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FOS NEWS - *Our clients come first*

Volume 1, Issue 2

Winter 2009

BRUCE O'NEILL NAMED 2009 SUPER LAWYER

FOS congratulates Bruce O'Neill for being named by *Super Lawyers* magazine as a 2009 top Wisconsin business litigation attorney. This is the 5th straight year he has been honored.

Bruce is recognized in the current *Wisconsin Super Lawyers 2009* and will be honored in the March, 2010 *Super Lawyers, Corporate Counsel Edition*.

Bruce was chosen after a rigorous search, which included surveys, peer nominations and recommendations.

An FOS senior partner, Bruce specializes in commercial litigation and family law. In his forty years of practice, he has won many high profile, "save-the-company" lawsuits.

FOS ANNOUNCES NEWLY REDESIGNED WEBSITE

FOS' attorneys and staff have worked diligently over the past few months to create an attractive, easy to navigate website with useful and practical information about our firm, our business, our attorneys and our staff. In redesigning our prior website, we incorporated your comments and suggestions. We want the site to give you the information you want, the way you want it.

Please take a moment to click on the FOS site, www.foslaw.com. We welcome your comments and feedback.

STAR DIRECT CASE PROVIDES NEW SUPPORT FOR RESTRICTIVE COVENANT ENFORCEMENT

By Mike Hanrahan

Wisconsin has been a notoriously difficult state in which to enforce non-compete agreements (also called covenants not to compete). A new Wisconsin Supreme Court decision may change that.

Wisconsin Statutes Section 103.465 defines when a non-compete agreement is enforceable. The courts historically viewed the statute more favorably to employees seeking to avoid future employment restrictions than to employers seeking to protect their customers and confidential information.

In July 2009, the Wisconsin Supreme Court, in Star Direct, Inc. v. Dal Pra, provided new support for employers enforcing restrictive covenants. Sales person Dal Pra signed a non-compete agreement with three separate restrictive covenants: one for non-solicitation of customers, another with a geographic restriction on competition, and a third prohibiting disclosure of confidential information. After quitting Star Direct, Dal Pra began competing in violation of all three covenants. When Star Direct sued, the lower courts found the geographic restriction clause unreasonable and voided all three covenants under the historical "all or nothing" analysis.

The Supreme Court reversed that decision and held that one restrictive covenant only invalidates other restrictive covenants when the clauses are "intertwined" — when one provision cannot be interpreted without reference to the other. The Court held that the geographic restriction was invalid but that it was not intertwined with the non-solicitation and non-disclosure covenants. So, those covenants were enforceable.

In finding the customer non-solicitation clause enforceable, the Court held that the employer had a legitimate interest in protecting its relationships with customers previously serviced by Dal Pra, even those customers he had not serviced for up to a year prior to his termination: "Dal Pra learned information either about the customers and/or about Star Direct's business that would give him a unique

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CONGRATULATIONS ERIC PAGELS!

Congratulations to Eric J. Pagels who, on October 11, 2009, completed the 32nd annual Chicago Marathon. This was Eric's second marathon. He plans to run his third in Green Bay in May of 2010.

A SIMPLE STEP TO MAINTAIN PERSONAL LIABILITY PROTECTION

By Eric Pagels

Some time ago, FOS obtained a judgment against an individual business owner for a debt of his corporation. The individual had not guaranteed the debt or otherwise agreed to be responsible for it. What happened?

The individual owner had not disclosed to our client that our client was contracting with the owner's corporation. So, even though the owner had gone through the steps of incorporating and forming a separate legal entity, which the owner believed would protect him from individual liability, the owner exposed himself to liability for his corporation's debt by failing to communicate his company's identity.

Because of that, it was unclear whether our client was contracting with the individual or the individual's corporation. When that happens, the company must prove that the corporation, not the individual, was the contracting party. The business must show that the customer knew (or should have known through disclosure) that the customer was dealing with the business entity, not its owner or representative.

What should the owner have done differently? The owner should have disclosed to this and other customers that they were dealing not with the owner himself, or an informal business name (a trade name or a "d/b/a"), but with a separately existing business entity, such as a corporation or limited liability company.

How could the owner have done this? By using his company's full corporate name on all communications and documents. This would include the "Inc.", "Corp." or "LLC" designations typically found at the end of a formally organized company's name. "Smith's Auto Mechanics, Inc." discloses the company's full corporate name. "Smith's Auto Mechanics" does not.

Where should the owner have disclosed the company's full legal name? On all material documents. These include all printed and promotional materials, contracts, quotations, terms and conditions, purchase orders, invoices, letterhead, emails, fax coversheets and checks.

When should the owner have made the disclosure? In all of its communications with its customers. At the very least, before contracting with its customers. The disclosure should be reaffirmed in all contracts, by having the full company name on all signature lines, with the owner signing only in a representative capacity on behalf of the company (i.e. president, secretary).

Business owners' liability is not common, but it does occur, with adverse consequences. Taking these steps ensures the problem won't happen to your business.

Keep liability where it should be—on the business, not on its owner.

QUESTIONS OR COMMENTS?

VISIT OUR REDESIGNED WEBSITE www.foslaw.com,

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MAKE SURE EMPLOYEES REMAIN "AT-WILL"

By Diane Slomowitz

Most employers know that Wisconsin is an "at-will" employment state. Under this doctrine, unless a written employment contract exists, an employee is "at will", and can generally be terminated without cause. That, however, is not the end of the story.

Even where an employee has not signed a formal employment contract, many documents can be construed as contracts, taking the employee out of the realm of the "at-will" doctrine. One example is the employee handbook.

The employee handbook customarily contains administrative provisions, including sick day requirements, vacation policies, holiday practices, provisions for anti-discrimination, and disciplinary, termination and grievance procedures. Many employers routinely have new hires sign a form acknowledging the employee's receipt and review of the handbook.

Employee handbooks are helpful to employers. They set expectations and procedures to be followed by all employees. Sometimes, however, a handbook can create a contract between an employer and its employees. This modifies the "at-will" nature of an employee's employment. If the employer does not follow the handbook's procedures, an employee could sue for breach of contract or wrongful discharge. Disputes in this area frequently involve discipline, termination or grievance procedures.

A well-crafted handbook, including provisions disclaiming the handbook's status as a contract, can go a long way to reducing an employer's legal exposure, while retaining the handbook's tangible benefits. So can an employer's ensuring that its administrative and human resources staff follow the handbook's procedures.

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PLAN EARLY TO PREVENT HOLIDAY PLACEMENT DISPUTES

By Stacey Moore

Every year, just before the holiday season arrives, family law lawyers see an increase in the number of phone calls and e-mails they receive. This is largely because many divorced or divorcing couples with children experience difficulties in setting a holiday placement schedule for their children. For those experiencing these types of problems, there are some things to keep in mind.

First, remember that court orders control. If there is an order in your case regarding the holiday placement schedule for your children, then you must follow it. The only exceptions are: (1) if a valid safety issue exists with respect to the children, or (2) if you and your spouse/ex-spouse *agree* that the holiday placement schedule should be modified.

If a valid safety issue exists, then, as a parent, you can refuse to send your child for scheduled placement with the other parent. If you have questions regarding the validity of your safety concern, an attorney should be consulted.

If you and your spouse/ex-spouse have reached an agreement regarding holiday placement that is different than what the court has previously ordered, then you can change the schedule. To be technically proper, you should submit your agreement in writing to the court and have the court sign off on the proposed change.

If no court order exists regarding the holiday placement schedule, both parents should consult with their attorneys regarding this issue *well* in advance of the holiday season. If one or both parents are unrepresented, then they should consult with one another, to the extent possible, to try to come to an agreement regarding the holiday schedule. Additionally, if you have not yet mediated regarding placement and custody issues, mediation should be scheduled right away, so that the holiday placement can be addressed with the mediator. Ultimately, if a holiday placement schedule cannot be agreed upon by the parents, the court will decide placement.

Finally, if a court order exists regarding holiday placement, but you wish to modify that order, you will need to bring that to the attention of the court by filing the appropriate motion. If your spouse/ex-spouse agrees to the modification, the process is fairly easy. All that needs to be done is to submit an order containing the proposed schedule change to the court for approval. Without an agreement between the parties, the court will ultimately decide the holiday placement schedule.

The bottom line is that if you know issues are going to arise regarding the holidays, it is in your and your children's best interests to address them early on, so that the holidays can be as relaxed and enjoyable as possible.

Star Direct…

Continued from page 1

advantage against Star Direct if he was allowed to pursue current and past customers, even those with whom he had not recently dealt."

Star Direct supports employers seeking to prevent former employees from interfering with customer relationships or using confidential company information. The decision newly holds that employers may include independent restrictive covenants in an employment agreement. While employers should not over-reach when drafting restrictive covenants, Star Direct prevents an employee from arguing that the invalidity of one restriction automatically voids all restrictions.

Given the complex case law interpreting Section 103.465, an employer should not use a restrictive covenant that has not been reviewed by an experienced attorney. Even if an employer has an existing agreement, now is a good time to have the non-compete reviewed to determine whether the restrictions are intertwined and whether more employer protection can be provided under Star Direct.

FOS RIDES FOR ZOO CHARITY

The FOS gang enjoying some down time after the ride

FOS was proud to participate in the September 14, 2009, "Ride on the Wild Side" family cycling benefit for the Milwaukee County Zoo. FOS participants included attorneys Michael Hanrahan, Allan Young and Thomas Shannon, office manager Judy Janetski, their families, and other firm members' families and friends.

Both the 17 and 27-mile rides began inside the Zoo grounds, then continued through Wauwatosa, along the Menomonee River and through the Oak Leaf Trail. After completing the ride, cyclists celebrated over lunch at the Zoo.

In addition to the beauty of the day, FOS participants enjoyed knowing that they were cycling (with or without blisters) to support a good cause.

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Fox, O'Neill & Shannon, S.C. provides a wide array of business and personal legal services in areas including corporate services, litigation, estate planning, family law, real estate law, tax planning and employment law. Services are provided to clients throughout Wisconsin and the United States. If you have any questions about these articles or any other legal topics, please call us at (414) 273-3939.

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IT'S TIME FOR YEAR END TAX PLANNING

By Gregory Ricci

Given the increased tax uncertainty from potential 2010 tax reforms and the 2011 expiration of the Bush tax cuts, year end tax planning is more important than ever in 2009. Benefits which, unless extended by Congress, will not be available for 2010 include:

- The option to deduct state and local sales taxes instead of state income taxes. If big ticket purchases are contemplated for 2010, consider making the purchase in 2009 instead;
- Sales and excise taxes on the first $49,500 of the purchase price for a vehicle purchased between February 17, 2009 and year end are deductible, subject to an income phase-out;
- A first-time home buyer credit of up to $8,000 exists for homes purchased before April 30, 2010, and in some cases, before June 30, 2010. Credits, which expire in 2009, are also available for energy saving home improvements;
- Individuals aged 70 ½ and older may make charitable contributions direct from IRA funds, without the imposition of an income tax, if the contribution is made directly by the IRA trustees to the charitable organizations;
- Businesses should consider making expenditures in 2009 which qualify for the 50% bonus first-year depreciation and the expensing option for up to $250,000 in qualified asset purchases; and
- Individuals aged 70 ½ can avoid taking their 2009 required minimum distribution from qualified plans.

Individuals should also consider the appropriateness of making 401(k) and IRA contributions and taking advantage of available higher education credits and tuition deductions.

The utility of these and other tax benefits must be evaluated according to each taxpayer's particular circumstances, and are best reviewed with a qualified tax professional. The time spent on tax planning now may be more than offset by the potential benefits resulting from such a review.