BUSINESS BRIEFS

Legal Developments Affecting Business

Saalfeld Griggs PC

First Quarter 2015

Marital Status Matters

Important Ramifications of "I Do" and "I Did"

By Jeff Moore

If you are in the throes of tying the knot, there may be a few important estate planning ramifications for which your wedding planner failed to prep you. For example, marriage actually revokes your current Will in its entirety. In addition, marriage effectively designates your new spouse as the new beneficiary on your retirement plan account—and that's regardless of whether you intended to or not. Not so similarly, however, a divorce may not effectively remove an ex-spouse as that same beneficiary. So whether you're in the middle of "I do," or perhaps in "I did," here are things to consider when it comes to your current marital status.

Marriage and the Will (Your Own or Oregon's)

As mentioned above, a Will executed prior to a marriage is revoked in its entirety by the subsequent marriage. You may be asking, "Really? Can they do that?!" Yes. The law presumes that by marriage, you intend to provide at least something to your new spouse. Accordingly, the law presumes that your marriage revokes the prior Will. That said, you should take an appropriate course of action as follows: (1) amend the Will to provide that your subsequent marriage shall not revoke the Will, (2) timely execute a prenuptial agreement containing the provision that your Will shall not be revoked by the subsequent marriage, or (3) execute a new Will or reinstate your original Will following your marriage.

You may be saying, "Hey, no worries! I belong to that 65% of Americans who never executed a Will!" Well, you do now. The State of Oregon actually writes one for you. Granted, it may not be what you want it to say, but you have one.

So whether you had a Will and it was revoked, or you have the Oregon default or "intestate" version, your estate plan may drastically change upon marriage or remarriage. For example, say you have two children from a previous marriage and just got remarried. What happens if you fall off the cruise deck during the honeymoon? The State of Oregon provides that one-half of your estate will pass to your new spouse of three days, and the other half will be divided equally among your children. That may or may not be what you wanted or anticipated (e.g., perhaps you wanted all of it to go to the new spouse…).

Plan accordingly.

(NOTE: This rule of revocation by marriage does not apply to a Living Trust; however, it would apply to the "pourover Will" associated with a Living Trust.)

In This Issue

Marriage and the Retirement Plan

If you are one of the many Americans who participate in a qualified retirement plan (e.g., a 401(k), profit sharing or defined benefit plan), be aware that unless your spouse—new or not—specifically waives his or her right to inherit the plan benefits, in most cases the spouse is by default the sole beneficiary. So let's take that same "honeymoon" example from above. Does that mean that the surviving three-day spouse is entitled to all of your 401(k) account, even though you named your two children the day before the wedding? In most cases, yes. Depending on the plan provisions, the subsequent marriage itself usually revokes all prior beneficiary designations in favor of your new spouse, regardless of what your beneficiary designation provided prior to the wedding and regardless of what you and your new spouse might have intended.

The challenge with retirement plan benefits is that any action to change this result requires the new spouse's signed consent and waiver. Unlike the unilateral action of simply modifying, re-executing or reinstating a Will, a change to your retirement plan designation requires this additional signed consent and waiver by your new spouse.

Plan accordingly.

You may be asking, "But what about a prenuptial agreement? Aren't I able to require a new spouse to sign appropriate documentation to effectuate my intended beneficiaries?" Yes and no—but plan on no. When it comes to qualified retirement plans, the laws generally disregard anything done in a prenuptial agreement. As draconian as that may be, that is the current law. But needless to say, having thorough discussions and agreements in place prior to the marriage is critical.

Let's say there is no new spouse—only a former spouse. While the final divorce decree may have authorized you to remove your former spouse as the primary beneficiary in favor of your children (or any other beneficiary), did you actually follow through and make that change? Unlike marriage, which automatically designates the new spouse as the beneficiary of the retirement plan benefit, divorce does not always automatically remove a former spouse as the beneficiary. Again, it depends on the retirement plan provisions. In short, just because the court decree authorized the change in the beneficiary designation, it does not mean that the beneficiary designation has actually changed. If no action is taken on your part to effectuate the change, it is possible that your former spouse could still be named as the primary beneficiary of the retirement benefits.

Plan accordingly.

Crowdfunding in Oregon's Craft Beverage Industry

By Caleb A. Williams

In a recent edition of Business Briefs we discussed crowdfunding and the opportunity to use such an investment vehicle for real estate development. Recent events in Oregon require that we return to the topic of crowdfunding. "Crowdfunding" is used to describe several different forms of raising capital, including advance sales of products or services (such as those featured on Kickstarter.com) or small investments by a large number of people in equity of a company. The last form of crowdfunding is the focus of this article.

In late January, the Oregon Department of Consumer and Business Services adopted regulations permitting Oregon companies to raise capital from Oregon residents through the sale of equity interests without registering those interests as a security. Prior to this year, the offer or sale of shares of stock would likely have required the registration of those equity interests as a security, an expensive and risky endeavor for most small businesses.

Oregon joins approximately 15 other states in permitting crowdfunding on some scale as an exemption to state securities laws.

As we discussed in our article last year, and which remains true as of the date of this writing, crowdfunding is not yet exempt from federal securities laws. Federal laws govern interstate transactions of securities. This means that Oregon companies cannot sell equity to residents of other states. The Securities and Exchange Commission is significantly delayed in its promised regulations addressing crowdfunding, although some commentators believe regulations will be adopted yet in 2015.

Under Oregon's new law, up to $250,000 may be raised by an Oregon company through crowd-funding without registration or licensing a salesperson. The most significant requirements include:

- The company must be registered and doing business in Oregon and the securities can be offered only to Oregon residents.
- The company can provide limited advertising to Oregonians on the investment.
- The company must meet with a business technical service provider (a small business advisor approved by the Oregon Department of Consumer and Business Services) to discuss the issuer's business plan before advertising, offering or selling the security.
- Written disclosures about the investment are required and the investor must receive and review the disclosure documents before an investment decision becomes final.
- No single investor can invest more than $2,500 in any one investment.

Oregon companies are already taking advantage of these relaxed securities rules for small investments. The Oregon nonprofit organization Hatch Innovation has launched a website (hatchoregon.com) with a platform for Oregon business to raise capital through crowdfunding. A number of business were prepared for the crowdfunding opportunity in Oregon and are both featured on this website and Oregonians may invest in those businesses through the website.

The opportunity for start-up cideries to raise capital through crowdfunding was discussed with some interest at the recently concluded CiderCon 2015 (the annual conference of the United States Association of Cidermakers), and in Oregon it is an option worth exploring for those in the craft beverage industry. It should go without saying that any winery, brewery or cidery considering crowdfunding needs experienced legal counsel to assist in evaluating the structure of any investment and navigate the complex securities laws and regulations. But producers or retailers of alcoholic beverages need to take additional care when considering raising capital through crowdfunding. Oregon and federal liquor laws prohibit investment by an individual with an interest in a retailer of alcoholic beverages from investing in a producer, and vice versa. In addition, owners of more than 10% of the equity in a company must be disclosed to the OLCC and TTB. Although it is likely that most investors through crowdfunding will own less than 10% of the company in which they invest, this is an additional factor to weigh when considering crowdfunding. Ultimately, craft beverage producers need to carefully structure the investment to avoid unnecessary licensing and operational difficulties.

If you are interested in learning more about crowdfunding in Oregon, please contact any one of our corporate transactional lawyers.

Businesses May Not Be Protected by Standard Liability Releases
By Therese Adams

The Oregon Supreme Court recently delivered an opinion that may well affect how much you pay to ski the slopes of your favorite mountain this season. But that may not be the extent of the decision's impact. In *Bagley v. Mt. Bachelor, Inc.,* the Court held that enforcement of a ski pass agreement which included a release of all claims for liability against the ski area operator would be unconscionable. However, as the Court acknowledged, the reasoning behind the decision may have implications that affect businesses beyond ski areas. Business owners who invite members of the public to their place of business may want to take heed as well.

Mr. Bagley bought a season pass to ride at Mt. Bachelor and rode the lifts over 100 times in 26 days. It was his third year to buy a season pass, and he classified his skill level as that of an "advanced expert." Mr. Bagley suffered an injury which left him paralyzed after he snowboarded over a human-made jump at Mt. Bachelor's "'air chamber' terrain park." He then brought suit against Mt. Bachelor, alleging that the ski area had been negligent in the design, construction, maintenance, and inspection of the jump. Mt. Bachelor defended against the claim by pointing to the release it required of all patrons. The back of the lift ticket included a release of all claims against Mt. Bachelor, Inc. other than those based on intentional misconduct. Each ski lift terminal also had a sign which stated "YOUR TICKET IS A RELEASE" and contained language further explaining the effect of the release. Mr. Bagley argued that the release should not be enforced because it violated public policy and was unconscionable.

The Court noted it had not addressed the issue—whether agreements that release liability in advance of an injury/incident can be enforced—in quite some time. In general, such agreements are valid and may be enforced so long as they do not violate public policy or are unconscionable. A contract may be "unconscionable" because it is negotiated in a way that is inherently unfair to one of the parties, or because it contains terms that are against the public interest (e.g. a contract to commit a crime). Mt. Bachelor argued that its release was not against the public interest, citing prior decisions by Oregon courts holding that releases of liability for basic negligence are against the public interest only when the party provides essential public services.

The Oregon Supreme Court was unconvinced that Mt. Bachelor's release should be enforced simply because a ski area operator does not provide an essential public service. The Court analyzed the negotiations that led to the release between Mr. Bagley and Mt. Bachelor. Though Mr. Bagley was not surprised by the release because releases of this nature are a common practice at ski areas, Mr. Bagley's ability to bargain for different terms was all but nonexistent because he was required to agree to all terms if he wanted to purchase the ticket. Furthermore, the Court looked at whether Mr. Bagley would suffer a harsh result if the release were enforced. The Court found that he would, because only Mt. Bachelor was in a position to be aware of and address any hazards it had created on its business premises. The Court also focused on the fact that Mt. Bachelor was the only one in a position to take on the expense of protecting patrons against any hazards, and could spread the cost of doing so among each patron.

The public policy consideration upon which the Court hung its hat was the longstanding concept that business owners should bear responsibility for conditions on their premises that have potential to harm others, referred to as "premises liability."

The idea that a business such as Mt. Bachelor could contract away such liability did not sit well with the Court. In particular, the Court found it in violation of the public's interest to enforce a release of liability for a business whose facilities were so open to the public that they had become places of "public accommodation." The Court cited other public accommodation laws that affected Mt. Bachelor operations to support its decision that the ski area should be treated as a public space in this context.

So where does the *Bagley v. Mt. Bachelor, Inc*. decision leave business owners who wish to limit their liability for accidents that occur on their property? Are these releases completely unenforceable when used by businesses operating recreational facilities? Are they enforceable in different situations? How "public" does a space have to be for the Court to treat it differently? While this decision does not answer those questions, it provides the current framework by which business owners and their attorneys should evaluate the enforceability of these releases. The Court's decision also left open the door for businesses to give patrons limited bargaining power by way of offering protection for negligence by charging an additional fee or through other methods.

Business owners who use releases and open their facilities to the public, particularly for recreational use or other widespread public use, should take a fresh look at the scope of the release and evaluate any necessary redrafting in light of this decision. This decision also gives business owners cause to reevaluate business insurance coverage to adequately protect against this risk. Changes in how the release is presented may also improve the chances of enforcing the release. Taking these steps may make the difference between an enforceable release you can rely on and an unanticipated lawsuit down the road. Our attorneys are available to evaluate whether any release you currently use may be enforceable, or to answer any other questions you may have about the use of releases in your business.

ERISA Bonds vs. Fiduciary Liability Insurance: *What's the Difference?*

By Catherine Trottman

This article is intended to help plan sponsors understand the difference between retirement plan fidelity bonds and fiduciary liability insurance.

Retirement Plan Fidelity Bonds

The Employee Retirement Income Security Act of 1974 ("ERISA") generally requires all retirement plans to be covered by a fidelity bond. These bonds, which are often referred to as "ERISA bonds," protect the plan against losses resulting from acts of fraud or dishonesty on the part of a plan official, a plan fiduciary, or any person who handles funds or property of the plan. ERISA bonds generally must be in an amount that is not less than 10 percent of the plan's assets as of the beginning of the plan year. Higher bonding requirements may apply when the plan invests in unconventional assets, like real estate and personal property. The minimum required ERISA bond is $1,000, and the maximum required bond is $500,000. Retirement plans that only cover the owner of the business that sponsors the plan are typically exempt from the bonding requirement.

Fiduciary Liability Insurance

In certain situations, a retirement plan's fiduciaries can be held personally liable for the performance (or nonperformance) of their fiduciary duties. The U.S. Department of Labor ("DOL"), which is the governmental agency that enforces ERISA, can impose significant penalties on fiduciaries who breach their fiduciary duties. In addition, plan participants who are harmed by a fiduciary breach can sue the fiduciary personally for damages. Fiduciary breaches under ERISA can include the failure to select and monitor appropriate investments, the failure to make certain that plan expenses are reasonable, and the failure to remit contributions to the plan in a timely fashion. Fiduciaries who breach their fiduciary duties can be held accountable to the DOL and/or the plan participants even if their breach was the result of simple negligence, as opposed to fraud or dishonesty. In such situations, the ERISA bond discussed above will not come into play. However, plan fiduciaries can obtain fiduciary liability insurance that covers these situations. Fiduciary liability insurance typically covers the legal costs of defending the fiduciary, and also covers damages in the event that the defense is not successful. It is important to note that, unlike an ERISA bond, fiduciary liability insurance is not required under ERISA.

The Difference

It is important not to lump these two types of insurances together. If a plan sponsor obtains fiduciary liability insurance, but not an ERISA bond, then the plan sponsor will find itself out of compliance with ERISA. The key to identifying whether you have an ERISA bond or fiduciary liability insurance is to look at the policy and determine who is the insured. If the insurance protects the plan, then it is most likely an ERISA bond. If the insurance protects the individual fiduciary, then it is most likely fiduciary liability insurance.

ERISA Bond vs. Fiduciary Liability Insurance: A Real World Application

Rainy Days, Inc. is an Oregon corporation specializing in the sale of umbrellas and raincoats. It sets up a 401(k) retirement plan called the "Saving for a Rainy Day Retirement Plan." The plan has $3 million in assets, a $300,000 ERISA bond (for which annual premiums are $150) and a $1 million fiduciary liability insurance policy (for which annual premiums are $2,500).

Rainy Days, Inc. is owned equally by two shareholders, Cloud E. Sky and Hale N. Sleet. Both are named as trustees of the retirement plan. Mr. Sleet is intimidated by Ms. Sky's stormy personality, so he defers to her on all matters regarding the retirement plan. In a whirlwind of imprudence, Ms. Sky invests $1 million of plan assets in a risky investment, and the value of that investment falls to $500,000 overnight. Depressed by her imprudence, Ms. Sky decides to head for sunnier skies and embezzles $500,000 in plan assets to fund her escape. When the plan participants learn of the situation, they file a $500,000 law suit against Ms. Sky and the plan for fraud, and another $500,000 lawsuit against Ms. Sky and Mr. Sleet for breach of fiduciary duty.

The fiduciary liability insurance will cover the costs of Mr. Sleet's defense and any resulting judgment because the claim against Mr. Sleet is for breach of fiduciary duty (i.e., the duty to monitor the investment of plan assets). The ERISA bond will cover the embezzled funds because Ms. Sky acted fraudulently when she stole plan assets, but only up to the $300,000 limit. The plan participants are still out $200,000. Although the fiduciary liability insurance provided $1 million in coverage, because the $200,000 shortfall is attributable to the embezzlement it is not covered.

For more information about ERISA bonds and fiduciary liability insurance, feel free to contact a member of the Employee Benefits & Executive Compensation team.

FIRM ANNOUNCEMENTS & SEMINARS

We would like to extend a warm welcome to our new attorneys.

Paul J. Sundermier, Of Counsel, recently joined our Litigation and Real Estate & Land Use groups. His practice is limited to representing parties in eminent domain actions – either the direct taking of private property by the government or "inverse condemnation" when the government denies that it has taken private property. Paul is one of the most experienced eminent domain law litigators in Oregon, and is co-chair of the Annual Eminent Domain Seminar in Portland.

Betsy Cantrell has joined the Business Law & Taxation group. She provides counsel to clients with regard to entity selection and formation, mergers and acquisitions, succession planning and business transition, and intellectual property and licensing. Prior to joining our firm, Betsy worked in Portland for a data threat, security and compliance solutions company.

Jeff Moore, a partner in our Estate Planning & Administration Group, recently gave a presentation to the clients of Tomson Burnham LLC Realty Group on "The Tips and Traps of Estate Planning".

On March 10, **Christine Moehl**, a partner in our Employee Benefits & Executive Compensation Group, will participate in a panel discussion for the Willamette Valley Association of Health Underwriters regarding the eligibility of pre-tax treatment for individual premiums through a payroll system.

The firm's **Dental Industry Group** is pleased to be a sponsor of the monthly meeting of the Marion Polk Dental Society on March 10.

Randall Sutton and **David Briggs** of the Employment Law Group will present to these groups on the following topics:

- **Client Employment Law Breakfast,** March 17. Topics will cover: Identifying when a disgruntled employee becomes a protected employee; practical steps in managing performance problems; documentation best practices; and terminating employment while minimizing risk. If you'd like to attend, please contact Kayla at kfranz@sglaw.com.
- **Oregon Medical Group Management Association**, Manager's Time Out Meeting, April 17, Astoria. The topic: "Employment Law Compliance Essentials – The Five Steps Every Practice Needs to Take".
- **Washington Bankers Association**, HR Training Conference, April 24. The topic: Social Media Policies.

The **Oregon Bankers Association**, **Oregon Dental Association**, and the **Marion Polk Dental Society** will publish an article by **Randall Sutton** titled "Employment Law Update: After Measure 91, Is Marijuana Just Another Legal Drug?" It discusses the recent legalization of recreational marijuana use, and how that affects businesses wishing to maintain a drug-free workplace.

The firm is proud to support many organizations in the mid-Willamette Valley and their activities.

- The **Medical Foundation of Marion and Polk Counties** presents **"From the Heart"** with **Robin Roberts** on April 17. For tickets, contact the Elsinore Theatre box office at 503-375-3574, or visit www.TicketsWest.com.
- **Mary Leonard Law Society's Monte Carlo Casino Night & Silent Auction** will be held on May 8 to benefit Liberty House and The Center for Hope & Safety. For tickets, please contact maryleonardlawsociety@gmail.com.

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