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.

LAKE SHORE NAMES ATTORNEY ELDON L. BOHROFEN CHAIRMAN OF THE BOARD

Lake Shore Wisconsin Corp., the proposed holding company for Lake Shore Bank, recently announced the formation of its board of directors. Attorney Bohrofen was among the nine individuals selected to serve as external directors. “We asked Eldon to serve for a variety of reasons – his banking experience, business expertise, prominence in the community and knowledge of our market,” states Jeanene Meisser, COO and controller.

Eldon is an attorney of the Sheboygan office of O’Neil Cannon He assists individuals and business owners with their estate planning needs, helping them minimize estate tax costs to effectively transfer their wealth from one generation to the next. He also focuses on the establishment of family foundations and represents corporate and individual fiduciaries.

O’Neil Cannon is a full-service legal practice with offices in Milwaukee, Port Washington and Sheboygan. Founded in 1973, the firm focuses its practice on corporate law, estate and succession planning, real estate and construction, municipal law and civil litigation.

CHAD RICHTER TO PRESENT “HOW TO BEGIN THE BUSINESS ACQUISITION/SALE PROCESS”

On Wednesday, April 9, 2008, Chad J. Richter will be presenting “How to Begin the Business Acquisition/Sale Process.” Mr. Richter will also discuss the effective use of Term Sheets and Letters of Intent in business transactions; including key legal components, misconceptions and pitfalls of these documents. The presentation is taking place at Cornerstone’s M&A Alliance Event from 7:30 a.m. – 9:30 a.m. at the Country Springs Hotel in Waukesha.

Mr. Richter is an attorney with the law firm of O’Neil Cannon He assists clients with a variety of corporate and business law matters such as the formation and organization of various types of business entities under operating, shareholder, and subscription agreements, including the preparation of financial and disclosure documentation. Chad concentrates his

practice on the structuring of business relationships under franchise, licensing, and distribution arrangements, and has worked with numerous franchise and dealership models, representing both franchisors/grantors and franchisees/dealers.

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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.

SHEBOYGAN COUNTY BAR ASSOCIATION ELECTS MUELLER AS V.P. AND PRESIDENT ELECT

J. Phil Mueller has been elected vice president of the Sheboygan County Bar Association. He will serve as vice president of the Association for 1 year, followed by a 1 year term as president starting January 1, 2009.

Mueller is an attorney with the Sheboygan law office of O'Neil Cannon He graduated from the University of Wisconsin-Madison in 1985 and received his law degree in 1988 from Creighton University. His practice focuses on business law and estate planning for small to medium sized companies. "I am honored to be elected by the local Bar Association," states Mueller. "I look forward to carrying on the Association's mission to encourage participation in public service, enhance the public perception of lawyers and foster professionalism and camaraderie."

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OCHD ELECTS GREGORY S. MAGER AS SHAREHOLDER

Gregory S. Mager has been elected shareholder in the law firm of O'Neil Cannon, and will continue his practice in the areas of civil litigation and family law, including mediation services. Mr. Mager graduated from Marquette University with an undergraduate degree in political science and philosophy, and a graduate degree in political science. He received his Juris Doctor degree from Marquette University Law School.

Mr. Mager is the Editor-in-Chief of the Wisconsin Journal of Family Law, a publication of the Family Law Section of the State Bar of Wisconsin. He was selected as a 2007 Wisconsin Super Lawyer Rising Star, *Law and Politics* and *Milwaukee Magazine*. In addition, Mr. Mager has received a Martindale-Hubbell Peer Review Rating of AV, reflecting an attorney who has reached the height of professional excellence and is recognized for the highest levels of skill and integrity. His memberships include the American Bar Association and the State Bar of Wisconsin as well as the Ozaukee, Milwaukee, Washington, and Waukesha County Bar Associations. Mr. Mager is also a member of the Society of Family Lawyers, the Lender J. Foley Matrimonial Inns of Court, the Collaborative Family Law Council of Wisconsin, Inc., and the Divorce Cooperation Institute, Inc.

O'Neil Cannon, founded in Milwaukee in 1973, is a full-service legal practice that primarily focuses on providing business law and civil litigation services to closely-held businesses and their owners. The firm represents corporations, institutions and partnerships at all stages of the business life cycle, helping them start, grow and transition from one generation to the next. We also assist business owners with their personal legal needs including tax and estate planning, family law and litigation – including personal injury litigation.

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.

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 Commission 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.

FOURTEEN OCHD ATTORNEYS AWARDED SUPER LAWYERS DESIGNATION

MILWAUKEE, WIS (November 16, 2007) – Fourteen attorneys from O'Neil Cannon have been selected as Wisconsin Super Lawyers for 2007.

Super Lawyers is a peer-nominated award recognizing the top 5% outstanding attorneys across the state of Wisconsin.The attorneys included in the Super Lawyer listing are: * Jim DeJong * Angela Campion * Tom Cannon * Paul Dirkse * Seth Dizard * Pete Faust * Herb Humke III * Dean Laing * Greg Lyons * Gregory Mager * Patrick Mc Bride * Randy Nash Additionally, Dean Laing was selected as one of the Top 50 Super Lawyers in the state.

Angela Campion, Paul Dirkse, Seth Dizard, Herb Humke III, and Gregory Mager were selected as Super Lawyers Rising Stars.

O'Neil, Cannon, Hollman, DeJong, S.C. is a full-service legal practice focusing on business law, estate planning, and major complex litigation with offices in Milwaukee, Port Washington, and Sheboygan. The firm was established in 1973 and is now listed as one of the Milwaukee-area's largest law firms.

OCHD SUCCESSFULLY DEFENDS BUILDER AGAINST CONSTRUCTION DEFECT LAWSUIT

Milwaukee, Wis. (October 5, 2007) – A recent Ozaukee County jury trial resulted in a decision in favor of a client of O'Neil Cannon The case involved a dispute between a homeowner and the builder of the home in which the homeowner sued the builder for alleged construction defects.

Attorney Steve Slawinski successfully defended the builder. The jury found in favor of the builder, resulting in no recovery for the homeowner. The trial court then granted the builder's motion to have the homeowner pay the builder's attorney fees, according to the terms of the contract between the two parties.

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