REAL PROPERTY TAX ASSESSMENT REVERSED BY COURT OF APPEALS

OCHD's Real Estate and Construction Practice Group found recent success in obtaining a reversal from the Court of Appeals relative to a real property tax assessed by the Village of Menomonee Falls against an 80-plus unit apartment complex owned by a client.

In an opinion released on May 2, 2007, the Court of Appeals District II reversed the decision of the Circuit Court for Waukesha County holding, among other things, that the Board of Review for the Village of Menomonee Falls failed to exercise proper judgment and failed to accept evidence of valuation submitted by the property owner as the "best information" available. See Opinion of Court of Appeals.

For further information or a consultation regarding your legal rights to object to and/or appeal a real property assessment on your residential or commercial property, please contact either Claude J. Krawczyk or John R. Schreiber of OCHD's Real Estate and Construction Practice Group.

PROTECTING THE ENFORCEABILITY OF YOUR MARITAL PROPERTY AGREEMENT IN THE EVENT OF A DIVORCE

In Wisconsin, people who are contemplating marriage or who are already married are permitted to enter into contracts with each other regarding their financial affairs to suit their needs and values and to achieve certainty, both during the marriage and in the event of a divorce. These contracts or marital property agreements are commonly known as pre- or post-nuptial agreements.

Wisconsin divorce law is clear that, as it relates to the division of property, any written agreement made by the parties before or during the marriage concerning any arrangement for property distribution shall be binding upon the divorce court, unless the terms of the agreement are inequitable to either party. Because the divorce court is required to presume any such agreement to be equitable as to both parties, the party challenging the agreement has the burden of producing evidence and persuading the divorce court that the agreement is unfair and unenforceable.

For an agreement to be unenforceable, it must fail to meet the requirements of procedural fairness or substantive fairness. To assess procedural fairness, the court assesses whether each party makes fair and reasonable disclosures regarding his or her financial status by disclosing assets, liabilities, and debts; and whether each party entered into the agreement voluntarily and freely. When assessing whether a party voluntarily and freely entered into the agreement, a divorce court examines whether a party had a meaningful choice. Divorce courts are instructed to consider whether each party was represented by independent counsel, whether each party had adequate time to review the agreement, whether the parties understood the terms of the agreement and their effects, and whether the parties understood their financial rights in the absence of an agreement. To assess substantive fairness, the court assesses whether the agreement was fair at the time of execution. If circumstances significantly change since execution, then substantive fairness is also assessed at the time of the divorce.

A marital property agreement that is fair at its execution is not unfair at divorce just because the application of the agreement at divorce results in a property division which is not equal between the parties or which a court might not currently order under the property division statute. If, however, there are significantly changed circumstances after the execution of an agreement, a divorce court must evaluate those circumstances and expectations from the perspectives of the parties at the time they entered into their agreement, not at the time of the divorce. Marital property agreements can (and should) be drafted in such a way as to address some of these contingencies.

While it is true that marital property agreements are binding contracts regarded with favor in Wisconsin, it is clear that, the parties to the agreement must keep in mind and adhere to the standards used to determine the enforceability of these agreements upon divorce, both when negotiating and drafting an agreement and during the marriage. To do otherwise is to risk an unpleasant surprise when a divorce court determines that the agreement is inequitable and, therefore, unenforceable at the time of divorce.

JIM DEJONG TO DELIVER PRESENTATION ON LEADERSHIP

On May 18, 2007, Attorney Jim DeJong will deliver a presentation on “Leading Those who do not Want to be Lead” at the CSI Management Coaching Clinic to be held from 11:30 – 4:30 at North Hills Country Club in Menomonee Falls.

The clinic will focus on the development of leadership skills, both for current and future

business leaders. Other presenters include Terry Mather of CSI Consulting and Don Menefee of Silent Partner.

Jim DeJong is president and managing shareholder of O'Neil Cannon He works with business clients in a wide variety of industries and service sectors, providing them with creative counsel and strategic help. Jim's corporate, LLC, and partnership practice is diverse and he is experienced in successfully guiding his clients through complex matters including forming and financing entities, as well as negotiating and preparing contracts and related documents. He also represents buyers or sellers of businesses, and provides counsel to clients on operational and governance matters.

O'Neil Cannon is a full-service legal practice focusing on business law, estate planning, and major complex litigation with offices currently in Milwaukee and Port Washington. On June 1, 2007, the firm will add an office in Sheboygan by joining forces with Hopp Neumann Humke LLP, one of Sheboygan's oldest and largest law firms. OCHD was established in 1973 and is now listed as one of the Milwaukee-area's largest law firms.

THE SPIRIT OF MARCH MADNESS TOUCHES ALL …

Nothing beats the camaraderie and emotion that accompanies an NCAA basketball tournament barn-burner, except, perhaps, the spoils and bragging rights that go along with picking an unforeseen upset of a top seed or, even better, winning your office pool. March Madness office pools are so much fun they should be illegal … well, actually, they currently are, at least in Wisconsin.

Presently, the Wisconsin statutes make it illegal to bet on sports events, and that includes an office pool. The Wisconsin statutes define a bet as "a bargain in which the parties agree that, dependent on chance even though accompanied by some skill, one stands to win or lose something of value specified in the agreement." Wis. Stat. § 945.01(1).

The consequences of violating the current Wisconsin statute forbidding betting on sports events may be a fine of up to $1,000, imprisonment for not more than 90 days, or both. Even more alarming, the fine for running an illegal commercial gambling operation is a fine of up to $10,000, imprisonment of up to 3½ years, or both.

A recent bill of the Wisconsin Legislature, however, proposes to decriminalize managing and participating in office sports pools by excepting sports office pools from the definition of a

"bet" under Chapter 945. If the proposed bill is enacted, people may legally participate in office sports pools under the following circumstances:

- All participants in the pool are employed by the same employer
- The entry fee does not exceed $50
- A prize is awarded based on the results of a sporting event or a series of related sporting events
- The prize is all or any portion of the money provided by the participants
- The person managing the pool is a participant and does not manage the pool for gain

This proposed amendment to Chapter 945 seems a good start toward decriminalizing an enjoyable and morale-boosting event in which a substantial number of American workers participate. Any bets on whether this proposal becomes a law?

O'NEIL, CANNON, HOLLMAN DEJONG S.C. EXPANDS TO SHEBOYGAN

Milwaukee, Wisconsin (April 12, 2007) – The Milwaukee law firm of O'Neil Cannon announced today that, effective June 1, 2007, the law firm of Hopp Neumann Humke LLP will become the Sheboygan office of OCHD.

A full service firm, Hopp Neumann Humke is one of Sheboygan's oldest and largest law firms. The firm's practice includes corporate, estate planning and probate, employment, real estate, litigation, and family law. The firm is perhaps best known for its extensive municipal law practice, and is currently under contract with the County of Sheboygan to provide all civil legal services for the County government. They also have similar relationships with several cities, villages, towns, sanitary districts, and other local units of government in Sheboygan and surrounding communities.

O'Neil Cannon currently has offices in downtown Milwaukee and Port Washington. "We are pleased to be able to expand our practice by joining forces with HNH," stated Jim DeJong, President of O'Neil Cannon "The Hopp Neumann Humke attorneys will bring valuable experience and extensive community ties to OCHD which will allow the combined firm to better service our clients in Sheboygan and the surrounding communities. We also look forward to the opportunity to expand our practice areas by adding municipal law expertise." O'Neil, Cannon, Hollman, DeJong's current practice areas include corporate, real estate and construction, employment law, tax and estate planning, and litigation. OCHD represented Mitsubishi Heavy Industries America, Inc. against the Southeast Wisconsin Professional Baseball Park District in the landmark litigation arising out of the construction of Miller Park.

O’Neil Cannon is a full-service legal practice focusing on meeting the needs of businesses and their owners. The firm was established in 1973 and is now listed as one of the Milwaukee-area’s largest law firms.

WISCONSIN’S NEW “RIGHT TO REPAIR” LAW

Wisconsin’s new “Right to Repair” law was enacted on March 27, 2006, and became effective on October 1, 2006. The new law affects the relationship between owners and builders or remodeling contractors, and between such contractors and the suppliers of windows and doors.

The “Right to Repair” law is a misnomer. The new law does not give the contractor an absolute right to repair a claimed defect. Instead, the new law is lmerely an ADR (Alternative Dispute Resolution) law that applies to construction defect claims on residential construction and remodeling projects. It is intended to reduce owner lawsuits by fostering settlement through mandatory pre-suit procedures aimed at opening a dialogue for a negotiated resolution of such claims.

At the time that the contract is made, the contractor is required to provide the owner with a specific statutory notice and a brochure prepared by the Department of Commerce advising the owner about the new law. Before an owner may commence a lawsuit or an arbitration against the contractor for breach of warranty or for construction defects, the owner must first give the contractor a written notice of the nature and description of the alleged defects, and the owner must also provide the contractor with an opportunity to offer to repair the defect or to make a monetary settlement offer. An action or arbitration filed by the owner without first giving the contractor such notice would be subject to dismissal without prejudice or to stay by the court or arbitrator pending the owner’s compliance with the statutory requirements.

In response to the owner’s notice of claim, the contractor has five options:

- Make a written offer to repair the defect at no cost to the owner
- Make a written monetary settlement offer
- Make a written offer including a combination of repairs and monetary payment
- Make a written statement rejecting the claim
- Make a proposal for inspection of the dwelling

Under the option to make a proposal for inspection of the dwelling, the contractor has the right to inspect the dwelling and to conduct destructive testing before responding to the claim on the merits. Contractors also have a right to seek contribution from suppliers of

windows and doors, and may require their participation in this process. In cases where the contractor does not flatly reject the owner's claim, the "Right to Repair" law includes specific procedures and deadlines requiring the parties to make a series of offers and counteroffers until the parties either reach an agreement or reach an impasse. The obvious intent is to cause the parties to engage in active negotiation. However, the law does not require the parties to reach an agreement.

The law will not apply to all owner-contractor disputes. For example, it may not apply to claims involving purely design defects, as opposed to construction defects. Nor would it apply to accounting or delay claims, or to claims arising under Wisconsin's Home Improvement Practices regulations. Furthermore, it allows owners to make immediate repairs "to protect the health and safety of its occupants" without first giving notice to the contractor. It is the author's opinion that owners would also be permitted to make emergency repairs where a failure to take immediate action could result in serious additional damage to the home, such as the emergency repair of a plumbing leak.

The "Right to Repair" law leaves many questions unanswered. For example, it does not specifically state what happens if the owner first repairs the alleged defect before giving notice to the contractor of a claim where the repair was not an emergency. Under such circumstances, the contractor's right to inspect the defect and to offer to repair has been compromised, but not necessarily its right to make a monetary offer of settlement. Such questions are left to the Courts to decide.

Without question, there will be a learning curve both for contractors and for attorneys and judges in dealing with the new "Right to Repair" law.

For more information, please contact Steven J. Slawinski.

A PRE-CLOSING PROFESSIONAL INSPECTION IS ESSENTIAL TO PRESERVE REMEDIES FOR HOME DEFECTS

A recent Wisconsin Court of Appeals decision, *Malzewski v. Rapkin*, 2006 WI App 183, demonstrates the importance of obtaining a professional inspection prior to closing on a residential home transaction. Failure to do so may, under certain circumstances, prohibit a buyer from asserting otherwise available remedies against a home seller if a defect is discovered after the sale.

In Malzewski, prospective buyers of a home received a Real Estate Condition Report from sellers disclosing a defect in the basement/foundation. Sellers explained that "[d]uring heavy rainstorms, there might be a little seepage in the walls/floors. The seller has regraded to correct this when it has happened."

Buyers' Offer to Purchase incorporated the language from the Real Estate Condition Report listed above, contained a home inspection contingency and further conditioned their purchase of the home upon the right to do a walk-through within three working days of acceptance. Sellers accepted Buyers' Offer to Purchase. Immediately prior to the closing, Buyers exercised their right to do a walk-through of the home. Upon noticing no visible defects, Buyers waived their right to conduct a home inspection despite having knowledge of foundation seepage and closed on the sale.

The following summer, Buyers noticed that paint had begun to peel on the basement walls and pre-existing cracks on the basement walls opened. An engineer was hired to investigate the foundation and concluded that the cracks had been present for many years, were failing and needed to be fixed. The cost to repair the foundation walls was estimated to be $25,600.

Buyers sued Sellers under contract, tort and statutory theories, seeking money damages or, alternatively, rescission of the sale and restitution. During the discovery process, Sellers admitted to their awareness of multiple 12-foot long, three-eighths inch wide cracks that they had filled with masonry caulk 10 to 20 times during their ownership of the home. Sellers also admitted to painting the walls 5 times and touching them up after they had filled-in the cracks with caulk from time-to-time. Sellers never, however, had a professional inspect the home's basement to provide an opinion or to get a repair estimate.

Buyers' claims were dismissed on summary judgment by the trial court. The trial court decided as a matter of law that it would not allow Buyers' claims to continue where there was no showing that Sellers had any subjective knowledge as to the significance of the basement cracks and where Buyers waived their right of inspection despite being informed of foundation seepage merely to save a few hundred dollars on a home inspection.

The Court of Appeals held that the trial court was correct in dismissing most of Buyers' claims since, in order to recover damages under breach of contract, breach of warranty, misrepresentation or theft-by-fraud theories, Buyers were required to show that they reasonably relied to their detriment upon an affirmation of fact from the Sellers.

The court added that Buyers acted unreasonably as a matter of law when they waived their right to have the home inspected prior to closing on the property. The Court of Appeals deemed that the language in Sellers' Real Estate Condition Report concerning seepage in the walls and floors of the basement was enough to put Buyers on notice, at least to the extent that they should have conducted further investigation by hiring a registered home inspector.

The court did, however, think one of Buyers' claims raised a factual issue that should have been reserved for determination by a jury. Specifically, Buyers' deceptive advertising claim under section 100.18, Wis. Stats., was returned to the trial court for a trial on the issue of whether Sellers' representation that the only problem with the basement was slight seepage was a violation of Wisconsin's deceptive advertising statute where Buyers waived their right to have the property inspected.

Despite the survival of Buyers' deceptive advertising claim, Malzewski stresses the importance, both in the eyes of a court and potentially a jury, of conducting a professional home inspection prior to purchasing a home. To ignore one's right to conduct such an inspection may be deemed unreasonable in the eyes of a court or jury and may foreclose remedies that would otherwise be available to buyers with claims relating to unknown home defects.
For further information on Malzewski and other cases and issues relating to home defect claims and defenses, contact John R. Schreiber of O'Neil Cannon

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ATTORNEY KARLA MASCHMEIER AUTHORS CHAPTER ON BENEFITS ISSUES

Milwaukee, Wis. (March, 2007) – Employee Benefits and ERISA Attorney Karla Maschmeier recently contributed a chapter to the book *Human Resources 2007: Answers to the Top 25 HR Questions*.

The book, a successor to several prior editions published by Thompson Publishing Group, provides HR decision makers with information and guidance on HR and benefits issues they can use on a day to day basis. It is scheduled to be published this summer.

Karla assists employers, third-party benefit plan administrators, and other retirement plan service providers in all aspects of employee benefits and executive compensation issues. She is an active writer and speaker on various employee benefits and ERISA topics.

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ATTORNEY THOMAS MERKLE APPOINTED TO MILWAUKEE OFFICE OF LAWYER REGULATION DISTRICT COMMITTEE

Milwaukee, Wisconsin (March, 2007) – Thomas A. Merkle, a shareholder with the law firm of O'Neil Cannon was recently appointed by the Wisconsin Supreme Court to serve on the Office of Lawyer Regulation's District Two Committee (Milwaukee). The office of lawyer regulation is an office of the Wisconsin Supreme Court System charged with carrying out the Supreme Court's constitutional responsibility to supervise the practice of law and protect the public from misconduct by persons practicing law in Wisconsin.

Mr. Merkle is one of the initial members of O'Neil Cannon He counsels his clients with general corporate and business law matters, including transactions such as acquisitions, sales, contracts, and financing. He also litigates cases involving shareholder disputes as well as family law cases involving closely-held businesses, partnerships, and professional associations. A trained mediator, Tom has also helped numerous clients with the resolution of shareholder disputes, business and family law issues. Tom is one of the founders of the Divorce Cooperation Institute, a group dedicated to fostering cooperation and greater professionalism among family law practitioners. He currently serves on the Board of Directors and is the organization's treasurer.

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O'NEIL, CANNON, HOLLMAN, DEJONG AND ATTORNEY TESS RECOGNIZED AS VOLUNTEERS OF THE YEAR

Milwaukee, Wis. (March, 2007) – The law firm of O'Neil Cannon and Attorney Robert Tess was recognized for their volunteer activities by HeartLove Place at a recent appreciation celebration.

The firm and Attorney Tess was recognized as Business of the Year and Volunteers of the Year for their legal assistance to HeartLove Place.

HeartLove Place is a non-profit organization conceived as a visible, neighborhood-based, well-managed facility where religious, social, and employment values are reinforced through the delivery of a continuum of program offerings for the families that participate. At the core of Heartlove Place is a strong desire to unify families, strengthen values, and energize a greater sense of community spirit within the central city.

Bob Tess is a real estate law attorney who represents developers, property owners, private and public companies, and lenders in all phases of transactions involving the acquisition, disposition, leasing, and financing of industrial, commercial, and mixed-use properties. A former corporate counsel in the real estate department for Menard, Inc., Bob was responsible for all aspects of new store and shopping center real estate development, acquiring over fifty million dollars in real estate and selling over two million dollars in excess property for the company in just under two years. He successfully handled all aspects of each new store project – from negotiating and drafting all applicable real estate documents, to obtaining all necessary governmental approvals.

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