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Parents now face liability for underage drinkers

by Douglas E. Lee

Twice in the last decade, the Illinois Supreme Court refused to allow persons injured by drunken minors to sue the adults who supplied the minors with alcohol. In both cases, the court said the creation of "social host liability" was an issue best left to the General Assembly.

The Illinois legislature finally acted in 2004, passing the Drug or Alcohol Impaired Minor Responsibility Act. Under the Act, which applies to conduct that occurs after Oct. 1, 2004, any person at least 18 years of age who "willfully supplies alcoholic liquor or illegal drugs" to a minor and "causes the impairment of such person" can be sued for injuries that result from the impairment, including injuries suffered by the impaired minor.

The critical word in the Act is "willfully." Although no appellate court yet has been asked to interpret the Act, it appears parents and other homeowners will not be liable under the Act only for allowing underage drinking to occur within their homes. Less clear, however, is the liability of an adult who knows alcohol in the home is readily available to the minor and nevertheless allows the minor to host a party.

Interestingly, the Act distinguishes between residential and non-residential property. While no liability is imposed merely for permitting consumption of alcohol or illegal drugs within a home, an adult who willfully permits the consumption of these substances within non-residential property owned or controlled by the adult is subject to liability under the Act.

The potential liability under the Act is staggering. A person entitled to bring a claim under the Act can recover economic damages (including medical expenses, loss of economic or educational potential and loss of productivity), non-economic damages (including pain and suffering, disfigurement and loss of companionship), attorney's fees and punitive damages.

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Legal issues arise when former employees become competitors

by Dana M. Considine

One of the most common types of business litigation is an action brought by a company to prevent a former employee from competing against it. Because these cases are so common, courts over the years have developed a fairly specific set of guidelines to assist both businesses and employees.

Courts typically begin their analysis by examining whether the new competitor's conduct occurred while the individual was employed by the company. Generally, courts say, an employee may plan, form and outfit a competing company while still working for his or her employer but he or she may not otherwise start competing. Therefore, it usually is permissible for an employee to form a rival corporation, select a business location, obtain financing and purchase furniture and equipment, as long as the actions are not conducted on the employer's time. An employee also is allowed to prepare a list of clients expected to follow the employee to his or her new business.

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IRS announces inflation, other adjustments for 2005

by Gary R. Gehlbach

The IRS has announced some inflation adjustments for 2005:

- The gift tax annual exclusion remains $11,000. That is, a person may make gifts totaling $11,000 per person per year, so long as the gifts are present interest gifts such as cash, without being required to file a gift tax return. Unlimited gifts may still be made for tuition and medical care. As is always the case, however, the devil is in the details.
- The gift tax annual exclusion for gifts to a non-U.S. citizen spouse will be $117,000 during 2005.
- If you are involved in farming to the extent that you materially participate in your farming operation, your estate might be eligible for special use valuation. Under §2032A of the Internal Revenue Code, qualifying estates can choose to value farmland for estate tax purposes at the production value rather than its market value. Given today's skyrocketing farmland prices, the gap between market value and production value is quite significant. But there is a limit to the amount by which the value of all qualifying farmland may be reduced from market value. For persons dying in 2005, that limit is $870,000. When coupled with the estate tax exclusion of $1.5 million, eligible farmers may avoid estate taxes on $2,370,000. For a married couple, the exclusion is $4,740,000. Restrictions apply, and in order to avoid estate taxes on this much property, it is essential that the estates be properly and carefully planned.
- During 2005, prepaid burial plans structured as qualified funeral trusts under §685 of the Code can accept a maximum of $8,200 in contributions for the benefit of an individual.
- Trusts and estates will reach the maximum income tax bracket of 35% for income greater than $9,750. Fortunately, most trusts are structured to distribute income at least annually to the beneficiaries, so that the income is taxed to the beneficiaries at their tax rates rather than to the trust.
- Investment income of a child under age 14 is generally taxed at the parents' top marginal rate if the child's unearned income exceeds the sum of $800 (the standard deduction for a dependent child) and the greater of $800 or the itemized deductions directly attributable to the production of the child's investment income. If the child's unearned income is less than $8,000, the parents may elect to include the child's unearned income on the parents' income tax return.

Competition . . .

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An employee, however, may not obtain confirmations from clients about whether they will follow the employee, solicit co-workers and clients, use the employer's facilities or equipment to develop the new business or use the employer's confidential information.

After leaving the business, the former employee - in the absence of fraud, a contractual restrictive covenant or the improper taking of a customer list - usually may compete with the former employer and solicit former customers and employees from the former employer.

In the corporate context, officers and directors owe a fiduciary duty of loyalty to their corporate employer not to actively exploit their positions within the corporation for their own personal benefit or to hinder the ability of a corporation to continue the business for which it was organized. A corporate officer therefore may not:

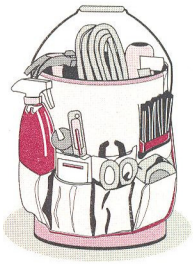
- fail to inform the employer that other employees are forming a rival company;
- solicit fellow employees to join a rival business;
- solicit business from the current employer's customers;
- use the company's resources to assist in developing the new business;
- use the company's confidential information, either before or after departure or
- orchestrate a mass exodus of employees to take place shortly after the officer's departure.

Generally, a shareholder does not owe a fiduciary duty to a corporation, unless the business is a closely held corporation in which the parties have the ability to hinder, influence or control the others or the business. In such a case, the restrictions on a shareholder are similar to those on an officer.

While the courts' guidelines are helpful to both businesses and employees, they are not bright line rules that apply in all cases. Legal counsel therefore often is necessary as businesses, employees and former employees consider their options.

Law entitles tenants to arrange own repairs

by Megan G. Heeg



Under a new law, a residential tenant can hire a repairman to make repairs to the tenant's unit (not to exceed the lesser of $500 or one-half of the monthly rent) and then deduct the repair costs from the rent if the repairs were "required under a residential lease agreement or required under a law, administrative rule, or local ordinance or regulation" and the landlord failed to make the repairs after written notice from the tenant.

In order for a tenant to make the deduction, the condition requiring the repair must not have been caused by the tenant's deliberate or negligent act or omission or by a person on the premises with the tenant's consent. In addition:

- the tenant must provide written notice to the landlord (by registered mail or other specified means) of the tenant's intention to have the repair made at landlord's expense;
- the landlord must have failed to make the repairs within 14 days after notice (or sooner in the case of an emergency);
- the repairs must be made in a workmanlike manner and in compliance with the law;
- the tenant must provide the landlord with a paid bill from an appropriate tradesman or supplier (unrelated to the tenant), along with the repairman's name, address and telephone number and
- the amount charged must not exceed the reasonable price customarily charged for the repair.

A tenant can deduct for repairs made by the tenant only if the repairs are performed in a workmanlike manner, the tenant holds the appropriate license or certificate required by state or municipal law to make the repair and the tenant is adequately insured to cover bodily harm or property damage caused by his negligence or substandard performance.

Because repairs performed under the new law are not construed as having been performed with the landlord's permission, contractors who are hired directly by a tenant likely will not have the right to record a mechanic's lien against the property. To retain the right to record a mechanic's lien for nonpayment, a contractor should obtain the owner's (or his agent's) authority to perform any requested repairs.

The new law does not apply to public housing, condominiums, owner-occupied rental property containing six or fewer dwelling units and units subject to the Mobile Home Landlord and Tenant Rights Act.

Business must destroy unnecessary consumer information

by Douglas E. Lee

Worried about identity theft and other inappropriate uses of credit information, the Federal Trade Commission has issued a sweeping new rule requiring businesses of all sizes to destroy consumer information they no longer need.

The new rule became effective June 1, 2005, but gives businesses until Jan. 1, 2006, to come into compliance. Businesses that fail to comply will be subject to actual damages, fines, attorney's fees and punitive damages.

The rule provides in part that, "Any person who maintains or otherwise possesses consumer information for a business purpose must properly dispose of such information by taking reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal."

In the rule, "consumer information" is defined to include credit reports, background checks and other information that identifies individuals by name and contains other personal identifying information, such as Social Security numbers. The rule applies to both paper records and electronic media.

As long as a business purpose exists for retaining the information, the disposal requirement is not triggered. Once that business purpose no longer exists, however, the rule effectively requires that the information be destroyed. While the rule does not specify a means of destruction, it notes that burning, pulverizing and shredding paper all are acceptable. For electronic media, the rule requires companies to destroy or completely erase the hard drive, disk or CD-ROM that stores the information.

To comply with the new rule, businesses that possess consumer information should consider adopting a document retention policy that, among other things, identifies consumer information maintained by the business, establishes clear standards for determining when a business purpose for that information no longer exists, designates the employee who is responsible for making that determination and directs how the information will be destroyed.

Spouses can protect property without prenuptial agreement

by Rolfe Ehrmann

No one plans a divorce when he or she is getting married. The decisions new spouses make about property, however, can profoundly affect the results of a divorce if it occurs.

If a bride or groom actually anticipated a divorce, she or he undoubtedly would retain counsel to draft a premarital agreement to settle in advance matters of potential support and the division of property. While premarital agreements are not uncommon, they are most often entered into by people with substantial property or people more advanced in age, on a second or third marriage, with children who are the intended beneficiaries of their own property. In many other cases, one of the persons entering into the marriage perceives a need for a premarital agreement but does not want to introduce the subject to his or her loved one. What to do?

In Illinois, many of the objectives of a premarital agreement can be achieved simply by being attentive to title. Generally, if a person owns specific property before the marriage and does not put the spouse's name on the title after the marriage, the person can claim that property as non-marital and should be able to keep it if a divorce occurs. If the person places the spouse's name on the title, however, a court might consider the property to be marital and thus subject to division if the couple divorces. Even without a premarital agreement, then, one can affect a later divorce simply by leaving title to property unchanged.

In Print and At the Podium

Mr. Lee recently was interviewed by reporters for *USA Today* and the Battle Creek (Mich.) *Enquirer* for stories they were writing about First Amendment issues . . . **Mrs. Heeg** in May joined other farm mutual insurance company representatives who traveled to Washington, D.C., to brief Illinois legislators on issues affecting the state property/casualty insurance industry. **Mrs. Heeg** is a member of the board of directors of Forreston Mutual Insurance Company . . . **Mr. Gehlbach** has accepted reappointment to the Editorial Board of the Illinois Bar Journal, which is responsible for all publications of the Illinois State Bar Association . . . In his most recent commentary for the website of the First Amendment Center, www.firstamendmentcenter.org, **Mr. Lee** discussed a Third Circuit Court of Appeals decision affirming the media's First Amendment right to publish truthful, lawfully obtained information, even if the information should not have been disclosed to reporters . . . **Mr. Gehlbach** was a speaker at a recent regional meeting of the Illinois Association of Mutual Insurance Companies, presenting an update on how to find and retain competent directors . . . **Mrs. Considine** recently taught a Junior Achievement class in personal economics to eighth graders at Reagan Middle School in Dixon . . . **Mrs. Heeg**, a member of the Leadership Committee for the Prairie State Campaign for Legal Services, is assisting the organization in collecting donations from local attorneys . . . This spring **Mr. Gehlbach** successfully completed the course work to be certified as a volunteer coach and joined the Dixon High School ranks of coaches, in charge of the high jumpers on the boys' track team.

Deals and Decisions

Mrs. Heeg recently helped several clients defeat preference demands from bankruptcy estates, saving the clients hundreds of thousands of dollars . . . **Mr. Ehrmann** and **Mrs. Considine** successfully represented the City of Amboy in an eminent domain proceeding, through which the City obtained easements necessary to complete a portion of its waterworks project . . . **Mr. Gehlbach** continues to work on a number of real estate development projects, from Naperville, to Rockford, to Rochelle and around Dixon and is currently involved in several annexation matters in the Dixon area . . . **Mr. Lee** recently conducted an investigation for a client that had received allegations of sexual harassment . . . In separate cases, **Mrs. Heeg** successfully negotiated settlements for clients injured at work, in one case obtaining a settlement more than twice the amount originally offered, in another, obtaining a reasonable settlement after the employer filed for bankruptcy protection and in the third, obtaining a settlement for more than ten times the amount originally offered . . . **Mr. Lee** successfully completed a trial on behalf of a client accused of failing to pay all amounts owed under a contract . . . **Mrs. Heeg** was reappointed to the panel of private trustees maintained by the United States Trustee for the Northern District of Illinois, Western Division. As a member of the panel, **Mrs. Heeg** administers Chapter 7 bankruptcy cases in Lee and Whiteside Counties.