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FOS NEWS - *Our clients come first*

Editor: Diane Slomowitz

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YOUR INSURER AND YOUR LEASE—A MATCH MADE IN COVERAGE

By Francis Hughes

I've negotiated oodles of commercial leases during my 23 years handling real estate matters at FOS. While many terms within leases vary from deal to deal, all lease negotiations involve one crucial section—the insurance provision. This obligation, which should be easily fulfilled, should not be sidestepped by lessees and their insurers. Other contracts, such as service agreements or supply contracts, often have insurance requirements, and this article applies equally to those.

Commercial lessors commonly require that lessees obtain certain types and amounts of insurance to cover their business, their property or the leased premises, and name the lessor, and its mortgagee, as additional insureds. To comply with these provisions, lessees usually contact their insurers, summarize the insurance they think they need, get a quick "Ok" from their agent, and go about their business.

If lessees do this and no more, and if a casualty occurs, triggering the "required" coverage, the lessee may, to its surprise, discover that its actual coverage is different or less than (and in violation of) the coverage required under the lease. If this happens, the lessee may have put itself into severe financial jeopardy, self-insuring the loss.

Just "having insurance" is not enough to comply with a lease's insurance provision. Some provisions are short and clear. Many others, however, are long, detailed and technical, and they are that way for a reason. The lessor wants to make sure that it is more than adequately protected if one or more risks occur during the term of the lease.

Neither lessees, nor attorneys, are insurance underwriters. Lessees should have their insurance and indemnity provisions reviewed by the underwriter for confirmation, in writing, that the contractually required coverage is provided by the policy.

This is easy to do, and is an assurance of protection. If you are unsure of the coverage you have, send the insurance and indemnity provisions of all of your existing leases and other contracts to your insurer. Double check your required coverage, and be sure to do the same for any modifications to existing insurance provisions or new leases. This may save you unnecessary trouble and expense in the future.

FOS WELCOMES KEN BARCZAK

Ken Barczak, a noted estate planning and tax attorney, has joined FOS. Ken is Of Counsel to the firm. "Of Counsel" means that an attorney has a special independent relationship with a law firm.

Ken's practice has been based in Waukesha County for the past 32 years and will continue to be based there. Ken recently opened a new office on the 2nd floor of the Elm Grove branch of Town Bank located at 131st and Watertown Plank Road.

All FOS attorneys have access to Ken's office space for client meetings.

In his Of Counsel status, Ken will also be able to transition his clients to FOS.

Ken is a CPA as well as an attorney. He is a Fellow of the American College of Trusts and Estate Counsel, has been listed in Best Lawyers in America, and has been listed in Wisconsin Super Lawyers magazine for the past five years. Ken is a member of the Board of Directors of the Real Property, Probate and Trust Law Section of the State Bar and is a former Chair of the section.

Please join us in welcoming Ken to FOS.

IN THE SPIRIT OF GIVING

In the spirit of giving, and in lieu of sending holiday cards, this year FOS is making a donation to Despensa de la Paz, a local food pantry. Despensa de la Paz was the site for the 2011 FOS Service Day.

FOS TO PRESENT SEMINAR ON EMPLOYEE THEFT

Employee theft has been in the headlines recently and the losses can be enormous. FOS, together with Wipfli CPAs, will be presenting a program entitled "Employee Theft: Is It Happening to You? Practical Steps to Identify, Protect and Avoid" on Thursday, January 19, 2012 at 3:00 p.m. at the Crowne Plaza in Wauwatosa, WI.

The program is directed toward business owners and managers, and is intended to offer practical advice regarding identifying, protecting against and reacting to employee theft.

Please contact FOS Office Manager, Judy Janetski, via phone at (414) 273-3939, or via email at jkjanetski@foslaw.com if you are interested in attending.

TAKE THAT SUMMONS OUT OF THE DRAWER

By Diane Slomowitz

A reasonably dressed man comes to your office, hands you some papers (a summons and complaint) and says "You've been served." You read the documents, but don't understand them. You put them on your desk's "lawyer" pile, to discuss the next time you meet with counsel.

Weeks later, you prepare for that upcoming meeting. You see, from the papers' first page (the summons) that the company was supposed to have responded 5 days earlier. No problem, you think. It's just a few days late. You call your lawyer. He groans.

What gives?

After a complaint is filed with the court, the complaint and a summons are "served"—usually by direct personal delivery—on the defendant. At that moment, the clock for the defendant's response starts ticking. The summons lists the response time, usually 20 or 45 days depending on the claim, and response filing procedures.

This deadline on a summons is critical. If it is missed by even one day, the court can enter a default judgment against the late defendant as to liability, and sometimes as to damages, without the court hearing the defendant's version of the dispute. Once that happens, the judgment can become a lien on real property, can hurt the company's credit rating and potentially violate its loan agreements, and trigger post-judgment collection efforts, including garnishment of bank accounts.

A default judgment can, under certain limited circumstances, be reopened. However, if it can be done, it is difficult and costly to do so. Not getting a summons and complaint to your lawyer, not getting legal documents from one company department to another, or forgetting about them due to other business needs, may constitute neglect, but not legally excusable neglect.

There are ways to prevent this potential catastrophe. First, create a mandatory policy which provides an immediate procedure for employees personally served with legal documents (or receiving them by mail, fax or email). Designate one person to receive all such documents, and have a designated back up person for when the former is absent. Require the person(s) to personally and immediately deliver the documents to a designated superior who is charged with handling legal notices. Then, create and distribute a document system, which charts the date of service, the response due date, and the steps taken to timely forward the complaint to the company's lawyer.

Second, make sure that the policy you've established is known and understood by all employees, is fully implemented and rigorously enforced. Make sure the left hand knows what the right hand is doing. And, double and triple check, not only that legal documents are timely sent to the company's lawyers, but that counsel is advised of, and receives them well before the response deadline.

FOS attorneys can help your company create a workable policy regarding legal documents. In addition to protecting the company, such a policy may reduce the piles on your already overcrowded desk.

TERMINATING THE PROBLEM EMPLOYEE

By William Soderstrom

Everyone who has owned, managed, or worked at a business has probably run into the Problem Employee. The Problem Employee is a person who causes difficulty in a myriad of ways in the workplace. Often, they have been with the employer for years, and can be in a position of responsibility. They are the opposite of the team player. The Problem Employee will often require countless human resource hours to deal with the problems they create. In the worst of circumstances, the employer can't take steps necessary to better the business because the Problem Employee, one way or another, will prevent it. Proper progress is thwarted by the Problem Employee because they have to be worked around to accomplish the company's goals.

The Problem Employee is only a political issue until the employer considers whether termination of the Problem Employee is an alternative. At that point, the political problem can become a legal one.

Wisconsin is an "at will" state, which means that unless there is a contract in effect, employees can be terminated for any reason or even no reason, as long as it's not a prohibited reason. Like most states, Wisconsin prohibits discrimination against various protected classes. Wisconsin at last count listed 17 of them, but the main ones prohibit discrimination based upon race, sex, age, disability and religious observance. Many times a Problem Employee will fall into one of these categories. Many employers then shy away from terminating the employee, reasoning they don't want to "buy a lawsuit."

The law, though, does not require that result. Employees in a protected class can be terminated; they just can't be terminated because of their class. They can still be terminated if they are poor employees.

However, with someone in a protected class and who has exhibited the personality that usually accompanies the Problem Employee, an employer has to be more careful making sure the reasons for termination are well documented. Good documentation will almost always provide a strong defense to a potential claim.

Timing of the termination is also important. Sometimes a Problem Employee will present the perfect opportunity-perhaps one more blowup with a supervisor. Those opportunities should not be squandered. Other times the termination might be coordinated with a new initiative of the employer. Developing a strategy to prepare for the termination will pay dividends down the road.

Over the years I have seen the havoc that Problem Employees can create with even well run companies. If management finds itself inordinately dealing with problems that come down to one employee, they owe it to themselves, the future of the company and the other employees to resolve it. This often will mean preparing and implementing a plan to terminate the Problem Employee in a fashion that exposes the company to the least legal risk.

We have many years of experience dealing with these issues. If you are suffering from a Problem Employee, feel free to call us.

SMALL CLAIMS INCREASE

Recently, the monetary limit for small claims actions in Wisconsin doubled, from $5,000 to $10,000. This means that cases that were previously required to proceed through the more complex, and more expensive, large claims division of the state courts can now be brought in small claims court.

While many view small claims as the "no need for a lawyer" court, the process has pitfalls for the uninformed litigant. If you contemplate filing a case within the new monetary limits, FOS' attorneys are available to consult with you and walk you through the small claims procedures.

FOS ON THE MOVE

FOS shareholder Matt O'Neill recently presented "Minority Shareholder Litigation: Rights and Responsibilities" at the Wisconsin Bar Association's Business Counsel Crisis Management Institute conference.

Matt O'Neill was also recently named a "key individual" attorney in the area of general commercial litigation by Chambers and Partners, a publisher of legal directories in the U.S.

FOS shareholder Greg Ricci will be a presenter at the National Business Institute's "LLCs: From Formation to Special Uses" seminar on December 12 at the Milwaukee River Hilton Inn.

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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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IN THIS ISSUE

YEAR-END PLANNING: IT'S NOT JUST ABOUT THE HOLIDAYS

By Peter White

Tax day (April 15th) may be months away, but the 2011 tax year will come to an end soon. Uncertainties continue to exist in the tax world, as many current laws will expire over the next two years. This makes year-end planning for the 2011 tax year as important as ever.

For example, the following benefits are set to expire at the end of 2011, unless Congress extends them:

- Businesses that purchase capital assets in 2011 can elect to take 100% bonus depreciation;
- Individuals aged 70-1/2 and older may make charitable contributions of up to $100,000 directly from IRAs, without the imposition of an income tax;
- Individuals can elect to deduct state and local sales tax in lieu of state and local income taxes;
- Alternative Minimum Tax ("AMT") exemptions were increased to $74,450 for joint filers and $48,480 for unmarried filers for 2011;
- The qualified tuition deduction was extended through 2011;
- A number of residential energy-efficient improvements can qualify for a tax credit; and
- Individuals can exclude 100% of the gain realized on the sale of "qualified small business stock" held for more than five years and acquired between September 28, 2010 and December 31, 2011.

In addition, the estate tax is currently set to expire in 2012. Even with the uncertainties over whether and how that expiration will occur, estate planning opportunities exist in this area.

Now is the time to consult with a tax professional to determine which tax benefits are available to you for 2011 and succeeding years. FOS stands ready to help you plan now to reap tax savings in the future.

Call FOS today with tax questions or for help with year-end tax planning.

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