

# ELECTION DAY REMINDERS FOR EMPLOYERS

While for some it may not come fast enough, election days will soon arrive—September 9 for primary contests, November 4 for the general election. As a reminder, Wisconsin law gives time off to employees to vote or work as an election official.

Employees must be allowed up to three (3) successive hours off to vote on election day. However, the employee must request the time off before the election day. The employer may decide what time of day the employee may leave and is not required to pay the employee for missed time.

If an employee wishes to act as an election official, he or she must be allowed to take off for all or any part of the work day, if the employee has given advance notice of at least seven (7) days. This is an uncompensated leave.

There are penalties for violating these rules. Failure to give time off for voting may result in six months' imprisonment or a fine of up to \$1,000. Any person who attempts to influence a voter by threatening discharge, reduced wages or promising increased wages may be fined \$100.

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## EMPLOYMENT CONTRACTS AGAIN BEFORE THE SUPREME COURT

Employers who want to protect their customer base and their businesses often ask their employees to sign an agreement pledging not to solicit customers or compete in the same area when they leave the employer. Two recent Court of Appeals cases demonstrate just how difficult writing an enforceable agreement on these two points can be.

In *Star Direct, Inc., v. Pra*, 2008 WI App 17, the Court of Appeals addressed whether one invalid clause in an employment agreement invalidates the whole agreement, even though the agreement explicitly provides that if a court finds one provision unenforceable, the rest of the agreement remains in place.

The Court found that one provision of the agreement, the “business clause,” which restricted Mr. Dal Pra from engaging in any similar business within a fifty mile radius that was substantially similar to or in competition with the employer’s business, to be both overboard and vague.

The second provision of the agreement, the “customer clause,” provided that Mr. Dal Pra

could not entice away any customers that Star Direct had before Dal Pra left the business for a period of twenty four months. The Court did not discuss whether this provision, on its face, was unenforceable. Instead it held that the provision governed similar types of activities and restraints and was indivisible from the business clause. Having determined that the business clause was unenforceable, the Court held that the intertwined customer clause was also unenforceable.

The employer also lost its bid to impose a penalty period for violation of an employment contract in *H and R Block E. Enter v. Swenson*, 2008 WI App 3. H and R Block's employment agreement provided that both its noncompetition and nonsolicitation covenants ran for two years after termination. However, both covenants also provided that if there were a violation of the agreement, the two year period would be extended by any period that the violation was taking place.

As in Star Direct, the Court applied four rules of legal construction in interpreting employment agreements: 1) they are prima facie suspect; 2) they must withstand strict scrutiny to pass legal muster as being reasonable; 3) they will not be construed further than the language of the contract absolutely requires; and 4) they are to be construed in favor of the employee.

In that context, the Court held that the language of H and R Block's agreement was unreasonable and hard to construe, and therefore not enforceable.

The last word has not been written, however. The Supreme Court has agreed to review the Star Direct case. H and R Block has also petitioned for Supreme Court review, but has stayed its petition until Star Direct is resolved. So, stay tuned.

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## **E-VERIFY MODERNIZES THE EMPLOYMENT VERIFICATION PROCESS**

The E-Verify system is the best available means for employers to maintain a legal workforce. E-Verify allows employers to confirm employment eligibility in seconds, virtually eliminates the hassle of social security number mismatch letters, and improves the accuracy of wage and tax reporting.

E-Verify is an Internet-based program that is free to participating employers. The United States Citizenship and Immigration Services, which is part of the Department of Homeland Security (DHS), and the U.S. Social Security Administration (SSA) jointly operate the E-Verify system. As of December 2007, more than 33,000 employers had registered to participate in

E-Verify, and nearly 3 million employee eligibility searches had been completed.

According to DHS and SSA, 92% of the searches produced employment eligibility confirmation within seconds.

Employers may use E-Verify to confirm the employment eligibility of new hires. If employers choose to use the system, E-Verify must be used for all new hires regardless of citizenship status. To use E-Verify, the employer must register online and post notices of participation. After registration is complete, employers have access to an automated system which searches the databases of the DHS and SSA. The employer submits the information supplied by the employee on the Form I-9 into the E-Verify system. Within seconds, the system will return one of three results: Employment Authorized, SSA Tentative Non-Confirmation, or DHS Verification in Process.

If the system returns a finding of Employment Authorized, the employer then records the system generated verification number on the Form I-9. If there is a SSA Tentative Non-Confirmation, which means the employee's social security number does not match the employee's name, the employer must follow the proper procedure to notify the employee of the SSA mismatch. The employee then has an opportunity to contest the finding. If the employee does not contest the Tentative Non-Confirmation, it is considered a Final Non-Confirmation, and the employer may terminate the employee. If the system shows a DHS Verification in Process, DHS will respond to the employer with a finding of Employment Authorized or Tentative Non-Confirmation, generally within 24 hours.

Wisconsin employers are not required to participate in E-Verify; however, nearly half of the other states require, or have pending legislation to require, employer participation in the public sector or both public and private sectors. Employers interested in registering for the E-Verify program may do so at <https://www.vis-dhs.com/employerregistration>. If you are interested in learning more about the E-Verify program, please contact Crystal Fieber at (920) 457-8400 or [crystal.fieber@www.wilaw.com](mailto:crystal.fieber@www.wilaw.com).

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## **MUST AN LLC BE REPRESENTED BY AN ATTORNEY IN A LAWSUIT?**

A small business man recently called and indicated that a limited liability company he ran had been sued. He had filed a response to the allegations of the complaint with the court and sent a copy to the attorney for the plaintiff. The plaintiff's lawyer immediately filed a motion to strike the answer and for default judgment on the basis that the response was not a proper answer to the complaint because it failed to follow the requirements of an answer, and

because it had not been signed by an attorney. Since the time to file a proper answer had expired, the plaintiff asked the court for a default judgment.

About ten years ago, the Wisconsin Supreme Court was asked whether a notice of appeal by a corporation signed by an officer of the corporation who was not an attorney was valid. The court concluded that it was not a valid notice of appeal, and therefore, the appeal was dismissed. There were primarily two bases for that decision; first, under Wisconsin statutes, a corporation, except in small claims court, must be represented by an attorney, and second, in that case, the notice of appeal filed by a person who was not an attorney was determined to be the unauthorized practice of law, that is to say, the practice of law by someone other than a licensed attorney.

Wisconsin, like most states, imposes penalties for the unauthorized practice of law. The unauthorized practice of law is a crime which may result in fines or imprisonment and may be punished as a contempt of court.

While an individual is permitted to represent himself or herself in a lawsuit, a corporation is not an individual. Only a person authorized to practice law may appear in court for a corporation. The only exception is small claims court.

Limited liability companies have been permitted to exist in Wisconsin for approximately 15 years. LLCs attempt to combine some of the advantages of the partnership form of doing business and the corporate form of doing business. In many ways, LLCs attempt to avoid some of the formalities required of corporations. There are, however, risks when avoiding those formalities if, for example, there is a dispute between the owners, or, as in this recent matter, if a member of an LLC attempts to respond to a complaint. In this recent matter, a proper answer was filed within a day after our firm was retained. In addition, written arguments were made to the court relating to the discretion to be exercised by the trial court as to whether a default judgment was appropriate. Prompt action in filing a proper answer was one factor considered by the court. Significant costs were incurred in order to regain the ability to defend this lawsuit.

Whether an LLC could avoid this holding relating to corporations has not been directly addressed by the Wisconsin appellate courts. We of course would recommend that your business not be the business that has to make those arguments. Those arguments were unsuccessful ten years ago in a slightly different factual situation. In our recent case, attempting initially to avoid the cost of hiring an attorney resulted in substantially higher costs and the risk that the defendant would be barred from defending the lawsuit.

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# PROTECTING YOUR ASSETS: AUTOMOBILE LIABILITY INSURANCE MAY NOT BE ENOUGH

“Don’t worry, I have plenty of automobile insurance.” Such a belief is shared by many individuals, including those who have just been injured in a serious automobile accident as a result of the negligence of another, and also by those who have just caused one. In either situation, insurance coverages and the amount of such coverages are of paramount importance. Insurance is a complicated subject and, therefore, it is not surprising that many people do not completely understand what coverages they have, or do not have. Insufficient protection, regardless of who caused the accident, is commonplace.

When an individual consults an attorney due to injuries that were caused by another driver, one thing an attorney does early on is evaluate the amount of insurance available to compensate the injured party. All too often with serious injury cases, there is inadequate insurance and, consequently, the injured party does not receive fair and reasonable compensation. Generally, Wisconsin does not require drivers to have automobile insurance. Even when they do have insurance, however, Wisconsin law allows insurance carriers to sell drivers as little as \$25,000 per person and \$50,000 per accident of automobile liability coverage. If the party causing your injuries has only \$25,000 in insurance limits, but your injury claim is worth \$425,000, for example, you may then be forced to try to recover the additional \$400,000 from the wrongdoer’s personal non-exempt assets. A lot of people do not have any or many non-exempt assets and, as a result, injured parties are often times insufficiently compensated for their injuries.

What can you do to protect yourself and your family from an underinsured wrongdoer? One easy answer is to purchase “underinsured motorists” coverage (often referred to as “UIM” coverage). UIM coverage is purchased under your own policy and acts as supplemental coverage to the other driver’s liability limits. For example, if the wrongdoer has limits of \$25,000, you have a claim worth \$425,000, and you have \$500,000 of UIM coverage, you would receive \$25,000 from the wrongdoer’s carrier and the remaining \$400,000 from your own carrier.

Why is it that so many people don’t have, or don’t have enough, UIM coverage, especially when the extra premium for UIM coverage is nominal compared to the protection it provides? Nobody effectively informed them that this coverage was available and/or its purpose was not adequately explained are the likely answers. Prior to 1995, neither insurance companies nor agents were required to inform insureds that UIM coverage was available. The Wisconsin legislature recognized this problem and the resulting shortfall to individuals injured by underinsured motorists, and insurers have since been required to provide written notice to insureds informing them of the availability of UIM coverage as well as a brief description of

the coverage. The 1995 law was helpful, but interpreting this law resulted in much confusion and debate. The Wisconsin Office of the Commissioner of Insurance, recognizing the importance of UIM coverage and policyholder knowledge of its availability, took action earlier this year by amending its administrative rules and creating others. While insurance companies have notice obligations that have now been clarified, policyholders should take steps to make sure they understand this important coverage.

Although “uninsured motorists” coverage (often referred to as “UM” coverage) is better understood and is found in every Wisconsin automobile liability policy as required by Wisconsin law, that law only requires that limits of \$25,000 per person and \$50,000 per accident be included in each policy. The previous example demonstrates that higher UM limits will also provide enhanced protection when you are injured by a wrongdoer who has no automobile liability insurance. Again, the premium for increasing your UM coverage is minimal.

On the other hand, if you cause an automobile accident, severely injuring someone, and your liability coverage is insufficient to pay the injured party’s damages, your non-exempt assets can be stripped away from you to pay the deficiency. To protect your assets and future earnings, sufficient liability insurance is necessary. Umbrella (or excess) policies minimize your personal exposure by providing supplemental coverage to your underlying policy limits. A large limits umbrella policy that supplements your automobile and homeowners’ liability policies may be well worth the additional premium cost.

Significantly, an umbrella policy purchased by you may also be utilized as a source of compensation to you; that is, when an uninsured or underinsured driver causes damages to you which exceed that wrongdoer’s insurance limits and also exceed the UM and UIM limits of your own automobile policy. However, you must specifically purchase UM and UIM coverages to be included as part of your umbrella. A common mistake is to assume that your umbrella policy includes UM and UIM coverages, just because your automobile policy has these coverages. Although not all insurance carriers offer UM or UIM coverage as part of an umbrella, those that do provide it do so at a relatively low premium cost.

Loss prevention measures are the ideal way to minimize injuries and liabilities, but accidents happen and preparing for the consequences must be done proactively. Regardless of who causes the injuries, individuals have the control to increase their recovery potential and minimize their exposure through the purchase of proper and sufficient insurance.

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# MAKE SURE YOU ASK FOR WHAT YOU WANT - INSPECTIONS, TESTING, OR BOTH

One of the smartest things a potential homebuyer can do in connection with the purchase of a new home is to have an inspection of the property conducted by a licensed home inspector prior to closing. Such inspections tend to be money well spent as they provide the potential homebuyer with a more detailed picture of the condition of the house and the various components and mechanicals that may be otherwise unknown to the untrained eye.

While the commonly used WB-11 Residential Offer to Purchase provides for a home inspection contingency, some buyers are surprised to learn that the standard language contained in this form offer places certain limitations on what the seller is permitting the buyer to do by agreeing to an inspection contingency. As such, a buyer needs to make sure that they ask for what they want.

The WB-11 Residential Offer to Purchase defines “inspection” as an “observation of the property, which does not include testing of the property other than testing for leaking carbon monoxide or testing for leaking LP gas or natural gas used as a fuel source.” A typical home inspection will address the condition of the foundation, basement, structural components, roof, attic and visible insulation, as well as the walls, ceilings, windows, doors, and floors. It will also cover the heating system, air conditioning system, plumbing, and the electrical systems. However, testing, other than testing for leaking carbon monoxide or LP gas or natural gas, is not authorized in the WB-11 Residential Offer to Purchase.

The WB-11 Residential Offer to Purchase defines “test” as the “taking of samples of materials such as soils, water, air or building materials from the Property and the laboratory or other analysis of these materials.” While buyers may look at the definition and decide that a “test” would be an unnecessary expense, the fact is that some very important information about the property may not be discovered unless certain testing is performed. For example, depending on the age, condition and history of the house, there may be mold, lead based paint or possibly asbestos present. However, testing for the presence of such hazards is not permissible in the standard WB-11 Residential Offer to Purchaser.

Additionally, another potential hazard that homebuyer should consider is a radon test. Radon is naturally occurring, colorless, odorless gas and has been connected to health problems due to concentrated exposure. Because every region in the state has been found to have some elevated levels of radon and since you cannot predict radon levels based on state, local, and neighborhood radon measurements, it has been recommended that every homebuyer (and every homeowner) should have a radon test performed. Again, however, based on the standard WB-11 Residential Offer to Purchase language, a Buyer would not be permitted to have a radon test completed unless specific language is added to the offer which would

permit such testing.

By ensuring that your offer to purchase properly addresses your home inspection and testing needs, you can move forward with your home purchase with peace of mind.

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## A MOMENTARY SIGH OF RELIEF FOR LAND CONTRACT VENDORS IN WISCONSIN

The Wisconsin Court of Appeals, in *Jakubow v. Lichosyt*, 2007 WI App 150, recently addressed the interplay of competing interests to real property where a land contract is involved: Namely, that of a third-party attempting to execute on a judgment lien against a land contract vendee's equitable interest in real property and that of a land contract vendor who has brought an action for strict foreclosure on the same real property. The Court of Appeals' analysis and determination of the parties' respective rights should be comforting to land contract vendors in Wisconsin ... at least for the time being.

The facts in *Jakubow* are relatively straightforward:

- In 2002, Lichosyt entered into a land contract with Jakubow to purchase real property in Sauk County, Wisconsin (the "Property"). The purchase price was \$4,350,000, with \$350,000 to be paid upon execution of the land contract. At the time of the Court of Appeals' decision, the value of the Property was \$6,668,000.
- In 2004, Republic Bank of Chicago (the "Bank") filed and docketed with the Sauk County Circuit Court a money judgment taken against Lichosyt in an Illinois court proceeding. The Bank then attempted to execute on the Property, requesting a judgment of foreclosure and sheriff's sale of the Property and distribution of proceeds to creditors.
- Asserting that its land contract vendor's lien was superior to the Bank's judgment lien, Jakubow filed a complaint for strict foreclosure naming both Lichosyt and the Bank as defendants.
- Subsequent to the filing of the strict foreclosure action, Lichosyt and Jakubow stipulated that Jakubow was entitled to strict foreclosure and, at the same time, Lichosyt executed a quitclaim deed of the Property to Jakubow releasing his right, title, and interest in and to the Property arising from the land contract. Lichosyt also waived any redemption period during which he would have had the opportunity to pay Jakubow what was owed in full or lose his interest in the Property.
- Following execution of the stipulation and quitclaim deed, Jakubow moved for summary judgment in her strict foreclosure action. The Bank opposed the motion, arguing that the Bank itself had a right to redeem the Property since substantial equity existed in the land above that which was owed to Jakubow. The Bank also argued that Jakubow's acceptance of a quitclaim deed from Lichosyt required dismissal of her strict foreclosure action.

- The trial court disagreed with the Bank and granted Jakubow's motion for summary judgment, ordering that all interests of the Bank in the Property be foreclosed with title vesting in the name of Jakubow. The Bank appealed the trial court's order, asserting, in part, that Jakubow's acceptance of the quitclaim deed from Lichosyt should have effectively terminated the strict foreclosure action, thereby preserving the judgment lien recorded against the Property.

The Court of Appeals began its review of the trial court's decision by identifying the respective rights that each party held. Lichosyt, as a land contract vendee, acquired equitable title to the Property while Jakubow, a land contract vendor, retained legal title as security for the unpaid balance of the land contract. Unless the land contract would have stated otherwise, equitable title effectively gave Lichosyt full rights of ownership, including the ability to sell, lease or encumber the real estate subject to the rights of the legal titleholder, Jakubow.

The Court noted that, following Lichosyt's default under the terms of a land contract, Jakubow could have sued for the unpaid purchase price of the land contract, for specific performance, or asserted the most common vendor remedy - an action for strict foreclosure. In a strict foreclosure action, a land contract vendor foregoes its right to collect the amount remaining on the debt and instead recovers the real property. Typically, the court sets a redemption period in which the vendee must pay up or lose its interest in the land.

The Bank, with a properly docketed judgment against Lichosyt, held a judgment lien on all real property of Lichosyt. As a judgment lienholder, the Bank was entitled to collect by executing on real property of Lichosyt, a process which includes a sheriff's sale upon notice with a right of redemption thereafter for Lichosyt and other prescribed persons. A judgment lien, however, creates no estate, interest or right of property in the land which may be bound for its satisfaction.

The Bank correctly stated that its judgment lien attached to the real property in which Lichosyt, through his land contract, had equitable title. The Bank, however, attempted to further contend that, by accepting a quitclaim deed of Lichosyt's equitable interest, Jakubow's strict foreclosure action immediately terminated and, thus, the Bank's judgment lien could not have been foreclosed. Moreover, the Bank argued that Jakubow's legal title merged with Lichosyt's equitable title upon execution of the quitclaim deed.

According to the Wisconsin precedent, if the equitable title of a vendee and the legal title of a vendor merge into one interest of the vendor, then lienholders may reach all of a vendor's interest in real property. The Court of Appeals recognized such precedent but also made clear that a claim to such equity is cut off by a judgment for strict foreclosure. The Court of Appeals rejected the Bank's argument that Jakubow forfeited her right to obtain a strict foreclosure judgment by accepting Lichosyt's quitclaim deed.

As noteworthy as the majority opinion in *Jakubow* was a dissent that, more or less, informally certified a much broader issue for consideration should this case proceed to the Supreme Court of Wisconsin. Particularly, the dissent identifies widespread inequity in the longstanding traditions of Wisconsin and other states in the way that land contract foreclosures are distinguished from traditional mortgage foreclosures (where, unlike strict foreclosure actions, junior lienholders and mortgagees routinely share in proceeds from foreclosure sales.)

The dissent views *Jakubow*'s sole, unencumbered entitlement to the Property valued at \$6,668,000 as evidence of the inequitable nature of strict foreclosures in Wisconsin. The Property was sold to Lichosyt in 2002 for \$4,350,000 with a down payment of \$350,000, leaving \$4,000,000 to be paid pursuant to the land contract over the course of seven years. The Bank's judgment lien totaled about \$2,000,000. According to the dissent, there should have been more than enough equity in the Property to satisfy the interests of both *Jakubow* and the Bank.

The dissent provides ample authority from which the Supreme Court of Wisconsin could be swayed to change the way Wisconsin views rights of various parties relative to strict foreclosure actions, including citation to a United States Bankruptcy Court opinion from the Western District of Wisconsin that is squarely at odds with the Court of Appeals' opinion in *Jakubow*. See *Berge v. Sweet*, 33 B.R. 642 (Bankr. W.D. Wis. 1983) (addressing a factual situation identical to the one in *Jakubow* but concluding that a land contract vendee's substantial equity in a farm could not be cut off from the grasp of creditors by a judgment of strict foreclosure.)

While, for the time being, *Jakubow* safeguards a land contract vendor's right to receive property following a strict foreclosure unencumbered by liens against the former vendee, as the title of this article warns, *Jakubow* may be a momentary victory for land contract vendors. The rationale of the dissent and its potential effect on the way Wisconsin courts handle strict foreclosure actions warrants further monitoring.

For further information on *Jakubow* and other cases or issues relating to land contracts or foreclosure actions, contact John R. Schreiber of O'Neil, Cannon, Hollman, DeJong, S.C.'s Real Estate and Construction Practice Group.

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## **WISCONSIN COURT OF APPEALS RULES IN FAVOR OF OCHD'S CLIENT**

On July 3, 2007 the Wisconsin Court of Appeals issued a decision in favor of OCHD's client,

Mitsubishi Heavy Industries America, Inc., in an appeal of a case arising out of the construction of Miller Park, home of the Milwaukee Brewers. That case involved the issue of which of Mitsubishi's insurers, Federal Insurance Company or Travelers Property Casualty Company of America, had the obligation to pay the attorney and expert fees incurred by Mitsubishi in defending the 2002 lawsuit filed against it by the Southeast Wisconsin Professional Baseball Park District.

In the lawsuit filed by the Baseball Park District against Mitsubishi, the Baseball Park District sought \$50 million in damages from Mitsubishi for Mitsubishi's alleged negligent design and erection of the stadium's retractable roof. Mitsubishi denied that the roof contained any defects caused by its design or erection, and filed a counterclaim against the Baseball Park District seeking additional costs incurred by Mitsubishi in erecting the roof due to material changes made by others to the roof's design after Mitsubishi bid the job. The case ultimately settled in 2005, with Mitsubishi paying nothing on the Baseball Park District's claims and receiving \$18 million on its counterclaim.

Following that settlement, Federal Insurance Company requested that the trial court order Travelers Property Casualty Company of America to reimburse it approximately \$28 million which Federal paid to Mitsubishi and two other insureds for attorney and expert fees incurred by them in litigation the underlying lawsuit. The trial court ruled in Federal's favor.

In rejecting Travelers' appeal of the trial court's ruling, the Court of Appeals held that Travelers, as the primary insurer on the project, and not Federal, as the excess insurer on the project, should have paid the attorney and expert fees of Mitsubishi and the two other insureds, and that Travelers was not entitled to a reduction of its obligation in that regard. In its decision, the Court of Appeals held that:

- "The trial court, on three occasions over nearly thirteen months, ruled repeatedly that Travelers had a duty to defend Mitsubishi... . Each time, Travelers refused to undertake the defense."
- "In the context of Travelers' repeated refusal to undertake any defense, the trial court repeated this finding on several subsequent occasions, and ultimately found that Travelers breached its duty to defend as to all three insureds. Still, Travelers did not undertake the defense of any party."
- "We perceive no good policy reason to reward Travelers ... for its repeated refusal to defend — even after being repeatedly told it had a contractual duty to do so — by reducing the amount the trial court has determined it owed. Such reduction would reward a primary carrier for a wrongful refusal to defend and create something akin to a litigation expense game of 'chicken' — with offsets going to the obligated primary insurer who breached its duty. Travelers is not entitled either by contract or equitable principles to reduce its obligations because an excess carrier, Federal, performed a duty that belonged to Travelers but which Travelers refused to honor."

Mitsubishi will receive approximately \$3.5 million as a result of the Court of Appeals' decision.

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# TURNING A DUPLEX INTO A “TWINDOMINIUM”

Some duplex owners have considered converting their properties into two unit condominiums, known as “twindominiums”. There are several legal steps and quite a bit of paperwork that must be completed in order to accomplish the conversion.

In order to create a condominium, the owner, with the assistance of an attorney and a surveyor, must prepare and file documents with the Register of Deeds. They include:

- A condominium declaration (the legal document establishing the condominium form of ownership for the property)
- A condominium plat or survey of the property showing all improvements

In addition, every condominium must have an owner’s association, to which all unit owners must belong. The association operates and manages the condominium and oversees the property. The association for a twindominium has only the unit owners as members.

There are additional disclosure documents that must be prepared and provided to every potential purchaser before closing. Wisconsin law has strict timelines about what information must be given and when, so an attorney should get involved early in the process to be sure everything is in order.

If one of the duplex units is rented, the owner must provide the tenant with notice of the conversion at least 120 days before they need to vacate the property. In addition, the tenant has a first right to purchase the unit for a period of 60 days from the date of the notice.

There are several other issues an owner should consider before converting a duplex. If both units are sold, then the former owner has no further involvement with the property. If the duplex owner decides to live in one of the units, the prospect of next-door renters becoming permanent property owning neighbors needs to be carefully examined.

It’s very important that purchasers have a very clear understanding of how a condominium is operated. There is no longer a landlord to make any needed repairs upon demand. The owner who creates a condominium must completely understand the way it will be operated in order to explain the respective rights and obligations to the unit new owners.

The responsibilities for repairs are established in the condominium declaration. The declaration, the plat, and other disclosure materials are needed whether there are two units or two hundred units. Under condominium law, maintenance and repair of a “unit,” which is the space owned and occupied exclusively by the owner, is that unit owner’s obligation. The rest of the property is either “common element” or “limited common element.” Each unit

owner owns part of the common element, which is that portion of the property jointly owned and used by both unit owners.

Where a unit ends and the common element begins determines who is responsible for maintenance, repair, replacement, if needed, and insurance. Exterior walls, the roof, a shared garage, and a common driveway are all common elements.

Limited common elements are those parts of the condominium owned by everyone, but only used by the owner of a particular unit. Examples of limited common elements would be attached balconies, patios, decks, garage spaces, or the like. Since a limited common element is still a common element, all owners share in the maintenance, repair and replacement of those portions of the condominium, even though not everyone may use them. A successful duplex conversion will probably include limited common elements for each unit, if possible, so each owner can enjoy the same amenities.

Wisconsin law requires each condominium to have an owners' association, organized to maintain repair and replace the common elements when they are damaged or worn out. The association also carries fire and casualty insurance for the entire property, other than the units, and a liability insurance policy to protect all of the owners from personal injury claims, such as a guest's slip and fall on common element areas such as porch steps. The association can be either incorporated or unincorporated and includes all owners as members.

The costs incurred by the association in performing these duties and carrying the insurance are assessed, usually monthly, to each unit owner. In a twindominium, the two owners must work together to take care of the property and share those costs. The monthly assessment is an additional expense for each unit owner in addition to taxes, mortgage payments and insurance for the unit itself.

The thing to remember is that the duties of repair, maintenance, and the like are based on the definitions of unit and common element. Those definitions are established by the duplex owner in the condominium declaration. The duplex owner, working with his or her attorney, has the opportunity to establish these definitions, thereby creating the rights and obligations under which the unit owners must live. The duplex owner decides who owns what and how the costs are to be shared.

This is very important to the owner who will continue to live in one of the units after the other is sold, since the duplex owner then becomes a unit owner, subject to the provisions of the declaration and the association rules. After the documents are recorded and a unit is sold, the former duplex owner is no longer in charge of the property.

With this as background, here are answers to frequently asked questions about twindominiums

**Q:** *Who will be in charge of the Association?*

**A:** Each unit owner must be a member of the association. Membership is automatic when a unit is purchased. The association can be a nonstock, not for profit corporation or a not for profit unincorporated association. In either case, the attorney preparing the declaration will also prepare the needed association documents, including bylaws. The bylaws outline how the association is operated and sets the rules under which it will control the common elements and levy assessments. All association decisions are made jointly by the owners. The association may have to file income tax returns, depending on how the assessments are handled.

**Q:** *What if owners cannot agree on what needs to be done by the Association?*

**A:** Because of the possibility of a deadlock, the Wisconsin condominium statutes provide a procedure for resolving disputes through arbitration. By accepting a deed to a unit, the owner automatically agrees to submit disagreements to arbitration, the cost for which is shared equally by the owners. The added costs of an arbitration proceeding should provide incentive for owners to settle their disagreements.

**Q:** *Are unit owners assessed differently if the entire roof needs to be replaced versus a leak repair in only one spot?*

**A:** No. The assessment procedure is the same in both cases. All owners must contribute to the cost of repairing or replacing a common element. The roof is almost always a common element. Although the leak may only affect one unit, all units must contribute to the cost of the repair since each unit owner owns a percentage interest in the common element. The declaration may provide for assessments for reserves to accumulate funds for major replacements, such as a new roof or gutters. In effect, the reserve fund assessment is a forced savings program to handle future capital expenses, such as a new roof.

**Q:** *Who maintains and paints the exterior?*

**A:** Exterior walls are common element, and the association has control of them. The association (the unit owners in a twindominium) will maintain the exterior. Usually the colors for walls, trim, gutters, and downspouts will be uniform, so the unit owners must agree on those decisions. All costs are assessed proportionately to the unit owners.

**Q:** *Who is responsible for repairs to exterior doors and the windows?*

**A:** In many declarations, the doors and windows are defined as being part of the unit, so the unit owner must take care of them, replacing them when needed. However, if a uniform appearance for the duplex is desired, the association will pick the design/color of the doors and windows.

**Q:** *Who repairs the garage?*

**A:** Typically a garage is designated a common element. All owners contribute to the cost of upkeep and repair. The parking spaces in the garage are usually limited common element. One space is assigned to each unit in the case of a two-car garage. A unit owner should be responsible for repairing any damage caused by his or her car.

**Q:** *Who can use the attic or the basement?*

**A:** The attic and basement may each be common element, allowing every owner to have access for storage, washers, dryers, and the like. They could be divided in some fashion, creating two limited common elements. Then each owner has separate space for his or her exclusive use. In either case, all owners share in any costs.

**Q:** *Who mows and maintains the lawn, shovels the snow, plants trees, flowers and bushes?*

**A:** Lawns, sidewalks and driveways are either common elements or limited common elements. As such, the association is technically responsible for maintenance, mowing, snow removal and the like. These services could be contracted out to third parties or the unit owners could divide the work between themselves. The declaration should provide for these alternatives. Provisions can be added to the declaration to allow unit owners to garden and plant flowers and bushes in certain areas. Those costs would be paid by the unit owner who does the planting. Major landscaping, such as new trees, or tree trimming, should be agreed upon by the owners. The association would have the trees planted or trimmed and assess the owners proportionately for such expenses. Unit owners must understand that they share the yard and are not entitled to plant whatever they want without first getting consent of the other owner.

**Q:** *How are utilities paid?*

**A:** As part of a duplex conversion, separate gas and electric meters should be installed, one set for each unit. Depending on the plumbing layout, separate water meters could also be installed. If there is only one water meter, the water/sewer bill would be paid by the association and assessed to the owners. This could raise complaints about excessive water usage by an owner. The cost of outside lighting would be shared in the same manner as other assessments.

**Q:** *How is insurance handled?*

**A:** The association buys the fire/casualty and liability insurance for the condominium and the premium is paid by the unit owners. Each unit owner purchases a separate condominium unit policy which insures against damage to the unit and its contents, and includes liability insurance for the individual owner. The association and the unit owners should buy their

respective policies from the same insurer. This eliminates the potential dispute between two insurers as to whether the damage or the accident occurred in the unit (unit owner's insurer is responsible) or in the common element (association's insurer is responsible). Insuring with the same company eliminates coverage questions.

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## **INHERITED RETIRMENT FUNDS ARE NOT CREDITOR EXEMPT**

Chapter 815 of the Wisconsin Statutes provides that certain personal assets are exempt from judgment creditors, and these exemptions can be claimed by individuals when they file federal bankruptcy. Likewise, the federal Bankruptcy Code [11 U.S.C. Section 522(d)] also provides an alternative set of exemptions that the individual can claim instead of using the Wisconsin set. Both sets generally provide for the right of individuals to retain their retirement funds (subject to some limitations) exempt from their creditors in bankruptcy. Section 815.18(3)(j), Stat.; 11 U.S.C. Section 522(d)(12).

There has been a recent local decision, however, denying such exempt status to an inherited IRA (whether originally-formed as an IRA, or a Rollover IRA set up when the decedent withdrew from a company-sponsored retirement plan) under the Wisconsin exemptions. In re Kirchen, Bankr. E.D. Wis. Case No. 04-29434. The bankruptcy trustee in that case successfully established that inherited retirement funds did not meet the requirement under Chapter 815 that the account be a fund for the retirement of the owning debtor, and therefore was not exempt. He directed the IRA issuer to pay out the funds to him to distribute to Kirchen's creditors.

Common definitive language under the Wisconsin law ("on account of ... age") is a similar element needed for qualifying such account under the federal exemption set, so undoubtedly a similar ruling will occur if the claim of exemption of an inherited account is presented to local bankruptcy courts under that set. By extension, inherited pension funds (including 401k's) are also at risk.

While under our Wisconsin marital property law, an inherited IRA or retirement fund would not be eligible to collection efforts of many creditors of the other spouse, it is still liable for debts incurred in support of the marriage (if all other assets have been exhausted) and for the liabilities of the recipient spouse. These positions may be overruled by higher courts, but for now, they pose a problem that might be avoided by planning steps that a prudent recipient of an inherited retirement funds can take. For more information and to discuss such planning steps, contact Russell C. Brannen, Jr.