan of action to deal with future uncertainties. Since these agreements are enforceable under contract law, the parties will be bound by the terms of the agreement. However, they will also be subject to the usual contract defenses, for example, fraud.

Domestic Partnership Law

In addition to the challenges that all individuals cohabitating together face, there are some special considerations for same sex couples. Same sex couples, until recently, did not receive any of the legal protections given to married couples. The new Wisconsin Domestic Partnership law went into effect last month and made it legal for same sex couples to register as domestic partners. What this means for same sex couples owning real estate and their estate planning is: a partner may inherit from the estate of a domestic partner who dies without a will; a partner may be presumed to be a joint tenant with a right of survivorship; and transfers between partners are no longer charged a real estate transfer fee. Since this law is new and currently facing legal challenge, it is not in the best interests of the partners to rely just on these presumptions, not to mention what these presumptions mean and how they apply to a given situation. It is still very unclear. It is also important to consider how these presumptions may be contrary to the partners' intent. Specifically, what if a partner unintentionally converts property, which he or she intends to pass to his or her heirs, into survivorship property? A clear express intent is always preferred.

Although different considerations are appropriate for a given situation, it is important to make sure that the acquisition and disposition of your real estate is in accordance with your estate plan.•

Employment Law

Social media's popularity may become employer's nightmare

By Anna M. Pepelnjak

Millions of people, including many of your business's current, prospective and former clients, customers, employees and vendors, participate in social media such as LinkedIn, Facebook and Twitter. Social media sites have already become an irreplaceable and growing marketing and communications tool for small, medium and large companies.

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Threat of Liability Exists

However, for employers, social media can be a two-edged sword. At the same time you, as employer, encourage your employees to further the company's reach using social media, you must be mindful of actions that can trigger liability. For example, if you choose to monitor your employee's participation in social media, you can run afoul of the Stored Communications Act, 18 U.S.C. §2707(a). In *Van Alstyne v. Electronic Scriptorium, Ltd.*, 560 F.3d 199 (4th Cir. 2009), the court overturned the jury's award of statutory damages, but affirmed an award of punitive damages and attorneys fees exceeding $235,000, where an employer obtained and disclosed emails from an employee's personal account.

Another pitfall is the disclosure of confidential information. If, for example, information protected by the attorney/client privilege is either intentionally or inadvertently disclosed, legal responsibility may result.

Social Media Policy

One way to avoid liability is to implement a social media policy. Dell Inc.'s policy is commendable because it mandates that online communications be transparent, ethical, accurate and lawful, and it provides notice of the consequences of non-compliance. It is excerpted below.

1) Transparency of Origin. Dell requires that employees and other company representatives disclose their employment or association with Dell in all communications when speaking on behalf of Dell.

2) Accurate Information. Dell employees and other company representatives may not knowingly communicate information that is untrue or deceptive.

3) Ethical Conduct. Dell employees and other company representatives will not conduct activities that are illegal or contrary to Dell's Corporate Code of Conduct, Privacy Policy and related policies.

4) Consequences of Non-Compliance. Dell employees or company representatives who fail to comply with this policy will be subject to discipline, up to and including termination of employment from Dell.

If your employees are engaging in social media, now is the time to examine the risks and benefits and establish clear guidelines for participation.•

Business Law

Seller financing: Financing acquisitions in a slow economy

By Steven M. Szymanski

Recent changes in the U.S. economy and credit markets have made acquisition activity uncertain. Seller financing has become a more prevalent discussion point in acquisitions.

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What is Seller Financing?

Seller financing typically occurs when traditional financing sources are unable to fully finance, in conjunction with the purchaser's equity, the acquisition price. The seller has to provide financing in order to complete the transaction. Seller financing also occurs when there is a valuation debate over the purchase price of the business. In order to bridge the dispute, the parties agree to a base purchase price to be paid at closing and a contingent purchase price which will be paid to the seller if the acquired business achieves certain financial benchmarks in the future, referred to as the "earn out."

Traditional Seller Financing Issues

A seller providing financing should understand that it is a lending entity to the purchaser. Therefore, a seller should consider whether traditional terms for a bank loan are appropriate for its financing. At a minimum, an interest rate should be charged to avoid having a portion of the financing treated as imputed interest under tax law. The seller must decide whether its financing will be unsecured or secured by collateral. Depending on the amount of the seller financing, the seller should also consider whether loan covenants (such as, restrictions on compensation and other payments to owners, restrictions on a sale of the business, financial covenants and restrictions on the incurrence of additional debt) are appropriate.

Earn Out Issues

An earn out is additional purchase price that a seller can earn if the acquired business achieves certain financial benchmarks in the future. Choosing the appropriate financial benchmark is usually a negotiated item. Other negotiated aspects of the earn out include: (i) whether there will be a limit on the amount of additional purchase price that can be earned, (ii) the duration of the earn out, and (iii) whether the earn out, once earned, will be paid in a lump sum or over time.

Intercreditor Issues

If bank financing is also provided in the acquisition, the seller will also need to be cognizant of intercreditor issues. Intercreditor issues concern the respective rights of the seller and the bank should the purchaser default on its obligations to either or both of them.•

Business Law

Raising the Red Flag: Programs for combating identity theft

By Mark W. Siler

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According to the Federal Trade Commission ("FTC"), as many as eight million Americans per year are victims of identity theft. Included in this number are doctors and accountants whose services are stolen by individuals requesting such services posing as another person. In response to concerns over this type of identity theft, the FTC has expanded its "Red Flags Rule."

Rule Requirements

The Red Flags Rule requires any person who regularly extends credit to conduct a risk assessment to determine if they have any accounts for which there are reasonable risks of identity theft. For purposes of the rule, the term "credit" includes the right to defer payment of debt or to purchase property or services while deferring payments. This broad definition of credit turns many entities we do not normally consider creditors, such as the aforementioned professionals, into exactly that.

Under the rule, a creditor must develop and implement a written program setting forth how the creditor will identify and deal with identity theft. However, there is no standard defining as to what constitutes an acceptable identity theft program. The FTC intends the rule to be very flexible, with the provisions of a creditor's program being determined by the vulnerability of that creditor's business to identity theft. Therefore, drafting an appropriate program may prove difficult.

Program Provisions Identified

Although there is no objective standard setting forth the provisions of an acceptable program, the FTC does identify certain provisions that a creditor may include. Some of the warning signs, or "red flags," of identity theft include suspicious address changes, requests for billings to go to a person other than the new customer and questionable calls regarding a client's personal records. Some methods for preventing identity theft suggested by the FTC include asking for photo identification, confirming all address changes at both the new and old address of the customer and requesting written confirmation from any paying party not the customer.

The FTC suggestions provide a good start in creating an identity theft program that complies with the Red Flags Rule. However, because there is no objective standard to determine the sufficiency of a program, it is a good idea for the professional who is a potential creditor to seek the advice of a legal professional in creating the program.•

Editor's Note: As of this printing, the rule goes into effect on November 1st.

Real Estate Law

Memo to landlords: Avoid liability for tenant property improvements

By Bryan W. Edgar

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Suppose a tenant makes improvements to rental property and then vacates the property, leaving the improvements behind. Under Wisconsin law, the property owner may be obligated to pay the tenant for the value of the tenant's improvements. A recent Wisconsin case discussed this issue.

In Ludyjan v. Continental Casualty Co., tenants constructed a house and pole barn on rental property. The landlord had allowed the tenants to construct the buildings, provided that the tenants agreed to remove them when their lease expired. Later, the landlord elected not to renew the tenants' lease. The tenants vacated the property but left the buildings behind.

Unjust Enrichment

The tenants sued the landlord for the value of their abandoned improvements under a theory called "unjust enrichment." This doctrine permits a court to grant recovery when a person confers a benefit upon another and the recipient of the benefit is aware of or appreciates the benefit and accepts or retains that benefit. The tenants argued that the presence of the buildings had increased the value of the landlord's property and that the landlord had accepted that benefit when he allowed the tenants to construct the buildings.

The Wisconsin Court of Appeals ruled that the landlord was not obligated to pay the tenants for their improvements. The court noted that a landlord is only liable to a tenant if the tenant's improvements are actually useful *to the landlord*. It is not enough that the improvements merely increase the value of the property. Because the parties had agreed that the tenants would remove their buildings upon expiration of the lease, the court concluded that the buildings held no value to the landlord, even though the landlord later retained possession of the buildings.

Recognize Potential Liability

It is important that owners of rental property recognize their potential liability to tenants for tenant improvements. Conceivably, a tenant could prevail against a landlord on an unjust enrichment claim if the tenant is able to prove that the improvements are valuable to the landlord and that the landlord knowingly retained the tenant's improvements. Based on Ludyjan, however, a landlord may be able to avoid having to pay a tenant for improvement by including a provision in the lease agreement requiring the tenant to seek permission from the landlord prior to making any improvements and to remove any improvements upon termination of the lease.•

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At the Firm. . .

- **Richard Rakita has been honored by the Jewish National Fund (JNF) and the Jewish Home and Care Center. He has received, along with his wife Gayle Weber Rakita, a JNF honorary award and was recognized for his years of service and leadership on behalf of the Home.**
- **Four WBB attorneys were recently selected by their peers for inclusion in *The Best Lawyers in America*® 2010 (Copyright 2009 by Woodward/White, Inc., of Aiken, S.C.). Congratulations to Randy Nelson, John Sikora, Philip Miller and Dwight Ellis.**
- **The 27th Annual Tax & Business Seminar will be held September 22nd at the Wisconsin Club. Attorneys Scott Fleming, Randy Nelson, David Roettgers, John Sikora, Philip Miller, Steven Szymanski, Nancy Bonniwell and James Swiderski will be among the speakers. A variety of tax and business issues are on the agenda. For more information please see our website at www.wbb-law.com.**

Client Corner

Kelmann Corporation

You may hope and pray you never have to call the Emergency Response Team.SM If you do, you will soon realize a sense of security and relief. In the event of fire, water, wind damage or other disaster, Kelmann Corporation assures rapid response to prevent additional damage to home, business, religious edifice or historic landmark. The Wauwatosa-based company is "Wisconsin's Premier Restoration Specialist."

Kelmann Corporation vehicles stand ready to respond to emergencies.

Childhood friends and partners Richard Niggemann and Jerome Kelly started the company in 1973 when they purchased and renovated, in short order, a fire-damaged building. That process was repeated time and again to become the foundation for their current business. What began as a two-man operation is now a corporation that employs over fifty people.

In addition to restoration, Kelmann Corporation has experience in renovation and reconstruction, with extensive experience in church renovations. The company is the 2008 Winner of the National Phoenix Award for Restoration Excellence and the 2004 Winner for the Phoenix Award for Reconstruction Excellence. The honors were received for its work on Saint Patrick Church in Milwaukee and on Friedens Evangelical Church in Port Washington, respectively.

By placing trust in Kelmann Corporation, each customer is provided a guarantee and commitment to quality service. These obligations to the customer play a large role in the company's business practices. In recognition of that, the Wisconsin Better Business Bureau has bestowed the company with its Torch Award for Business Ethics and Integrity—three times.

—Kelmann Corporation (www.kelmann.com) is a Weiss Berzowski Brady LLP client.