

EXECUTIVE REPORT

Greetings to our clients and friends and welcome to our firm's fall 2019 newsletter. We hope that you had an enjoyable summer and are working back into your fall rhythms and routines. In this edition of the Petrie + Pettit newsletter, we are offering informative articles on a variety of topics — from short term rentals to potential fiduciary duties of Wisconsin companies to their creditors to estate planning for pets. We hope you find this information helpful, and we welcome your call or email at any time with questions.



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SHORT-TERM RENTALS ARE MORE COMPLEX THAN YOU THINK.



With the rise of short-term rental (STR) sites like Airbnb, Homeaway, and VRBO, you may be wondering if turning your home or rental property into a short-term rental is the way to go.

There are many benefits to short-term rentals including an increased income stream and as a result, many are considering making the switch. However, before jumping on board the STR bandwagon, be aware that you will need to address issues such as licensing, local ordinances, taxes, insurance and more if you want to rent your property for the short-term.

LICENSING

According to the Wisconsin Department of Agriculture, Trade and Consumer Protection ("DATCP") if you are charging rent to a tourist or transient occupant for any amount of time then you are operating a tourist rooming house" and are required to purchase a license through the state. Wisconsin defines a "tourist or transient occupant" as a person who travels to a location away from his or her permanent address for a short period of time for vacation, pleasure, recreation, culture, business or employment.

Your local municipality (village, town, city or county) may also require you to be licensed through the municipality as well and may have different code requirements for properties engaged in commercial activity.

LOCAL ORDINANCES

Cities, villages, towns and counties may impose additional regulations on your short-term rental such as limiting the total number of days that the property can be rented, prohibiting rentals for less than a certain number of days, requiring registration fees, imposing inspections or nuisance regulations, or limiting the number of occupants based on bedrooms.

TAXES

With limited exceptions, you will need a seller's permit from the Wisconsin Department of Revenue if you are operating a short-term rental. You will need to collect and remit state sales and use taxes and, additionally, any applicable county sales tax, municipal room tax, local exposition tax, special district tax or premier resort area tax.

INSURANCE COVERAGE

Even if you are planning on renting your home out for only a single occasion, you should check with your insurance company in advance regarding coverage. Once you rent all or part of your home out, most insurance companies will consider this a business use and your general homeowner's policy will likely deny coverage for any incident related to the business use. Without insurance coverage, liability may fall to you, personally.

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*Jennifer M.
Hayden*

ANNOUNCEMENTS



INCLUDING PETS IN YOUR ESTATE PLANNING

Owners have very close relationships with their pets and consider their pets to be members of the family. Therefore, it is not surprising that owners want to include their pets in their estate plans in the event that their pets outlive them. A direct gift of money or other property to a pet cannot be made since an animal is property and one piece of property cannot hold title to another. However, one can make a direct gift of a pet, as well as a cash bequest to defray the costs of care, to an individual or could give an individual the power and discretion to find a suitable home for the pet. Either a testamentary or a living trust may be used, although a living trust would avoid the delay between the pet owner's death and the probate of the Will and funding of the testamentary trust. If you have any questions about the appropriate estate planning techniques to provide for your companion animals, please do not hesitate to contact us.

I always enjoy receiving comments from our clients, business associates and friends regarding articles appearing in our firm's newsletters. The most comments I ever received pertained to an article I wrote a number of years ago about involving pets in your estate planning. The comments I received ranged from a client who wanted to establish a six-figure fund for her two dogs, to a client who wanted all of his pets euthanized following his death, to a client who wondered why we wasted the space on something as unimportant as "pets." Regardless of your opinions on our newsletter articles, all of us at Petrie + Pettit appreciate your feedback, so please keep the comments coming!

James R. Petrie CHAIRMAN OF THE BOARD

SUMEETA A. KRISHNANEY presented a seminar on Special Needs Trusts and Guardianships to an overflow crowd at Curative Care Network in Wauwatosa on September 18th. Additionally, Sumeeta and Missy Burback, a financial advisor with Northwestern Mutual, will be speaking to the New Berlin School District on October 16th on the topic of estate planning for families with a loved one with special needs.

On November 19, 2019, **DAVE MCCLURG** will be speaking at the Metro Milwaukee Society for Human Resource Management's Fall Forum at the Embassy Suites in Brookfield. Dave's presentation will focus on strategies that HR professionals can use to identify and prevent FMLA abuse along with policies that can help employers avoid inadvertent FMLA violations.

Congratulations to **RENEE RUFFIN NAWROCKI**, who was recently elected to serve as the 2019-20 President Elect of the Association for Women Lawyers.

JIM AND LAURA PETRIE were both named as 2019 Milwaukee 5 Star Wealth Managers in the area of estate planning and were featured in the July edition of Milwaukee Magazine. Jim and Laura have been honored with this 5 Star designation for multiple consecutive years.

On October 26, 2019, **TRISTAN PETTIT** and the Apartment Association of Southeastern Wisconsin will present the 20th Landlord Boot Camp, an all-day seminar covering all aspects of residential landlord-tenant law in Wisconsin. In addition, Tristan presented a seminar for the Central Wisconsin Apartment Association in Stevens Point on the topics of Rental Documents and the Residential Rental Rules (ATCP) on September 11th, and he also presented a private seminar for a client on Emotional Support Animals and the Reasonable Accommodation Process on September 24th.





WHAT ARE A WISCONSIN COMPANY'S FIDUCIARY DUTIES TO ITS CREDITORS?

Financially distressed companies typically have more than enough problems to worry about, but one issue that may not be on the radar for officers and directors of companies dealing with financial difficulties is the fiduciary duty that may be owed to the company's creditors.

Officers and directors (who are often also the shareholders in small businesses) face many difficult decisions when attempting to decide which business risks to undertake when it appears the proverbial ship is sinking.

Courts outside of Wisconsin predominately only require that a company be "insolvent" in order to afford creditors the right to bring a claim against the company's officers and directors for breaching a fiduciary duty. However, this standard does not mean that once a company becomes insolvent, it must immediately shut the doors and liquidate its assets to pay creditors. The "business judgment rule" still protects good faith yet risky business decisions made by officers and directors, even if those decisions ultimately end up having a negative impact on creditors.

Wisconsin courts have taken a slightly different approach. In Wisconsin, the leading case on the issue is *Beloit Liquidating Trust v. Grade*. In this case, Beloit Corporation filed a chapter 11 bankruptcy, and the creditors' committee, which represents the entire body of unsecured creditors in a bankruptcy case, brought an action against the company's officers and directors for breaching their fiduciary duty to creditors by making questionable business decisions that ultimately contributed to the company's demise. According to the creditors' committee, once the company realized that it was insolvent and unable to pay its debts in the normal course of business, it had a duty to manage the company and preserve assets for the benefit of its creditors.

The Wisconsin Supreme Court disagreed, and held that in Wisconsin, a company must be both "insolvent" *and* no longer a "going concern" before a fiduciary duty is owed to its creditors. As to the first prong, insolvency in this context simply means that the company's assets, taken at a fair valuation, are insufficient to

pay its debts. However, even upon a showing of insolvency, as long as the company is continuing to operate, the second prong of the analysis is not met, and it does not owe a fiduciary duty to its creditors.

Based on the deviation from the rule found in many other jurisdictions, the Beloit case has attracted a considerable amount of criticism, including from Wisconsin's own Court of Appeals. In *Polksy v. Virnich*, the Court of Appeals noted that it did not believe that Beloit set forth a sensible rule, since an insolvent business that is technically still operating as a "going concern" could strip assets from the struggling enterprise without breaching a duty to its creditors.

Although at first blush it may seem that there is a large gap between the law in Wisconsin and other jurisdictions, the distinction is less dramatic than it appears. In the asset stripping scenario that the Court of Appeals is concerned with, creditors in Wisconsin can still bring actions for preferential payments or fraudulent transfers for any assets that were transferred for less than fair market value or for nefarious purposes. For risky business decisions that officers and directors make in good faith with the hope that they will turn the company's fortunes around, they would likely be protected under both standards; under the "business judgment rule" in other jurisdictions, and due to the fact that company is still classified as a "going concern" in Wisconsin. While the analysis may be different, the result in most cases will be the same.



David J. Espin

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SHORT-TERM RENTALS

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SHORT-TERM LODGING MARKETPLACES

If you want to market your short-term rental you will most likely use a short-term lodging marketplace. A lodging marketplace provides a platform through which an unaffiliated third party offers to rent your short-term rental to a person and collects the rent from that person. If you list your property for rent through a lodging marketplace that marketplace is required to register with the Department of Revenue for a license and is responsible for collecting state-imposed taxes.

ADDITIONAL REQUIREMENTS

You may be prohibited from renting your property on a short-term basis. Your Condominium Association Bylaws, Homeowner's Association, Subdivision Covenants, Tenant's Organization, or Lease may prohibit short-term rentals entirely or impose additional requirements.

While short-term rentals offer many benefits, there are many issues that must be addressed prior to listing your STR on Airbnb, Homeaway, or VRBO. If you would like to discuss whether short-term rentals are right for you, please give us a call.

