



**CLIENT SPOTLIGHT:
THIRST AND VINE**



Wine Bar - Retail - Bistro

Milwaukee is known for excellent restaurants and specialty food stores. However,

only Milwaukee's renaissance couple, John and Ann Nehring, have successfully managed to operate both.

Sendik's in Shorewood, and Groppi's in Bay View, are long-established, go-to-destinations for high quality grocery items, including hard to find ingredients and delicacies. Their names have become synonymous with the communities they enrich and serve.

John and Ann's newest Shorewood addition is Thirst and Vine, a specialty wine and gourmet food bistro. The bistro, featuring live music many nights, has quickly become a destination of choice on the East Side.

If that weren't enough, the Nehrings' V. Richard's Bakery will soon open in Brookfield, featuring an array of baked goods to be sold at that store and other outlets.

So, whether you're hungry or thirsty, for food or music, John and Ann Nehring have the right place for you.

GREG RICCI NAMED FIVE STAR WEALTH MANAGER

FOS congratulates shareholder Greg Ricci for being named a Milwaukee 2010 Five Star Wealth Manager, in the area of estate planning, by Crescendo Business Services, in partnership with *Milwaukee Magazine*.

As a Five Star Wealth Manager, Greg is a member of an elite group, consisting of less than six percent of the wealth managers in the metropolitan Milwaukee area with at least five years experience in financial services. Wealth managers include estate planners, attorneys, financial advisors, tax advisors, account-

ants and life insurance agents.

Greg was selected for this honor from an independent survey of high-net-worth households in the Milwaukee area. Background checks were conducted on each nominee and they were then further screened by a blue ribbon panel of financial service industry specialists.

Greg is also a CPA. He spent 3 years in the Tax Department of the "Big 8" public accounting firm Arthur Andersen prior to practicing law.

Greg focuses his practice on estate, tax and family business succession planning, advising closely held businesses and their owners in tax and business matters, probate and trust administration.

Greg's honor was announced in the July 2010 issue of *Milwaukee Magazine*.



TERMS AND CONDITIONS—BORING BUT CRUCIAL



By Fran Hughes

Your company receives a purchase order for an expensive machine. Its back page has several columns of small print, titled "Terms and Conditions." You skim them, but they are so boring, you don't really read them. You deliver the machine, invoice the customer, and wait for payment.

When payment doesn't come, you call the buyer, who claims the machine is defective. The buyer won't pay, but it wants your company to pay for the business it claims it lost because of the defect. You tell the buyer

that your company policy is to replace the machine, nothing more. Your buyer then reads from the small print that the seller is liable for all "consequential" damages—damages in addition to the machine's cost.

By not objecting to the buyer's terms and conditions, and not submitting your own, you have given the buyer legal ammunition to hold you liable for its claimed damages.

How can this nightmare be avoided?

By drafting and consistently using terms and conditions whenever you sell goods or provide services. When crafted and

used correctly, they can constitute binding contractual provisions, even without the buyer's written approval. By continuing, without objection, with a transaction after receiving a document containing terms and conditions, a party will be viewed as having agreed to them. A court would likely reach that result in the above example.

Terms and conditions usually cover many aspects of a transaction, including payment, delivery, title, inspection, claim and remedy issues. One important protection for a seller of goods is a limitation of the warranty.

Continued on Page 2

MAINTENANCE AND SUPPORT MODIFICATIONS: KNOW YOUR RIGHTS



By Diane
Slomowitz

I once had a divorced friend who paid child support and maintenance to her ex-spouse like clockwork, even though she had trouble making ends meet. Then, she lost her job.

My friend continued to make her support and maintenance payments from her personal savings. An educated, professional woman, she believed that her maintenance and child support obligations were set in stone.

My friend was wrong.

Wisconsin law provides a mechanism for an ex-spouse to ask the court to modify maintenance (unless a party has waived maintenance or its modification) and/or child support, where a change of circumstances has occurred. While the resolution of a modification request is within the court's discretion, a party having arguable grounds for modification should consider asking for the appropriate relief. The court may decide to modify an award of child support upon finding a substantial change in circumstances.

In a situation where child support is awarded as a fixed dollar amount, rather than as a percentage of income, where 33 months has passed from the last child support order, or where the amount of support awarded is different than under the percentage standard, a rebuttable presumption exists that a substantial change of circumstances has

occurred.

A presumption means just that—that a substantial change is presumed to exist. It does not limit the evidence which can be presented by both parties, or guaranty that the court will find that a modification is necessary. The party opposing modification may submit evidence to support his or her position. The court will decide whether that evidence is strong enough to rebut the presumption.

Even if a rebuttable presumption does not exist, the court may find a substantial change in circumstances where: the payor's income has changed; if support is not expressed as a percentage; the payor's earning capacity has

changed; the child's needs have changed; or other relevant circumstances exist.

As to maintenance, if payments are not expressed as a percentage of the payor's income, a substantial change in either party's cost of living may support a revision of maintenance. If payments are expressed as a percentage of income, a change in the payor's cost of living alone will be insufficient. This makes sense, since the percentage maintenance changes with the payor's income.

Any modification of child support or maintenance is effective prospectively only. No modification can occur before the date of the modification mo-

tion. So, a delay in filing a modification motion is the enemy of the movant and the hero of the opponent.

I don't know whether the court would have modified my friend's obligations, had she filed a modification motion. However, she didn't even know she had the option to do so. Contrary to that old saying, ignorance is not always bliss.

QUESTIONS OR COMMENTS?

CALL US
414-273-3939,

OR EMAIL US
info@foslaw.com

TERMS — *Continued from Page 1*

Properly drafted terms and conditions can effectively disclaim warranties, such as warranties of fitness for a particular purpose. A seller can also limit its liability by warranting goods only for a specific time period, and even then only allowing replacement as a remedy, not consequential damages.

Had the seller in the above example objected to the buyer's terms and conditions and submitted its own terms, with appropriate warranty disclaimers and limitations, the seller would have been in a much stronger legal position.

Terms and conditions are effective only if they are submitted and agreed to (even tacitly) before, not after, the transaction. They should be a part of every material document issued to a potential/actual buyer, from the first substantive contact regarding a potential order. This includes all proposals and quotations.

While terms and conditions should be included with invoices, by the time the product is produced and delivered, it may be too late. If your company conducts most of its business electronically, the terms and conditions should be contained in or be attached to each material electronic communication.

Terms and conditions are just as important for a buyer to submit to its seller. The buyer's terms and conditions should be included with quotation requests and purchase orders.

If both the buyer and the seller use terms and conditions, the situation may become extremely complicated. When that happens, the court may have to resolve this "battle of the forms" to determine the controlling contract terms.

Nonetheless, it is crucial to at least try to bind the other party to your company's terms and conditions. Otherwise, if a dispute arises, you risk setting your company up for a fall.

ARE YOU PROTECTED AGAINST ACCOUNTING FRAUD?



By Michael
Hanrahan

The \$34,000,000 Koss embezzlement sent shivers down the spine of most business owners. Do you know how you can prevent such a thing from happening to your company and, if it does occur, how to recover losses?

Business owners may believe that an independent audit by a reputable accounting firm will detect all material fraud, and that the firm will be liable for accounting malpractice if it fails to do so. The reality, however, is more complex.

I recently handled an accounting malpractice lawsuit which resulted in a six-figure settlement, and the potential pitfalls of these claims are fresh in my mind.

Of course, the best way to protect your company is to prevent embezzlement in the first place. Employee financial fraud is much less likely to occur if a company diligently adheres to strict internal controls.

An independent accounting firm's internal control assessment can help design a control plan. Do not assume that an independent auditor has a legal duty to assess internal controls as a part of a financial audit. The assessment of internal controls is not the purpose of a financial audit. An accounting firm must be specifically engaged to perform an internal control review.

Accountant financial reviews have three levels: audit, review and compilation. An audit provides the greatest level of financial scrutiny, and requires the auditor to "test" financial statements by analyzing supporting financial information. A review has more limited testing procedures, and a compilation is just a review of the financial statements, often without verification. Reviews and compilations are not designed to detect fraud, so your company should not rest easy if they detect no problems.

Even if a full audit is performed, an accounting firm is not automatically legally responsible for failing to detect any fraud. An audit firm will

only be liable if it fails to perform the work in accordance with the profession's standards.

Even if a firm is negligent, a lawsuit against it could be dismissed if the court finds that the audited company was equally at fault – often, when a company's managing officer (instead of a non-officer employee) commits the fraud.

An audit engagement contract between company and accounting firm may define many legal rights, such as the location for disputes, the time to bring claims, and recovery limitations. This contract should be carefully reviewed when choosing an audit firm, as all contracts are not equal.

Working to strengthen internal controls and regular audits are a step in the right direction—prevention. However, not everything can be predicted and prevented. Therefore, businesses should also obtain insurance coverage, if possible, for employee fraud/embezzlement. If the worst still happens, the attorneys at FOS are ready to determine whether legal remedies exist in your situation, and act on your behalf if they do.

AL YOUNG LEADS STATE'S TAX LAWYERS



Al Young has been named Chair of the State Bar of Wisconsin's Taxation Section!

Al has served on the Taxation Section's Board of Directors for 5 years. The Section provides a forum for members to discuss tax issues, offers information on tax law developments and works with the Internal Revenue Service and the Wisconsin Department of Revenue to promote good tax policy and resolve tax irritants. It also advocates for tax fairness and simplicity and submits *amicus curiae* briefs to the Wisconsin Supreme Court in tax cases of public interest.

FOS congratulates Al for his commitment to serving the best interests of our clients, the legal profession and the general public.

MEET OUR STAFF: LORI CZARNECKI



You've talked to her for years; when you need information from your file, contact numbers of and lists of services offered at the courthouse, or your attorney's schedule, she has the answer. You know her voice, but what about the face behind it?

Legal Assistant Lori Czarniecki has been with FOS for 32 years. During those years, she has worked with almost all of FOS' attorneys. Lori knows the ins and outs of the legal system and how to handle difficult situations or last minute emergencies.

FOS is proud of it's hardworking staff, who enable our attorneys to provide the efficient, quality services you deserve. The next time you're in the office say hi to Lori, or any of our other staff, so they know YOUR face.



622 N. Water Street
Suite 500
Milwaukee, WI 53202
Phone: 414-273-3939
Fax: 414-273-3947
www.foslaw.com

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.

Address label

IN THIS ISSUE

Page 1

Terms and Conditions
Greg Ricci—Five Star Wealth Manager

Page 3

Accounting Fraud
Al Young Leads State's Tax Lawyers

Page 2

Maintenance and Support Modifications

Page 4

Deducting Home Mortgage Interest

This newsletter is for information purposes only and is not intended to be a comprehensive summary of matters covered. It does not constitute legal advice or opinions, and does not create or offer to create any attorney/client relationship. The information contained herein should not be acted upon except upon consultation with and the advice of professional counsel. Due to the rapidly changing nature of law, we make no warranty or guarantee concerning the content's accuracy or completeness.

DEDUCTING HOME MORTGAGE INTEREST



By Al Young

Did you know that not all home mortgage interest is tax deductible? Interest on only two types of home mortgages is deductible - Acquisition Indebtedness and Home Equity Indebtedness.

Acquisition Indebtedness is a mortgage incurred in buying or substantially improving a principal residence and/or one other home. Interest on Acquisition Indebtedness is fully deductible if the amount of the Acquisition Indebtedness does not exceed \$1,000,000 (\$500,000 for married indi-

viduals filing separately). If the amount of the Acquisition Indebtedness exceeds the dollar limit, only the interest paid on that portion of the mortgage that equals the limit is deductible. For example, if Acquisition Indebtedness is \$1,200,000, 5/6 of the total interest paid during the year is deductible.

Home Equity Indebtedness is any other mortgage up to \$100,000 (\$50,000 for married individuals filing separately) as long as the sum of the Home Equity Indebtedness and the Acquisition Indebtedness does not exceed the fair market value of the home. The mortgage must be recorded with the local Register of Deeds.

There are several common scenarios where mortgage interest is not deductible. The most common is where a mortgage is refinanced in an amount that exceeds the balance of the old mortgage by more than \$100,000. The refinanced amount equal to the balance on the old mortgage qualifies as Acquisition Indebtedness. Assuming that there is no other Home Equity Indebtedness, \$100,000 of the refinanced amount qualifies as Home Equity Indebtedness. Interest on the remainder of the refinanced mortgage is not deductible.

Sometimes, mortgages are given by relatives. The borrowers sign a promissory note, but a mortgage is not recorded with the

Register of Deeds. Failing to record the mortgage renders all of the interest on the mortgage nondeductible.

A third common situation arises when a taxpayer is subject to the Alternative Minimum Tax ("AMT"). Interest on Acquisition Indebtedness is deductible for the AMT, but interest on Home Equity Indebtedness is not. For taxpayers subject to the AMT, interest on a second mortgage or other Home Equity Indebtedness is not deductible.

Call me before refinancing your mortgage. I will help you to structure it to take maximum advantage of the available tax deductions.