

TRI-COUNTY BAR

Buffalo, Jackson, Pepin & Trempealeau

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TRICOUNTY BAR NEWS

Wikileaks reports that the upcoming TCBMWBM 2011 will be held at (wait, here comes the big surprise) the Skyline Golf Club in Black River Falls. This midwinter meeting location is a roll back to the Bush era, but is promised to spur job growth and create wealth, at least for some. Mark the date of January 14 on your calendar now.

President Skolas, a global warning proponent, is taking tee times. Provocatively dressed snow men and women will magically come to life and drive the beverage carts. Winter rules apply.

No matter how you feel about the science, the meeting will start at 1:00, lunch off the menu starting at 12:00.

The meeting will feature plenary sessions, keynote lectures and several specialized sessions on special topics. There will also be an educational program.

Some of you may have last seen the canoe of new TCB member Hailey Huiting, Cochrane, and

new associate member Emily Cannon, La Crosse, disappearing into the whitecaps of Lake Pepin during the summer meeting. Upon safely reaching the shore, Hailey quietly uttered my favorite line of the gathering- "I just want to go home now". Unfortunately Hailey is relocating away from Cochrane. She is currently in Eau Claire and exploring several options. Having survived the summer meeting, and Lake Pepin, I am sure she will succeed at whatever she does.

The TCB 2010 Winter meeting was approved for 5.0 CLE credit hours. No ethics credits, as usual.

In 2003 the TCB purchased "the Howard Lot" adjacent to the Pattison Radisson. TCB members helped finance the purchase with \$42,000 of Series A and Series B Notes.

Eric Stutz, through his widow Joyce Stutz, forgave his Series A note. The remaining 24 Series A \$1,000 Notes bear interest at 6.00% from 2003 and are due in

a single installment on January 31, 2023. However, if the \$1,000 principal balance is paid in full before January 31, 2013, the interest is waived.

The 17 Series B \$1,000 Notes bear interest at 6.00% and are due in full on January 31, 2023, but do not contain the same early payment/forgiveness of interest.

The Winter meeting agenda will include, as a discussion point, whether Tri-County Bar, Inc. should refinance this \$24,000 and pay off the Series A Notes before January 31, 2013, thereby taking advantage of the waiver of interest clause.

CIVIL

TRACTOR NOT A MOTOR VEHICLE
A tractor is not a motor vehicle for the purpose of a motor vehicle exclusion in an insurance policy because they are not designed to operate on a public road. *Olson v. Farrar*, 09 AP 2385.

CHOICE OF LAW Minnesota law, not Wisconsin law, controls the interpretation of the term "permission" in an insurance contract issued in Minnesota and



both the insured and the agent are located there, even if the accident occurred in Wisconsin. *Kender v. Auto Owners Inc.*, 2009 AP 483.

AMENDING PARTY'S NAME

Where the wrong defendant was named, a Court could not amend the name of the party and then immediately enter default judgment without service of the amended pleadings on the newly named party. In this case the change from "Cintas Corporation" to "Cintas Corporation No. 2" involved legally independent companies. *Johnson v. Cintas Corporation*, 2009 AP 2549.

CORPORATE VEIL *Lea v. Growmark Inc.*, 2009 AP 2339, discusses when a company's president may be held personally liable on a nuisance claim arising from groundwater contamination by the company.

SURFACE WATER EXCLUSION

Once rain hits the ground, it becomes surface water within the meaning of a policy exclusion of coverage for surface water damage. *American Family Mut. Inc. v. Schmitz*, 2010 AP 16.

INSURER SAYING PREMIUM PAID

An insurer is estopped from denying coverage based on nonpayment when a customer has relied on a statement from the insurer's representative that the premium had been paid. *George v. Wisconsin Mutual Insurance Co.*, 2009 AP 925.

ELECTRONIC DISCOVERY RULES Effective 1-1-11, new rules governing electronic discovery becomes effective. One aspect was added in November, the requirement that counsel confer with each other before requesting e-discovery. The rules cover mandatory subjects. When you think about the world today, these rules may apply in many common cases, such as divorce. Do you want emails, voice mails, text messages, phone records, financial records from a small business? Judge Duvall is considering adding to his pretrial conference some questions about e-discovery, such as what type of electronic records may be involved, preservation, date by which the attorneys must confer, a report back to the Court of agreements reached at the conference.

The following are several miscellaneous notes from a recent Civil Law seminar. You might find something of interest.

A nonincurring spouse is not liable to the creditor. The nonincurring spouse can be named as a defendant in an action against an incurring spouse only for the purpose of determining that the debt is a marital debt which can be collected from any community property. But the Judgment is not entered or docketed against the nonincurring spouse.

A domestic support obligation (a DSO), like child support or maintenance, is not dischargeable in either Ch 7 or 13 bankruptcy. A debt to a former spouse other than a DSO is not dischargeable in Ch 7, but is in Ch 13. While the description of the debt as a DSO or not is not binding on the Court, in *In re Weaver*, 316 BR 705 (Bankr. WD Wis. 2004), some specific language was held as clearly indicating a court's intent to make a debt a DSO. One might consider the *Weaver* language if you are trying to clarify a debt as a nondischargeable DSO.

Only the person who files bankruptcy can claim exemptions. So if one spouse files prior to divorce, and doesn't claim the other spouse's Harley, or home, as exempt, the trustee may be able to go after the filing spouse's community property interest without the nonfiling spouse being able to claim exemption. I can see this being used as a weapon between divorcing parties.

But might there be a reason for one spouse to file bankruptcy before divorce? If one spouse has a nondischargeable debt (taxes, student loan etc) on which the other spouse is not liable, can the nonliable spouse file, claim the community property as exempt and prevent the creditor of the nondischargeable debt from proceeding against the exempt community property?



Is there anyone in the TCB who is an expert on bankruptcy planning and divorce- file before or after, file separately or together, who could perhaps develop this subject further, or perhaps act as consultant to other TCB members?

Ch 128 Personal Amortization can be filed to include just one debt. All debts need not be included. It allows repayment of the debt without interest over the 3 year plan period, during which a stay of execution is in effect. So it could be used in a credit card collection, or in defense of a real estate foreclosure.

CRIMINAL LAW

CCAP AND AMENDED CHARGES

How a DA amends a charge affects how the case shows on CCAP. If a DA files an amended Complaint, the Clerk erases the old charges and renames and renumbers the charges per the amended document. But if the DA amends the Complaint orally in court, the Clerk doesn't rename or renumber the counts as they appear on CCAP and the original charges are preserved as originally filed. The Supreme Court continues its review of this issue.

SEX OFFENDER REGISTRY AND

PARK BENCHS A sex offender cannot be convicted of violating the registry law for failure to notify of change of address if the defendant is homeless and has nothing other than a park bench, a bush or similar on-the street

location. *State v. Dinkins*, 09 AP 1643.

INCONSISTENT DEFENSES NOT INEFFECTIVE Arguing inconsistent theories of defense may be reasonable trial strategy and is not necessarily ineffective assistance of counsel. *State v. Marks*, 10 AP 165.

PROBATION TERMINATION A court has no authority to reduce the term of probation based on rehabilitation. Terms, but not length, can be modified. *State v. Dowdy*, 2010 AP 772

PROBATIONER STATEMENTS TO SOCIAL WORKER Statements made by a probationer to a social worker as a condition of probation may not be used against him in a probation revocation hearing. Such statements are "compelled" for 5th Amendment purposes. *State v. Peebles*, 2009 AP 3111.

REOPEN AND AMEND

AGREEMENTS Plea agreements to "reopen and amend" to a lesser charge after a future event (like successful probation) are illegal. In *State v. Stoner*, 2009 AP 2663 the Court prescribed the remedy- vacation of the plea agreement in its entirety.

REINTERROGATION AND THE 5TH

AMENDMENT Where a defendant initiated conversation with police after invoking his 5th Amendment

right to counsel, his statements are admissible. *State v. Hampton*, 2009 AP 3040. This has been the rule for 4th Amendment right to remain silent, but it is extended to the 5th as well.

DV FACTS IN COMPLAINT

PREVENTS FIREARM POSSESSION

A person may not legally possess a firearm if a criminal complaint alleged a domestic violence offense, even if the Judgment of Conviction showed the offense as a "non-domestic" disorderly conduct. The complaint as the charging document described a domestic relationship between the defendant and his victim. *Koll v. Dep't of Justice of State of Wis.*, 2009 AP 74 (2009).

EVIDENCE

ADMISSION OF INADMISSIBLE

EXPERT OPINION BASIS Experts can rely on inadmissible testimony in reaching conclusions. But can they state the inadmissible evidence to the jury as part of explaining the foundation of their opinion? The Supreme Court discussed the issue and noted the problems with doing so. But if I read the case correctly, it prohibited a defense expert from telling the jury of PBT results as part of explaining his BAC curve calculation not on that basis, but because 343.303 prohibits introduction of PBT evidence. It further held that 343.303 did not violate a defendant's right to present evidence. *State v. Fischer*, 2010 WI 10, No 07 AP 1898. The



book Fine's Wisconsin Evidence has a good discussion of this issue.

FAMILY

PHONE APPEARANCE IN TPR A parent may admit to TPR grounds by a telephone appearance when consented to by all parties. *In re the TPR of Shaw S.*, 2010 AP 1678.

PROBATE

BASIS ALLOCATION INFORMATION RETURN In a recent estate, Dave Fugina pointed out an information return required to be filed under IRC 6018 for persons dying in 2010 (and later?) where assets exceed the 1022(b)(2)(B) limit (generally \$1,300,000), whether such assets are passing by a trust or other nonprobate transfer (such as joint tenancy) or through probate. The purpose of the return is to allocate the decedent's basis among the various assets. The penalty for failure to file the 6018 information return is \$10,000, even though the IRS has not issued a form to use to file the return, nor any regulations or other guidance on how to do it. This is not a detailed discussion, but be aware of the issue and get some tax advice on any death involving assets exceeding \$1,300,000. Thanks to Dave.

REAL ESTATE

RE LICENSING FOR LAND

CONTRACTS Your client wants to sell that residential rental

property on land contract. Any problems? Fred Berns points out one I bet you didn't know your client might have. The federal Safe Mortgage Licencing Act (SAFE), and Wisconsin's version found at 224.72 et seq., defines a residential mortgage loan as any loan on any real estate where a dwelling is (or is intended to be) built. Negotiating a seller financed land contract is likely to meet the definition. Sales involving your own personal residence (and property of certain close relatives) are exempted, but arguably not a residential rental property your client does not live in.

IF DEFICIENCY WAIVER, NO "FAIR VALUE" REQUIRED When the mortgage lender waives deficiency judgment, the Court may not refuse to confirm the sale based on inadequacy of the sale price. "There must be a demand for a deficiency judgment and one or both of the conditions set out in *Rose* are present." The first *Rose* condition is where there is an inadequate price which has resulted from circumstances such as a mistake, misapprehension, or inadvertence. The second is where the price is so inadequate as to shock the conscience of the court. *Countrywide Home Loans Inc. v. Russ*, 2009 AP 2873.

FORCED SALE FOR ENCROACHMENT If a person unintentionally builds part or all of a building or other improvement on the land of another, the Court has the authority to shape a reasonable and equitable remedy, which may include forcing the landowner to sell the land under the encroachment to the encroacher. *Some v. Zurawski*, 2009 AP 2300 (2009).

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Jaime Duvall, Editor.

