The Gavel

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A periodic newsletter on legal issues for clients and friends of **David B. Forest, P.C.**
45670 Village Blvd., Shelby Township, Michigan 48315 (586) 532-6100

WE'RE MOVING !

It's been nearly seven (great) years on Garfield, but the practice has grown so much that the time has come to move the law offices! Our brand new offices are located in Shelby Township, and are only about 2 miles from the old Garfield offices. From the intersection of Hall (M-59) & Hayes Roads, go north on Hayes a quarter of a mile past the Meijer store and make the first left, onto Lakeside Blvd. North. A few hundred yards down Lakeside Blvd. North, directly across from Lifetime Fitness, is the Shelby Village Office Center. We are in the left building at 45670 Village Blvd., next to an adjoining suite with other lawyers. Stop in and see us!

Please note that not only has the address changed, but so have the phone and fax numbers. However, we still have the same website and the same professional legal services.

Finally, please accept our apologies for being so late with this issue of *The Gavel*. We expected to be in the new offices this past summer, but the build out took a long time. We think you'll agree the new offices are worth the wait!

Disclaimer: Nothing in this newsletter is intended to be or is a substitute for legal advice.

Can Officers and Directors be Liable To Creditors (?!?) if the Corporation goes Under?

A fledgling movement, started in Delaware courts, may expand the potential liability of corporate directors and officers to the creditors of the corporation if the company is (or close to becoming) insolvent.

First, some background. Directors and officers have always owed a fiduciary (high degree of good faith) duty to the corporations they serve. There is the strict duty of good faith, and the duty to the shareholders to maximize value and allow for the greatest return on their investment. The duties must be handled prudently, and in a manner that he or she believes to be in the best interest of the corporation.

So how do creditors of the corporation become so important that the directors and officers have to consider their needs as well? **The concept of a fiduciary duty owed to creditors arises only when a company is insolvent or nearly insolvent.** Insolvency is measured under either of two tests: the balance sheet test (liabilities exceed assets) or the cash flow test (not paying its debts as they become due).

As a corporation is going under, it is easy to see how the interests of the shareholders and the creditors will diverge. The shareholders want the maximum return on their investments in the corporation, while the creditors desire to collect as much of their debts as possible. Delaware case law has evolved so that at the insolvency or near insolvency, the directors and officers must consider the interests of the shareholders (as they have always done) but also consider the interests of the creditors.

This 'tight rope' act becomes especially tricky when the directors and officers are considering a potential buy out, sale of assets, or transactions with 'control persons' (insiders) or their relatives. But why should the directors and officers take creditors in consideration? As it was phrased in a famous Delaware case, because within the community of interests that the corporation represents, it is **"... the right (both the efficient and fair) course to follow..."**. While at first glance, this might seem to be unfair, If you have ever been in the position where a business owes you money and the business is not only failing to pay, but it is sinking fast, you would be able to better appreciate the Delaware position.

How will this affect us in Michigan? Delaware tends to be the leading jurisdiction when it comes to corporate and business law, and many states (including Michigan) can be expected to follow. *Source: Michigan Business Law Journal*.

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small claims caseS

As it comes to pass, you may either sue or be sued in small claims court. Small Claims court is a division of your local district court, and is designed to resolve smaller civil matters in an efficient and timely manner. No attorneys are allowed (though an attorney can 'remove' the claim to regular district court, which then proceeds as a normal court case). The only other requirement is that the claim cannot be greater than $3,000; even if it could be more, the small claims court can only grant judgment up to $3,000.

So how do you proceed without an attorney? It can be done, and is done every day in small claims court, but a few words to the wise. **The first thing to remember is to stay calm.** The magistrate who hears your case has heard hundreds of similar disputes. While your case may seem like the gravest injustice to you (and it could be), the magistrate has heard it all before.

You should dress nicely, showing respect to the magistrate. Does this mean Sunday best? Not necessarily, but jeans and t-shirts do not show that you are serious about your case. The magistrate will tell you where to sit, and if necessary where to stand, and when it is your turn. If you are confused or just don't know, ask the magistrate - he or she should be helpful. Remember to speak respectfully to the magistrate; it does make a difference.

Before you walk into the courtroom, write out what you want the magistrate to know. You should only focus on the important issues that will help the magistrate to resolve the case. Skip the ancillary stuff that will not help the magistrate to decide the case, no matter how badly you want someone to know what a lousy person the other side is. Try to stick to your guideline, and let the magistrate know in advance what the point is that you are trying to make.

What carries the day in small claims court is evidence - tangible items or documents. For example, a neighbor had a claim against a painter for the house across the street. The painter had sprayed on a windy day, and as a result the neighbor's house and car got paint on them. The painter denied all of this. So the neighbor filed a claim in small claims court, then took a close up picture of his car, unscrewed the mailbox, coach lights, etc. from his house, and put all the items into a big box, and hauled it off to court. His evidence carried the day. There can be no greater proof than the items with paint on them.

Without any corroborating evidence, the case just becomes a swearing contest between two people, and the magistrate is left to decide who is telling the truth and who isn't. If you have a witness or two, especially those that would appear to be unbiased, have them come to testify as well.

Finally, good luck (sometimes the other side doesn't show up, and you could win by default!).

CASE IN POINT:

Noncompete Agreement (revisited)

In a prior issue (*The Gavel* 1-99, available at www.forestlaw.com) the topic of non competition agreements was discussed. A recent Michigan case has expanded the use of this concept in Michigan.

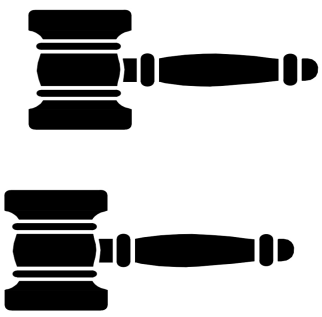
A home improvement company employed a number of independent sales representatives to sell the company's products and services. As part of the agreement with each, the company had them sign a covenant not to compete with the company: they were not to compete within Michigan for a period of three years. Subsequently, a number of the sales representatives left the company and set out to establish a competing company. **The home improvement company sued them, alleging among other things, that the sales representatives had violated the non compete covenant.**

The defendants countered with a rather interesting legal argument. In essence, they contended that the laws that allowed non compete agreements to be enforced only applied to employees. Since the Defendants were not employees but independent contractors, the repeal did not apply to them; i.e. the original prohibition on non-compete agreements still applied, and therefore the Plaintiff could not bring the unlawful claim against them. The trial court agreed with the Defendants and dismissed the non-compete claims against them.

Plaintiff appealed. On appeal, the Michigan Court of Appeals undertook a (very long) legal

analysis of the original case law (called *common law*) before the enactment of the original Anti-Trust laws. **The Court of Appeals found that all reasonable non-compete agreements were now enforceable.**

Bottom line: **covenants not to compete by non-employees (here independent sales representatives) are enforceable**. Plaintiff home improvement company wins. Bristol Window and Door, Inc, v Hoogenstyn, *Michigan Court of Appeals*.



➥REFERRALS

If you are pleased with the **service and professionalism** you have received from our office, it would be greatly appreciated if you passed the good word along. **Referrals are always appreciated and encouraged**, and we look forward to the opportunity to serve your associates and friends. If we cannot immediately service their needs, we will be happy to **refer them to the appropriate attorney specializing** in their specific area of need.

However, if you have not been pleased, contact us directly!

David B. Forest, JD, MBA
Attorney and Counselor at Law
(586) 532-6100
(586) 532-6104 fax

WWW.FORESTLAW.COM