BUSINESS BRIEFS

Legal Developments Affecting Business

WINTER 2012

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A JURY OF YOUR PEERS?

By Hunter Emerick

Our country holds dear the right to trial by jury. Thomas Jefferson described a trial by jury as "the only anchor ever imagined by man by which a government can be held to the principles of its constitution." That right is set forth in both the Federal and State Constitutions.

The Seventh Amendment to the United States Constitution provides that "the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise reexamined in any court of the United States, according to the rules of the common law." Article 1, Section 7 of the Oregon Constitution states that in "all civil cases, the right to trial by jury shall remain inviolate." Article 7, Section 3 states that "in actions at law where the value in controversy shall exceed $200.00, the right of trial by jury shall be preserved."

Neither the United States nor the Oregon State Constitutions, however, guarantee a right to have a case heard by a jury of your peers. In fact, jury selection is governed by rules that prohibit lawyers from selecting juries based on specific racial, ethnic or age classifications. The constitutional requirement is only that a jury be impartial, not that it be populated with citizens who are similar to the litigants. Of course, civics lessons goes out the schoolhouse door when our case is to be decided by a panel of our fellow citizens. Then, we naturally want jurors who will see our case through our eyes.

In the American colonies, juries were developed, in part, as a response to the Crown's efforts to suppress free trade or impose taxes. Colonial jurors would often refuse to convict Americans charged with violating the Crown's laws. The Crown was not the only litigant that feared continental juries. Frequently, Revolutionary War bond holders did not fare well before juries of the day. The juries of the Continental United States seemed to have a populist agenda.

Despite the importance of the development of a jury trial in the history of our country, and as a protector of individual rights and freedoms, few have actually ever witnessed the selection of a jury. Recently, a twelve person jury was seated to hear a civil dispute in Marion County. Two alternates were added to the panel. The case was estimated to take two weeks. The initial jury panel was approximately sixty members.

Because of the length of the trial, the judge asked all of the panel members whether service on the jury for ten working days would constitute a substantial hardship to their lives or their livelihood. For the most part, anybody with a life or livelihood answered that question affirmatively. Because of the large number of panelists, the judge was fairly liberal in recognizing any excuse to avoid service on this jury. Caretaking for young children or elderly parents, previously scheduled vacations, critical deadlines for students, employees who were not paid for jury duty, and mom and pop operations were all granted leave from service. A number of business owners or managers were excused from the panel. Ultimately, close to half of the panel was dismissed.

From the remainder of the panel, the attorneys had to seat fourteen jurors, twelve regular jurors and two alternates. As a result of *voir dire*, the seated jurors had the following characteristics: three of the jurors were retired; six owned homes; and six

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rented homes. The age ranges were wide. Five jurors were in the 56-65 age range; and four were in the 18-25 age range. There were only two jurors in the 36-45 age range, and two in the 46-55 age range. Most of the jurors were employed in retail, with four of them working as salespeople or clerks, and one had management responsibilities. Two of the jurors were employed in government, and two worked in the financial services sector. Of the jurors, only eight were married, and of those folks who were married, six of the spouses were employed. Strangely, the largest single type of employer was the big box stores. Three of the jurors worked at Wal-Mart and one at Lowe's.

During the course of the trial, three jurors were excused. One juror's spouse was seriously injured in a road rage incident. Another juror returned to work on the evening following his jury selection and learned that his employer would not pay him to be away from his job for two weeks. Finally, the third juror was excused because he did not speak English. Because of the manner in which juror selection now occurs, it is possible that an individual may not be specifically questioned by the attorneys. This individual had responded in English to the written juror questionnaire. Although the responses were broken English, it appeared as though the individual juror could read and understand English. As it was later determined, another juror was assisting him in answering the questions in English.

In this case, the parties at issue were all business owners. One of them was a professional. The case was a somewhat complicated civil matter. Unfortunately, the jury did not have a single business owner, nor did it have anyone with any significant business experience. It certainly was not a jury of peers of any of the litigants. However, the jury fulfilled the constitutional mandate by being impartial. That is, they had no apparent connections or biases to any of the litigants. Nonetheless, it is questionable that without our legal system the group of relatively sophisticated litigants would have picked this group of citizens to resolve their dispute. Everyone considering using the court system should carefully consider who may be dispensing justice.

New and Proposed State Legislation Affecting Wineries

By Caleb Williams

2011 Oregon Legislation Follow-up

In these pages last summer, we described pending Oregon legislation that would restrict most accessory uses on wineries in areas zoned as exclusive farm use (EFU). Certainly due to additional input by individual wineries and the Oregon Winegrowers Association, the bill was substantially modified prior to passage and ultimately, the legislature adopted a law that expressly permits certain accessory activities at wineries in EFU zones that either: (a) produce less than 50,000 gallons annually and have at minimum 30 acres of vineyards (at least 15 of which are on-site), or (b) produce at least 50,000 gallons annually and have at minimum 80 acres of vineyards (at least 40 of which are on-site). Existing wineries on EFU zoned lands are grandfathered in under the law, and counties retain regulatory power over uses, although within the parameters established by this statute.

Accessory activities that the law permits include wine tours, wine tastings, wine clubs, and limited service restaurants. Special events such as weddings or concerts are also permitted at wineries on EFU-zoned land if several requirements are satisfied, including that the winery's wine is featured at the event and the event be directly related to promoting or selling the wine. However, there are limits on the number of these accessory activities that may occur at a winery in a given year. Events that feature a winery's wine must be limited to 25 days or less per year and the gross income from the sale of accessory items or services can't be more than 25 percent of the gross income from the on-site retail sale of wine. This law also permits the largest wineries – those that produce at least 150,000 gallons of wine and own 160 acres (80 of which are on-site, with 50 on-site acres of vineyard) – to operate a full-service restaurant at the winery.

Proposed 2012 Oregon Legislation

The state legislature is meeting for a short session in 2012. As of this writing, two bills directly affecting the wine industry have been proposed:

SB 1501

This bill resurrects an attempt to permit a retailer (or group of retailers) to store wine at a central

warehouse under the retailer's control, and then deliver it directly to the retailer's store, and not through a licensed wholesale distributor. The bill would create a new OLCC license – a central warehouse license. If this bill becomes law, it could create an opportunity for wineries to increase their self-distribution by selling a greater amount of product directly to a retailer, which could store the product in its central warehouse until needed on the shelves. In the 2011 legislative session, a bill with similar purposes was introduced, but did not move out of committee during that session.

HB 4121

This bill impacts the same land use statutes that were modified by 2011 House Bill 3280. This Bill would expand the definition of a winery permitted in exclusive farm use zones to those that produce wine from grapes or other fruits, honey or other agricultural products. Wineries that produce wine from these things would be permitted in EFU-zoned lands so long as the winery met the minimum acreage requirement set forth in ORS 215.452. Under the bill, these wineries would also be permitted to host accessory uses just as those now permitted to wineries producing grape wines.

<u>2012 Washington Legislation</u>

The Washington House of Representatives has recently approved a law that would give growers of wine grapes a priority lien over other creditors against a wine producer to whom the grower has delivered grapes for wine production. The lien permitted by House Bill 2362 would be statutory, and automatically provide the grower a lien against the grapes, the producer's inventory and accounts receivable. The priority lien lasts for 60 days from the date payment is due for the grapes, but can be extended for up to 12 months if a notice of the lien is filed by the grower within that 60 day period.

If passed by the Senate and signed by the Governor, this legislation would provide unusually strong protection to growers of wine grapes as compared to other industries.

If you have any questions about the impact of this new or proposed legislation on your winery, please contact our Winery, Vineyard and Brewery Team.

Prepare to Be a Top Gun Trustee or Executor

By Freeman Green

"What is the difference between pilots that wash out of flight school, and pilots that go on to become a Top Gun?" I recently asked this question of Greg, a former military Top Gun pilot, who went on to become an instructor at the Navy's legendary TOPGUN school. Greg's answer contains an important principle of success for future Trustees and Executors.

"Today's fighter planes travel incredibly fast," Greg explained. "When you're traveling near the speed of sound, objects that appear distant at one moment, will be upon you and then behind you the next moment; new pilots can quickly find themselves overwhelmed by this onslaught. Successful pilots think several steps beyond the obstacles at hand, and prepare themselves accordingly."

As our population ages, more and more people will find themselves handling the affairs of friends and family who have lost mental capacity or passed away. If a friend or family member has named you to serve as their Trustee or Executor, there are a number of simple questions you can ask them today to prepare for your future responsibility. Here is a checklist of seven questions to get you started:

1. What do you own?

When you step into your role as a Trustee or Executor, one of your first responsibilities will be to identify all property owned by your loved one. Working with your loved one today to develop and maintain a comprehensive list of assets is much easier than trying to create the same list when he or she can no longer help you.

Assets to ask about include: bank accounts, investment accounts, real property, timeshares, vehicles, safe deposit boxes, stocks, bonds, business interests, notes or other obligations owed to your loved one, life insurance, IRAs, 401(k)plans, pensions, annuities, and valuable items of personal property.

Find out details about each asset, such as account numbers, the location of the property, and any agreements affecting the property (such as rental or security agreements).

2. How is each asset titled?

"Title" refers to the manner in which an item of property is owned. An asset's titling will control how that asset passes at death. Each asset will fall into one of four categories:

Individual Name. An asset owned solely in your loved one's individual name will go through a court process known as "probate" before being transferred to the person(s) named in your loved one's will. If no will exists, the asset will generally pass to the surviving spouse, or to the decedent's children if there is no surviving spouse. However, if the decedent is survived by a spouse, and the decedent has surviving children who are not related to the decedent's spouse, then one-half of the asset will pass to the decedent's spouse, and one-half of the asset will be pass to the decedent's children who are not related to the surviving spouse.

Joint with Rights of Survivorship. Property owned by two or more persons with survivorship rights will pass to the surviving owners. When a single surviving owner remains, the property is owned solely in that surviving owner's name, and will pass through probate upon the surviving owner's death.

Beneficiary Designations. Many assets that would initially be owned in your loved one's individual name can have a beneficiary designation added to specify the beneficiary(ies) who will receive that item of property at death. The beneficiary(ies) will receive the property without the need for a court probate. Beneficiary designations are common on life insurance policies, IRAs, and 401(k)s. Similar designations can be added to bank accounts and business interests (if permitted by the business' governing document).

Trust. Assets owned by a living trust will pass probate-free to the named beneficiaries of a trust, in accordance with the terms of the trust.

3. What debts and obligations do you have?

You will have the responsibility of using your loved one's property to satisfy his or her outstanding debts and obligations. This includes payment of state and federal income taxes, state and federal death taxes, mortgages, insurance premiums, medical bills, credit card bills, and inter-family loans. Learn about the frequency of each obligation and your loved one's usual method of payment.

Remember to ask about "optional" obligations (such as magazine subscriptions and gym memberships) that will need to be cancelled upon your loved one's death.

4. How should family loans be handled?

It is not uncommon for parents to make loans to children and grandchildren. Will these loans be forgiven upon the death of the parent, or will a child's share of the inheritance be reduced by the amount owed? Do your loved one's estate planning documents address these wishes? Loans between family members can be a source of confusion, misunderstanding, and litigation if not properly addressed in the estate plan. Remember: gifts and loans to a single individual in excess of $13,000 in a single year have tax implications that should be discussed with a CPA or attorney.

Consider the following example. Kelly's will states that upon her death, her property will be divided equally between her three sons: Maverick, Goose, and Iceman. During life, Kelly loans $100,000 to Maverick. Upon Kelly's death, the loan to Maverick will become an asset of the estate, and Kelly's executor will be obligated to enforce the loan against Maverick. Maverick may use his inheritance to pay off the loan. If Maverick's inheritance is insufficient to satisfy the loan, his brothers will inherit the loan, and they will have authority to enforce the loan against Maverick. However, if Kelly includes a provision in her will that the loan is to be forgiven, then the loan will end at her death. Alternatively, Kelly could include a provision in her will stating that if the loan exceeds the value of Maverick's inheritance, the loan will be forgiven and Maverick will receive no other distribution. Provisions such as these can help preserve family harmony by preventing Maverick from becoming a debtor to his brothers.

5. What estate planning documents have you completed?

Learn what estate planning documents your loved one has in place, and where those documents are located. Common estate planning documents include a power of attorney, will, health care

directive, and authorization for release of medical information. Find out when the documents were last updated and encourage your loved one to keep his or her documents current with their desires, circumstances, and changes in the law.

6. What are your wishes regarding health care?

End-of-life decisions are difficult to make under the best of circumstances. Understanding the wishes of your loved one, with regard to life support and tube feeding, will make those decisions easier, should you need to make them in the future. To avoid confusion, ask your loved one to express his or her wishes to all interested family members, and make sure that each family member has a clear and consistent understanding of those wishes.

Your loved one should express these wishes in a legal document known as an Advance Directive. Because health care decisions may need to be made on short notice, the decision-makers named in the Advance Directive should have quick access to copies of the document.

7. Who are your key helpers and advisers?

Finally, obtain names and contact information for your loved one's professional advisers and business associates, including their financial adviser, CPA or tax preparer, attorney, insurance agent, business partners, key employees, and bookkeeper. These people will understand many details of you loved one's financial affairs, and will become an important resource to you when you step into your role as Trustee or Executor.

Serving as a Trustee or Executor can be overwhelming, particularly in the initial stages of a trust or probate administration. Take time to prepare today, while your loved one is alive and well, and you will find yourself confident and prepared when the time comes to step into the pilot's seat.

TITLE INSURANCE – WHO NEEDS IT?

BY ALAN SOREM

Real estate transactions are expensive. High transactional costs eat away expected profits and can sometimes even kill a deal, which is why buyers and sellers always look for ways to decrease transactional costs.

It is this motivation to reduce costs that often causes parties to ask why they need title insurance. Title insurance, like all insurance policies, is a tool to minimize risk. This article will discuss what title insurance is, how much it costs, and when it is appropriate.

What does title insurance actually insure?

Title insurance is simply a contract that insures a few basic facts. When considering the value of a title insurance owner's policy, these are the three most important facts insured.

1. The person or entity signing the deed has legal title to convey the real property and the person who is signing the deed has the authority to do so.

2. The list of liens, encumbrances, or notices of legal proceedings identified in title report is a complete list of those recorded in the public records as of the date of the report.

3. The property has legal access to a public road.

Knowledge of the above facts is essential to determining whether any real estate document accurately reflects the parties' intentions, which is why every real estate transaction form addresses title insurance policies. Insurance policies are most helpful in cases where there was a fraudulent transfer or mistake regarding the title property either by the current seller or by the former property owners. If you purchased real property from someone who did not have the legal right to convey your title, an insurance policy may be the only way to recover your damages.

Knowing what the insurance policy does not cover is just as important as to what it does cover. Here is a list of seven important exceptions, loopholes and pitfalls.

1. Watch out for the definition of words in the insurance policy. The term "property" means only the legal description the title company attaches to the title report. The title company does not insure, however, that the legal description or map it provides is

accurate. Thus, if the legal description describes the wrong property, the title insurance report will not provide you with a remedy.

2. The search of "public records" is limited. It does not mean a search of all government records. Generally, if a lien, encumbrance, or notice of violation was not filed within the local county real property or court records, it is not within the scope of your insurance policy.

3. Damages caused by noncompliance with zoning or land division regulations are excluded. For example, title policies do not insure that the real property you are buying was lawfully created through a subdivision, partition, or other lawful process. This is still a necessary step that you as a buyer must investigate as part of your due diligence process.

4. Liens from contractors and engineers are generally excluded. You may be forced to pay a contractor's claim for work requested by the previous owner. This risk is especially high when you are purchasing property that has recently been under construction.

5. Boundary encroachments are excluded. If your building or road is actually located on your neighbor's property, the title company will not cover damages resulting from the encroachment.

6. Bonus problem. Most title companies issue title policies and provide escrow services. Escrow services generally make sure that the deed and money exchange hands at the same time. However, you must use caution when relying on an escrow officer to determine that all conditions to closing have occurred such as assigning leases, deposits, or obtaining certain permits. One of the documents escrow officers generally ask buyers and sellers to sign at a closing is a statement that the parties themselves have made sure all the conditions to closing have occurred.

These problems and limitations do not mean title insurance policies are worthless. I generally recommend them in all real estate transactions. However, it is important to understand what is and is not covered by an insurance policy when considering if the cost is justified.

How much does title insurance cost?

Title policies are not free. Standard owners policies cost a base rate of $200.00 plus an additional $3.00 per thousand dollars insured. For example, the cost of a $325,000.00 policy is $1,000.00. These prices are fixed throughout the state and do not change from title company to title company. Discounts can apply in some instances when other title insurance policies have been recently issued.

Is title insurance worthwhile?

Obtaining title insurance is a business decision. I generally recommend obtaining title insurance for all buyers because the event of a mistake or fraud, no matter how unlikely, can be catastrophic for that buyer. I also recommend sellers obtain a "Seller's Endorsement", which will protect them from damages caused by mistakes unknown to the seller.

This information is intended to be generalized and does not cover all nuances to a real estate transaction.

If you have specific questions regarding title insurance in your next transaction, please contact me or one of the other attorneys in our real estate department.

FIRM ANNOUNCEMENTS

Robert Saalfeld, James Griggs, Douglas Alexander, and Randall Cook of Saalfeld Griggs PC were recently selected by their peers for inclusion in The Best Lawyers in America® 2012 (Copyright 2011 by Woodward/White, Inc., of Aiken, S.C.). Additionally, the firm's Corporate Practice and Employee Benefits Practice Groups were ranked First-Tier in the U.S. News – Best Lawyers "Best Lawyers Law Firms." The Best Lawyers in America® directory is published annually each year.

Randy Sutton, and **Mark Shipman** were both recently AV rated by Martindale Hubbell. AV Preeminent is a significant rating accomplishment, a testament to the fact that a lawyer's peers rank him or her at the highest level of professional excellence. Congratulations Randy and Mark!

Caleb Williams was recently appointed to the City of Salem Budget Committee. The Citizen Budget Committee consists of the entire City Council and nine citizen members appointed by the Council who examine, analyze and recommend a budget to the Council.

Saalfeld Griggs PC is sponsoring the **Oregonians in Action Education Center's Annual Land Use Forum** on Saturday, April 7th, 2012 at the Salem Conference Center. **Alan Sorem and Mark Shipman** will present on Land Use 101, and **Freeman Green** will speak on Estate Planning. There will be over 20 courses offered at this full day seminar covering building codes, well drilling, wetlands, development issues, septic systems, and updates on new land use legislation. Oregonians in Action is a non-partisan, non-profit organization representing Oregon home and property owners. Its mission is to defend the right of private property owners to make use of their property. For more information on the Land Use Forum, please visit www.oia.org.

Dorothy Bean recently joined the Habitat for Humanity of the Mid-Willamette Valley Board of Directors. Habitat for Humanity of the Mid-Willamette Valley promotes home ownership by building homes in partnership with local hardworking families in need of adequate, affordable housing. Dorothy also recently became a member of the Salem Chapter of the National Association of Women in Construction, an organization that encourages the advancement and growth of women in the construction industry through education, support and community involvement. Dorothy focuses her practice, in part, on construction law.

Steven Hitchcock recently joined the Salem-Keizer Education Foundation Board of Directors. Salem-Keizer Education Foundation is a non-profit organization dedicated to enriching the quality of education in local public schools.

Freeman Green recently joined the Boys & Girls Club of Salem, Marion and Polk Counties Foundation Board as a Trustee. The Boys & Girls Club is dedicated to giving children and adolescents opportunities for success by promoting academic success, character and leadership development, and healthy lifestyles.