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FOS NEWS - *Our clients come first*

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Editor: Diane Slomowitz

THEY CAN SUE ME IN ALASKA, AND USE TEXAS LAW—FOR MY WISCONSIN CONTRACT?

By Diane Slomowitz

Negotiating contracts can be downright messy.

By the time you agree to major business terms, you may not want to argue the "small stuff."

Jurisdiction, for example: that's just meaningless lawyer-talk, you think. Or venue: whatever that is, it can't be important, you say. And choice of law: the law is the same everywhere, right?

Jurisdiction—which court has the authority over a particular defendant; venue—where a lawsuit occurs; and choice of law—which state's (or federal) law applies, are three critical but often overlooked contract provisions.

Ignoring them in contract negotiations could lead to a procedural and/or substantive nightmare in a subsequent contract dispute.

The law generally allows contracting parties to agree to the applicable jurisdiction, venue and law in a dispute, so long as the court/locale/law has some reasonable connection to the parties and the dispute.

Jurisdiction, venue and choice of law provisions are customarily raised when one contracting party is located outside of Wisconsin.

If, for example, you contract with a California company to ship Wisconsin product to California, the California company's contract may require that contract disputes be resolved by (jurisdiction) and in (venue) a California court.

Even if your company has minimal contacts with, and no witnesses in, California.

If you don't object, and if a dispute later arises, you may be forced to sue or be sued in California, not Wisconsin.

That would be disruptive, overly time-consuming, and expensive.

For that reason, you might want the contract to specify that a Wisconsin court has exclusive jurisdiction over the parties, and venue must be in Wisconsin, if a lawsuit arises regarding the contract.

You can't negotiate that provision, however, unless you know what venue means and how important it is.

While jurisdiction and venue can be procedurally difficult

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FOS WELCOMES LAUREN MADDENTE

Fox, O'Neill & Shannon, S.C. welcomes Attorney Lauren Maddente as an associate with the firm.

Lauren provides legal services primarily within FOS's business and litigation groups.

Lauren received her law degree, *cum laude*, from Marquette University Law School.

While in law school, Lauren served on the Moot Court Executive Board.

Lauren also competed in the Jenkins Honors Moot Court and National Moot Court Competitions.

Lauren further acted as president of the law school's Legal Writing Society.

Lauren is a Wisconsin native, having grown up in Delafield.

BARCZAK CRAFTS DIGITAL PROPERTY LAW

FOS congratulates of-counsel **Kenneth Barczak** for his participation in the development of Wisconsin's new Digital Property Act.

Ken was a member of the committee which helped craft the statute's language.

The Act expands and details the authorized disclosure of digital property, such as email, social media and online banking accounts, to fiduciaries, including personal representatives, trustees, power of attorney agents, guardians and conservators.

Since its passage, Ken has made multiple presentations regarding the statute to attorneys and other professional groups.

Ken, former chair of the Wisconsin Bar's Real Property, Probate and Trust Section, is currently a member of the Section's Board.

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RESIGNATION STARTS CLOCK FOR CONSTRUCTIVE DISCHARGE DISCRIMINATION

By Jacob A. Manian

If a company is around long enough, it may eventually be subject to an employment discrimination claim.

One such claim can involve an employee alleging constructive discharge.

Under discrimination law, a "constructive discharge" occurs when an employer makes working conditions so intolerable, often through harassment or retaliation, that an employee is effectively forced to resign.

An important question when such a claim is filed is whether the employee has filed his or her claim on time. If an employee misses the filing deadline, his or her claim will likely be dismissed.

The common filing deadline in private employment discrimination is 300 days.

Until recently, the question was 300 days from when? The date of resignation or the date that the employer committed the last "bad" act forcing resignation?

The U.S. Supreme Court recently answered that question for constructive discharge discrimination claims.

In *Green v. Brennan*, the Court ruled that the filing period for a constructive discharge claim starts when the employee *tenders his or her resignation,* not when the employee was last treated in a discriminatory fashion.

The employee in *Green* filed a discrimination claim after he was denied a promotion.

The employee, Green, asserted that, after and because of his discrimination claim, his working conditions became intolerable, forcing him to resign. He later filed a new claim, this time for constructive discharge.

The employer in *Green* (the Postal Service) argued that Green's claim should have begun to run on the date of the employer's *last act* triggering the resignation, not the resignation itself.

The Supreme Court disagreed, ruling that the filing period begins to run on the date the employee tenders his or her resignation, not the earlier date of the last discriminatory act.

Because *Green* involved a federal employer, its claim deadline was 45 days. So, employee Green had 45 days after his resignation to file his constructive discharge claim.

Under *Green*, the private claim 300 day deadline does not begin to run until the employee tenders his or her resignation.

Employers may view the Supreme Court's ruling as "expanding" an employee's time to sue, in that the clock does not begin to run until the resignation itself.

The ruling, however, is limited to constructive discharge cases, not other types of discrimination claims.

In any event, the ruling provides a clear rule upon which both employers and employees may rely going forward.

Sue in Alaska?

Continued from page 1

and expensive, choice of law can substantively hurt your case.

A Wisconsin statute, for example, requires written notice, with specified information, when a patent right is claimed or asserted against a Wisconsin company.

Assume your Wisconsin company licenses a patent from a Massachusetts patent owner.

If the contract requires Massachusetts law, and if Massachusetts has no patent notification law, you will lose the protection of Wisconsin's notification law, with no other law to take its place.

Some statutes, like the Wisconsin Fair Dealership Law, prohibit parties from using venue or choice of law to contract out of its requirements. There, a court will likely disregard a conflicting contract provision.

Further, contracts can be interpreted differently depending on their precise wording.

For example, the fact that a party "agrees" to an Ohio court's jurisdiction over it does not mean that Ohio is the "only" court with jurisdiction.

Similarly, the fact that a case "can" be venued in Nevada does not necessarily mean that it "cannot" be located elsewhere.

Likewise, the fact that Minnesota law "may" apply does not always mean that Florida law "can never" apply.

So, when negotiating a contract, add jurisdiction, venue and choice of law to your checklist.

Otherwise, you may end up suing or being sued in California, or making your case under Maine law.

"FOOD FROM THE BAR"

FOS won the "Best Participation Rate" prize in the Milwaukee Bar Association's inaugural "Food from the Bar" campaign.

The campaign was a month-long "friendly" competition among local law firms, all to benefit Feeding America Eastern Wisconsin, the nation's largest domestic hunger-relief organization.

FOS's participation rate was a whopping 100%!

"Food from the Bar" raised more than $13,000.00 for Feeding America.

PATENT TROLLING PREVENTION IN WISCONSIN

By Bailey M. Larsen

In recent years, "patent trolls" have increasingly acquired large patent portfolios, not to innovate or create products, but to leverage payments from so-called patent "infringers."

These trolling companies send form demand letters to targeted patent owners, accusing them of infringement, often with no description of infringing conduct or even the so-called infringed patent.

To avoid costly litigation, many targets pay to "settle" rather than defend themselves.

To curb bad-faith patent trolls, Wisconsin, with 26 other states, has enacted anti-patent trolling legislation.

Wisconsin's law prohibits the mindless "patent notifications" - the assertion or enforcement of patent rights, through letters, e-mail or other written communications – issued to Wisconsin companies, by requiring that they contain the following information:

- The "infringed" patent/ patent application number;
- A copy of such patent/ pending application;
- The name and address of the patent/ application owner and others with enforcement rights;
- Each asserted claim, and each relevant product, service, process, or technology of the target;
- The theory of each claim, and its relation to the target; and
- Every legal proceeding, pending or completed, as to each patent/pending patent.

If a notification is incomplete, the sender must provide all required information within 30 days after notice by the recipient.

The law also prohibits false, misleading, or deceptive information within a patent notification.

Patent notifications that omit or contain false, misleading, or deceptive information are subject to a $50,000 fine *for each violation*.

Aside from government enforcement actions, recipients of notifications violating the statute may bring private actions against the sender.

Injunctions, damages, costs and reasonable attorneys' fees are available to private action winners.

Punitive damages are also recoverable, equal to the *greater of* up to $50,000 per violation or three times the total amount otherwise awarded.

The statute does exempt isolated entities, including higher education and certain health care or research institutions. Most companies trolling Wisconsin businesses, however, should be covered.

If you receive a patent notification, contact your FOS attorney to review its compliance with Wisconsin's patent notification statute.

FOS ON THE MOVE

FOS shareholder **Matthew O'Neill** moderated the panel "Holding Government to Account: Changes to Oversight of Wisconsin's Ethics and Elections Laws."

The presentation occurred at the State Bar of Wisconsin's annual convention, which was held in Green Bay, Wisconsin on June 16, 2016.

FOS shareholder **Diane Slomowitz's** article, "Screen Reading: Will Mandatory E-filing Change How We Write Briefs?" was published in the June 1, 2016 edition of the State Bar of Wisconsin's *Inside Track*.

Diane's prior article, "Briefs for the Brief Writer: Posner on Prose: Oft-cited federal judge dispenses writing advice," was published in the May 3, 2016 *Wisconsin Law Journa*l.

To read these articles, go to www.foslaw.com/attorneys/diane-slomowitz.

LAW DOGS ON THE LOOSE!

FOS's furry friends abounded, and bounded, at the firm's second Doggie Day. Pictured are Al Young/Lizzie, Matt O'Neill/Fergie, Diane Slomowitz/Jake, Bailey Larsen/Tootsie and Bill Soderstrom/ Ty/Maddie, all overseen by Bill Fox.

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IN THIS ISSUE

APPEALS COURT CLARIFIES "SUBSTANTIAL FAULT" DEFINITION

By Michael G. Koutnik

A recent Wisconsin Court of Appeals decision provides insight into how courts will interpret a 2013 revision to Wisconsin's unemployment insurance benefits law.

Under that 2013 revision, terminated employees can be disqualified from receiving unemployment benefits if the employee's "substantial fault" resulted in the employee's termination.

Unfortunately, the legislature did not clearly define what "substantial fault" means.

Instead, the legislature defined what *is not* substantial fault:

- one or more minor infractions of rules unless an infraction is repeated after the employer warns the employee about the infraction; or
- one or more inadvertent errors made by the employee; or
- any failure by the employee to perform work because of insufficient skill, ability, or equipment.

The recent case of *Operton v. Labor and Industry Review Commission* shows how difficult it may be to prove that even multiple employee errors could constitute "substantial fault," if the errors are not intentional ones.

In *Operton*, the Wisconsin Court of Appeals held that an employee who was repeatedly disciplined and ultimately discharged for a series of "cash handling errors" could not be denied unemployment benefits under the "substantial fault" exception.

The court reasoned that repeated inadvertent errors, even if warnings are given, do not constitute "substantial fault" under the statute.

The court further concluded that the cumulative effect of repeated inadvertent errors cannot be deemed "substantial fault."

In light of this ruling, employers would do well to continue maintaining employee conduct records and, before opposing unemployment benefits, ensuring that an employee's pre-termination conduct is intentional, and not inadvertent.

FOS can guide you through the "substantial fault" issue.