PETRIE PETTIT

FALL 2023

EXECUTIVE REPORT

I hope this message finds you well. It is with great pleasure and profound gratitude that I extend my warmest appreciation to each and every one of you. As we embark on a new season, I wanted to take a moment to express our heartfelt thanks for your unwavering trust and continued partnership with our law firm. Your support over the years has been instrumental in our growth and success.

At Petrie+Pettit, we are committed to providing you with the highest quality legal services, tailored to your unique needs. We understand the challenges and opportunities that you face, and we remain dedicated to helping you navigate the legal landscape with confidence and ease.

We greatly value your trust, appreciate your continued partnership, and are excited about the opportunities that lie ahead.

Tristan R. Pettit

EXECUTIVE VP

EVICTIONS & BANKRUPTCY

Evictions are typically matters handled exclusively through the state court system, in whichever county the property is located. Every now and then, though, we have to make a trip to federal court to assist a landlord. This most frequently arises when a tenant files for bankruptcy protection.

Bankruptcy is authorized by the United States Constitution and is codified in Title 11 of the United States Code. There are 15 "chapters" of code, but the most common of those in this context are Chapter 7 and Chapter 13. The bankruptcy protections provided by filing under either chapter are extremely powerful, and can stop an eviction in its tracks.

Chapter 7 bankruptcies are relatively short-lived. The filing of a Chapter 7 bankruptcy creates an automatic stay of any action to collect on a debt, including past-due rent, or to continue any action to recover an interest of the "bankruptcy estate", which includes the tenant's right to continued occupancy of the rented premises. Chapter 7 bankruptcies are typically open for four to six months before the case is closed. If the case results in a "discharge," most debts which existed at the time of the filing are wiped out. Rent incurred before the case was filed is generally discharged in a Chapter 7 bankruptcy.

Chapter 13 bankruptcies usually run for a much longer duration. These bankruptcies may repay some amount of the existing debt to creditors, but do so over a 3 to 5 year period. The filing of a Chapter 13 bankruptcy also creates an automatic stay against collection or recovery.

There are a few exceptions to the automatic stay. Most relevant to a landlord, is that if a judgment of eviction is entered by the state court before the bankruptcy is filed, the landlord can still execute the writ and remove the tenant from the property. Be aware, however, that there is an exception to this exception, so there are limited circumstances when even a previously granted judgment of eviction is halted by a bankruptcy filing!

In all other circumstances, whether a Chapter 7 or a Chapter 13 is filed, in order to move forward with an eviction action, including serving a notice terminating the tenancy, the landlord will need permission from the Bankruptcy Court to do so. We obtain this permission by filing a Motion to Lift the Automatic Stay.

For Chapter 7 bankruptcies, the process of obtaining a lift of the stay requires a specific basis to file and may take as long as the life of the bankruptcy itself, so doing so may be an exercise in futility. Once the Chapter 7 discharges, dismisses or closes, the landlord can proceed against the tenant for any debt incurred after the date the Chapter 7 case was filed. Lifting the stay may allow the landlord to begin the process a few weeks earlier than the end of the bankruptcy.

For Chapter 13 bankruptcies, though, given their much longer duration, lifting the automatic stay is a viable option for the landlord. There need to be grounds for the motion, such as failure of the tenant to pay rent after the filing of the bankruptcy. The Bankruptcy Court will also likely give the tenant a "second chance" with the first motion, and order that any rental arrears incurred after the date the case was filed be included in the repayment plan, but may also order that any future missed rent payments will result in an immediate lifting of the stay.

Evictions are complicated enough, but when you add in a bankruptcy as well, navigating both the state AND federal courts becomes a minefield. Petrie + Pettit has shepherded may clients through both court systems and stands ready to assist you.

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I THINK I DISCOVERED A FRAUDULENT TENANT, WHAT CAN I DO?

Identity theft or fraud for the purposes of renting an apartment is a growing issue. We have heard there are social media pages dedicated to selling fraudulent identities to individuals specifically to rent apartments as well as sites that will produce fake paystubs, bank account information, credit reports and checks or money orders, along with the more traditional methods such as friends and family members posing as a current employer or former landlord to give a good reference.

With all of the available options, it is likely that at some point you may believe you have a tenant who used one or several of these methods to pass your screening criteria, enter into a written rental agreement and take possession of an apartment.

Frequently, the potential for fraud comes to light because of other issues with the tenancy. In most cases, there will be a corresponding failure to pay rent, bounced payments or non-rent breaches occurring some amount of time after the tenant has been residing in the apartment. Unfortunately, once the tenant has been residing in the apartment, it is likely that you will need to issue notice and proceed with filing an eviction action as it is unlikely the police will take any action to remove the tenant, though you can certainly file a police report if you have a sufficient basis to do so. In certain circumstances, the police may be able to provide the actual identity of the person residing in the apartment, which can be helpful in proceeding.

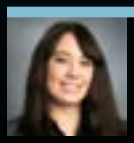
If your rental agreement contains a provision regarding providing accurate and complete information in the application and rental documents as the basis for an eviction action, you could issue notice and, if necessary, file an eviction action based on that provision. You will have to be prepared to prove what information was provided by the tenant and what was fraudulent or inaccurate. We do not believe that this is the type of criminal activity which threatens the health, safety or peaceful enjoyment of other tenants or immediate neighbors such that a Non-Curable Notice for Criminal Activity could be used but, particularly if there is a police report, you may be able to allege that criminal activity provisions of your lease have been breached by the fraud.

Alternatively, if you do not have sufficient evidence of the fraud or rental agreement provisions to proceed on that basis, you can wait until the tenant fails to pay rent or "bounces" a rent payment and serve notice and file an eviction action based on the non-payment. You will want to do so promptly, as collecting charges for any unpaid rent or physical damage to the apartment in these cases is obviously next to impossible.

If the tenant happens to be paying rent, you can wait until there are non-rent breaches such as noise complaints, fights with other tenants, or other activities for which you would normally issue a Notice to Quit or Vacate. You would issue the notice and then file an eviction action on that basis, if the tenant fails to cure or vacate after the notice period.

So, it may be likely that the tenant will stay in the apartment as long as possible, fail to appear in court and have vacated by the time the Sheriff executes the writ. We cannot, of course, guarantee what any particular tenant will do, so, as in all instances, you must proceed as thought the matter will be contested in court and it will be necessary to proceed through the eviction case and have the sheriff execute the writ of restitution.

If you prefer, at Petrie + Pettit S.C., we are ready, willing and able to discuss these options with you in greater detail, or to assist with drafting notices and, if necessary, filing eviction actions against fraudulent tenants.



Jennifer M. Hayden

ANNOUNCEMENTS

TRISTAN R. PETTIT – On November 4th, Atty. Tristan Pettit presented his all-day Landlord Boot Camp for the Rental Property Association of Wisconsin (formerly known as the AASEW) in Wauwatosa. This was the 26th time that he has presented his Boot Camp to the group. On November 9th, Tristan presented a private seminar to a client on Fair Housing issues. The following weekend, Tristan presented his Landlord Boot Camp in DePere for the Apartment Association of Northwestern Wisconsin and the Fox Valley Apartment Association. So far in 2023, Tristan has presented a total of 18 Landlord-Tenant related seminars.

JENNIFER M. HAYDEN – Attorney Hayden has also been busy presenting landlord/tenant seminars, speaking before both the Waukesha Apartment Association on October 18th and in front of a private landlord on October 27th.

REACH OUT TO ANY MEMBER OF THE PETRIE + PETTIT LANDLORD/TENANT TEAM TO ARRANGE FOR A PRESENTATION AND LET US PUT OUR SUCCESS AND EXPERIENCE TO WORK FOR YOU!

DAVID J. ESPIN – Attorney Espin recently argued in person before the 7th Circuit Court of Appeals. He reports that, in order to avoid any traffic delays, he drove down to Chicago the night before. He was so concerned about forgetting any part of the court-appropriate attire, he got fully dressed (suit, tie, shoes, socks, belt and all!) and had his wife give him a once over to confirm he wasn't missing anything. Fortunately, no last minute stops at Macy's were required!

NEW CHALLENGES

TO NON-COMPETE, CONFIDENTIALITY AND NON-DISPARAGEMENT PROVISIONS IN EMPLOYMENT AND SEVERANCE AGREEMENTS

AS YOU MAY KNOW, THE FEDERAL TRADE COMMISSION PROPOSED A HIGHLY CONTROVERSIAL RULE IN JANUARY OF 2023 THAT WOULD BAN NON-COMPETE (BUT NOT NON-SOLICITATION) PROVISIONS IN MOST EMPLOYMENT AGREEMENTS.

Although it was initially expected that the FTC would fast-track consideration of this proposed rule, the massive and overwhelmingly negative responses the FTC received has reportedly pushed back the date for the Commission's final consideration of the rule to the spring of 2024. Many commentators speculate that the final rule, if any is issued, will include significant modifications that will limit the scope of the restrictions on the use of non-compete agreements.

Although properly drafted and narrowly drawn non-compete agreements remain enforceable in Wisconsin, the drumbeat of opposition to such agreements continues. At least 5 states (California, Oklahoma, North Dakota, Minnesota, and New York) have now banned or severely restricted the use of non-compete agreements. And recently, National Labor Relations Board (NLRB) General Counsel (GC), Jennifer Abruzzo, issued an "Enforcement Memorandum" (GC Memo 23-08) asserting that most non-compete provisions in employment contracts and severance agreements violate the National Labor Relations Act – which applies to both union and non-union employers.

GC memos are not binding law. However, they outline legal theories that the GC intends to use in prosecuting alleged unfair labor practices. The memo indicates that the GC seeks to advance the novel theory that non-compete agreements generally interfere with employee rights protected by Section 7 of the National Labor Relations Act.

The GC Memo asserts that, absent "special circumstances," the "proffer, maintenance, and enforcement" of non-compete agreements tend to infringe on employees' Section 7 rights to engage in "protected concerted activities" under the Act and are, therefore, unlawful because employees could reasonably construe the provisions to "deny them the ability to quit or change jobs" by limiting access to other employment. The GC argues that these agreements weaken employees' leverage and bargaining power by discouraging organizing activities and other employee activism. She suggests that enforcement actions will focus on the level of the worker within the organization and the worker's compensation, declaring that non-compete agreements with low-to-middle wage workers who are not privy to confidential or trade secrets information should be invalidated.

The GC grudgingly recognizes that non-compete provisions may be lawful if they "clearly restrict only individuals' managerial or ownership interests in a competing business," or "protect employers' proprietary information or trade secrets." However, the memo argues that an employer's interest in retaining employees or protecting its investment in employees will generally not justify a broad non-compete provision.

The GC is requiring that all NLRB regional offices submit cases concerning "arguably unlawful" non-compete agreements to the NLRB Division of Advice. Once complaints are issued, the GC will seek to convince the members of the Board to adopt her theory that such provisions violate the Act.

However, this may not require a great deal of persuasion. Earlier this year the Board decided that broad confidentiality and non-disparagement terms in severance agreements will be deemed unlawful because they tend to interfere with, restrain, or coerce an employee's ability to speak about the severance agreement or otherwise communicate with other employees about their former employer. Although prior Trump-era rulings allowed employers to include confidentiality and non-disparagement clauses in severance agreements, the current Biden NLRB held in *McLaren Macomb* that the employer's ***proffer*** of a severance agreement containing confidentiality and non-disparagement clauses violated the Act because the clauses "have a tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights to discuss terms and conditions of employment with co-workers, former employees, the union, any government agency, and any third party in which communications may affect a labor dispute" – even if there is no evidence that the employer intends to enforce the provisions in question.

Employers that continue to enforce broad confidentiality and non-disparagement clauses in their severance agreements could face unfair labor practice charges. Pending future Board decisions, the consequences of such charges are unclear. In a worst-case scenario, the entire severance agreement and any releases/waivers it contains could be invalidated. Alternatively, only those portions of the agreement related to confidentiality and non-disparagement could be held to be unenforceable. However, carving these provisions out will ultimately undermine the value of the agreement for many employers as confidentiality and non-disparagement clauses are often important incentives supporting the offer of a severance agreement in the first place.

David A. McClurg

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WISCONSIN REPEALS ITS PERSONAL PROPERTY TAX ON BUSINESS OWNERS

IN JUNE OF 2023, Governor Evers signed Wisconsin Act 12, which repeals Wisconsin's personal property tax on business owners. When the bill goes into effect in January of 2024, it will eliminate a time-consuming and oftentimes costly tax filing for business owners across the state.

Prior to Act 12's enactment, Wisconsin required personal property taxes to be paid on certain types of tangible personal property being used for business purposes, such as furniture, fixtures, and equipment. However, over the years a number of exemptions to this default rule were enacted, including exemptions for manufacturing equipment, inventory, and computers. Eventually, so many exemptions were put into place that the exemptions essentially swallowed the rule, and the benefits of the personal property tax law arguably failed to justify the costs borne by business owners to stay in compliance.

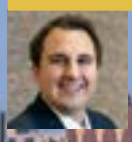
Under the new tax scheme, business owners will no longer be required to pay personal property taxes and any related compliance costs, such as the cost of paying an accountant to prepare personal property tax returns. Another change is that under the newly enacted Wis. Stat. § 70.17(3), buildings, improvements, and fixtures on (a) leased lands, (b) exempt lands, (c) forest croplands, and (d) managed forests will be required to be taxed as real property. Under the prior law, Wisconsin allowed these types of improvements to be taxed as *either* real property *or* personal property.

Further, this new statute allows tax assessors to create separate tax parcels for any buildings, improvements, and fixtures that are owned by a party other than the owner of the land on which they are located. In turn, these improvements can then be assessed as real property to their actual owners.

Finally, the Act clarifies that manufactured homes and mobile homes that are not otherwise exempt from taxation under Wis. Stat. § 66.0435(3) will be assessed as real property rather than personal property.

Business owners should take note that Act 12 does not take effect until January 1, 2024, so you may still be liable for personal property taxes that accrue in 2023 pursuant to your company's 2023 personal property tax assessments.

If you have questions on how Act 12 may impact your business, you can reach out to Petrie + Pettit's knowledgeable business attorneys.



David J. Espin