An Illinois Law Firm

Getting Down to Business

Heyl Royster
Business & Commercial Litigation Newsletter

Fall 2013

Welcome Letter

Dear Friends,

Welcome to the latest issue of Heyl Royster's newsletter that addresses issues facing business owners and managers, and offers the perspectives of attorneys who represent clients that range from sole proprietorships to multinational corporations.

In this edition, we have articles on three issues that arise in everyday business situations. On the following page, my article on the Statute of Frauds discusses the basic provisions of, and some of the exceptions to, this statute. It provides insight on some common questions regarding the terminology and practicality of the Statute of Frauds, and provides tips to help your business.

Patrick Poston's article discusses the Employee Retirement Income Security Act ("ERISA") and the fiduciary obligations that arise for those employees who serve on boards of employee benefit plans. Patrick provides information regarding the requirements of ERISA, and how businesses can best comply with these requirements.

Finally, Tammy Hackmann of our Employment & Labor Practice discusses a recent appellate court case that addressed non-competition and non-solicitation agreements. Many companies use these agreements, but Illinois law is often unclear as to which agreements will be enforceable. Tammy details the new bright-line rule established in *Fifield v. Premier Dealer Services, Inc.*

We would also like to invite you to a free seminar that will focus on the new Illinois Concealed Carry Act, and how it affects employers. Please join us at one of the locations where it is being offered, or via webinar (see sidebar). This interesting topic has been getting a lot of attention lately.

As always, if there are particular topics that you would like us to discuss in future editions, we welcome your recommendations. If we can assist you with these or any other legal matters, please do not hesitate to contact us at any time.

Natalie D. Thompson
Business & Commercial Litigation Practice Group

Lunch & Learn!

The Effect of the Illinois Concealed Carry Act on Employers

Illinois' new Concealed Carry law goes into effect 1/5/14. How will the new law impact employers and employees? In what locations does ***the law prohibit*** concealed carry, and in what locations can ***employers elect to prohibit*** concealed carry? What issues should an employer consider in determining whether to prohibit concealed carry? What are the most recent developments from around the state?

Please join us for a discussion that will address these and related topics at the location nearest you:

Rockford
Northern Illinois University Rockford Campus
8500 E. State Street, Room 200
Wednesday, October 16, 2013

Peoria (Also offered as a webinar on this date only)
Heyl Royster Offices
Chase Bank Building
124 S.W. Adams Street, Suite 600
Thursday, October 17, 2013

Urbana
ILEAS (Illinois Law Enforcement Alarm System)
1701 E. Main Street
Wednesday, November 6, 2013

All of the seminars will be held from Noon - 1:00 p.m. Lunch will be provided.

Please RSVP to sgullette@heylroyster.com or 309-676-0400 x277. Space is limited.

Natalie Thompson of our Business and Commercial Litigation Practice also practices in the firm's Appellate Practice. Heyl Royster's Appellate Practice has extensive experience in all aspects of appellate practice in both state and federal courts of review. Beginning with our next newsletter, Natalie will provide an "Appellate Watch" discussing recent decisions of the Illinois Supreme Court, the Illinois Appellate Court, and the Seventh Circuit Court of Appeals.

Back to the Basics: The Statute of Frauds

By Natalie Thompson
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Introduction

The Statute of Frauds under the Uniform Commercial Code provides that a contract for the sale of goods for more than $500 is not enforceable unless there is some writing sufficient to indicate that a contract for sale has been made and signed by the party against whom enforcement is sought. In other words, if two businesses have agreed that one will sell one hundred pounds of steel to the other (for more than $500), and the buyer later decides to purchase elsewhere, the seller can only enforce the agreement if there is a written confirmation that is signed by the buyer.

The Exception to a Required Signed Contract under the Statute of Frauds

However, as is typical with the law, there is an exception. If, within a reasonable time, a writing in confirmation of the contract and sufficient against the seller is received and the party receiving it has reason to know its contents, this written confirmation is adequate. Looking at the above scenario with the one hundred pounds of steel, this exception means that if the seller sent the buyer a written confirmation of their oral agreement within a reasonable period of time, the agreement would now be enforceable, despite the fact that the buyer did not sign it.

While these provisions might seem basic, there are a number of questions that arise. The most common are: what is a reasonable period of time? How does one business know if the other business has received its written confirmation? What if the party receiving the written confirmation disagrees with its terms? Are there any other rules that businesses should keep in mind?

What is a Reasonable Period of Time?

There are various holdings regarding the reasonableness of when a written confirmation is received. One case, *Bureau Service Co. v. King*, 308 Ill. App. 3d 835 (3d Dist. 1999), held that a delay of over eight months in sending confirmatory memoranda was unreasonable. According to a recent Illinois decision, reasonable means reasonable under the circumstances, which is a question of fact. *Irvington Elevator Company v. Heser*, 2012 IL App (5th) 110184, ¶ 23.

The Court in *Irvington Elevator Inc. v. Heser* discussed the reasonableness of time in which a written confirmation of a contract is received. In *Irvington Elevator*, the plaintiff filed a breach of contract claim regarding a grain contract, and the defendant claimed Statute of Frauds as a defense. On appeal, the Fifth District looked to the Statute of Frauds and the definition of a reasonable amount of time, and also discussed the course of dealing between the parties and usage of trade in the industry. The court distinguished *Bureau Service Co.,* first by saying that contracts confirmed 16 days to 4 months are far less than the 8 months in *Bureau Service Co*. Moreover, it refused to adhere to a bright line test, stating that "[b]y its very nature, the meaning of the phrase 'within a reasonable time' connotes flexibility." *Irvington Elevator Company v. Heser*, 2012 IL App (5th) 110184, ¶ 17.

As shown by *Irvington Elevator* and *Bureau Service Co.*, the definition of "reasonable" will differ in different situations. For instance, if a business typically sends its written confirmation two weeks after the agreement is made, it is unlikely that a court will find this to be unreasonable. However, if this same business were to wait two months, the court might find this to be unreasonable, even though in other cases (such as *Irvington Elevator*), longer periods of time were found to be reasonable.

The best advice would be to send a written confirmation as soon as possible. If this time period varies, try to be as consistent as possible.

How Does One Business Know if the Other Business Has Received its Written Confirmation?

Because the Statute of Frauds does not require the sending of a written confirmation, but rather the receipt of a written confirmation, it can lead to some confusion. For instance, a business will not know if the business to which it sent the written confirmation received it, unless they want to call and ask (a tedious task). Further, a business trying to deny the existence of a contract might deny its receipt of the confirmation even if it did in fact receive it. So, what is the best way for a business trying to enforce a contract to show receipt?

In *Tabor & Co. v. Gorenz*, 43 Ill. App. 3d 124 (2d Dist. 1976), the plaintiff provided direct testimony that the customary procedure at its business was to mail the written confirmation, but the specific person who mailed the confirmation was not identified. The defendant claimed that upon his denial of the receipt of the confirmation, the plaintiff was required to prove the mailing by producing the direct testimony of the person who mailed it. The defendant further argued that it was insufficient to merely prove an office custom of mailing without direct proof that procedure was followed in this particular instance. The court disagreed, finding there was evidence of an office custom with corroborating evidence to establish that the custom was followed. When the receipt of a written confirmation is denied, "the question of receipt is a question of fact." *Pillsbury Co. v. Buchanan*, 37 Ill. App. 3d 876, 878 (4th Dist. 1976).

Again, it is very important for businesses to be consistent in their practices. Not only should written confirmations be sent as soon as possible, but a business should follow the same procedures for each of these mailings. Then, if another business ever denies the receipt of confirmation, the business who performed the mailing can easily produce an affidavit outlining their mailing procedures, which the courts will take into consideration.

What If the Party Receiving the Confirmation Disagrees with its Terms?

Of course, it would not be fair if any business could require an agreement simply by sending a written confirmation to another business. Also, since the exception to the Statute of Frauds allows enforceability without signature, the terms and pricing of the agreement may be misconstrued in the written confirmation. In these situations, the business receiving the written confirmation must object in writing within ten days of its receipt. Another good reason to keep a close eye on incoming mail!

Are There Any Other Rules that Businesses Should Keep in Mind?

There are less common instances where an unsigned agreement may be enforceable. One of these situations is when the goods sold are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business. In this instance, the seller must have made a substantial beginning of their manufacture or commitments for their procurement. A good example would be a company that agrees to make 1,000 personalized pens for another business. The company begins the manufacture, but the buyer denies the agreement and the seller has no contract with the buyer's signature. These personalized pens obviously cannot be sold to another business, and this exception would apply.

A seller or buyer can also enforce an agreement without the signature of the other if the payment has been made and accepted or if goods have been received and accepted. For instance, if the buyer pays the seller and the seller accepts this payment, the seller must perform regardless of whether the seller has signed a contract. Likewise, if the seller delivers the purchased goods and the buyer accepts these goods, the buyer must pay the seller.

Conclusion

In sum, the best piece of advice is to have all agreements signed. However, if this is not possible at the time an agreement is made, make sure to send a written confirmation evidencing the product, quantity and price (as well as any other agreed upon terms) to the other party as soon as possible. Finally, make sure to keep all business practices consistent.

Natalie Thompson represents businesses and individuals in commercial disputes, as well as in the areas of contract law and torts. She also handles cases in the Illinois Appellate Courts, the Seventh Circuit Court of Appeals, and in the Appellate Court's Workers' Compensation Commission Division.

Fiduciary Obligations of Employee Benefit Plan Sponsors

By Patrick Poston
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If you receive this newsletter, chances are you own a company and/or hold a high-level position within a company. More likely than not, that company offers some variety of employee benefit plans. These benefits may include pension plans, profit sharing plans, 401(k) plans, or so-called "welfare plans" (i.e. group health benefit plans, long and short term disability plans, and other non-pension benefit arrangements). Regardless of the type of employee benefit plan offered, most plans are governed by a federal law entitled the Employee Retirement Income Security Act ("ERISA"). ERISA establishes minimum standards for most voluntarily established pension and health plans in private industry to provide protection for the individual employees enrolled in these plans. Included in these standards are strict fiduciary obligations for those who manage and control plan assets.

ERISA requires a named fiduciary with the authority to control and manage the operation and administration of an employee benefit plan. This named fiduciary must adhere to the "prudent person" rule. This rule establishes that, in the administration of the employee benefit plan, the prudent plan sponsor must exercise: 1) the duty of care; 2) the duty to use skill; 3) the duty of loyalty; 4) the duty to follow documents; 5) the duty of fairness; and, 6) the duty to avoid prohibited transactions.

With respect to the duty of care, a plan fiduciary must exercise the care that a reasonably prudent person would exercise under the circumstances. This entails engaging in (and documenting) informed deliberations regarding plan decisions. It also includes careful investigation in the selection of core plan investments. This duty may also require delegation of investment decisions to a qualified designee and then monitoring of that designee's performance. A plan fiduciary must exercise this duty of care with respect to diversification of plan-asset investments, administrative expenses, and qualified default investment alternatives (i.e. default investment strategies for plan participants that do not control their investment decisions). The procedural process by which a plan sponsor conducts this oversight is as important as the end result.

A plan sponsor is also required to exercise the level of skill a reasonably prudent person would exercise under the same circumstances. The plan sponsor must either possess or obtain this skill set. In some instances, this may require the use of outside expert advice in the management of the plan.

In order to comply with the duty of loyalty required of plan sponsors, the sponsor must act with the exclusive purpose of providing benefits to participants and beneficiaries of the plan. Closely related to this requirement of loyalty is a duty of fairness. This means that plan sponsors cannot manage plan assets in a manner that is self-serving or that benefits only certain of the plan participants. It is worth noting that intent is not required to violate this duty– in other words, a plan sponsor can violate this duty even if he or she did not intend to manage assets in a manner which provided unequal benefits to plan participants.

Closely following the duties of loyalty and fairness is the duty to avoid prohibited transactions. In instances where the plan sponsor is also a beneficiary, conflicts of interest can sometimes arise. This presents a special problem and often times the use of independent advisors is necessary to avoid potential complications. Plan sponsors should also avoid the payment of fees related to the management of plan assets to parties with an interest in the plan. When expert advisors or vendors are utilized in the management of a plan, it is important that they be independent of the plan and its participants. It is also worth noting that ERISA imposes specific obligations of disclosure in certain instances.

Plan sponsors are also required to make plan decisions based in conformity with documents. Plan

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documents and those documents related to the plan control should be consulted in asset management decisions. In order to comply with this duty, organizations and plan sponsors should develop and adhere to a written investment policy. However, an investment policy should not be overly stringent or so detailed so as to prevent a reasonable degree of flexibility in the management of plan assets.

While ERISA does not require a committee to fulfill the fiduciary obligations of the plan sponsor, a committee is typically preferable. In such instances, committee members should consist of prudent, responsible persons who have the willingness to learn, intelligence to understand, and ability to question. Recommended committee personnel include a director of employee benefits, director of human resources, or a CFO of an organization.

Failure to adhere to the strict fiduciary obligations imposed by ERISA can lead to costly and potentially embarrassing litigation for the organization and/or plan sponsor. If your organization finds itself involved in such litigation, the use of experienced and effective legal counsel can mean the difference between a favorable result and a game-changing outcome. The attorneys of Heyl, Royster, Voelker, & Allen, PC have experience in ERISA litigation and can be a critical resource for any organization that faces litigation over potential non-compliance with the fiduciary obligations imposed by ERISA.

Patrick Poston joined the Peoria office of Heyl Royster in 2011. Since that time, he has been actively engaged in all phases of litigation – from initial strategy and planning to final preparations for trial. He represents individuals and companies in a wide variety of practice areas, including: commercial transportation, commercial litigation, insurance coverage, tort, and contracts.

Illinois Appellate Court Mandates Two-Year Rule for Non-Competition and Non-Solicitation Agreements

By: Tammy Hackmann
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The Illinois First District Appellate Court recently held there must be at least two years or more of continued employment to constitute adequate consideration in support of a non-competition or non-solicitation provision. See *Fifield v. Premier Dealer Services, Inc.*, 2013 IL App (1st) 120327. This decision is significant because it imposes a bright line rule requiring two years of continued employment before such agreements are enforceable and it rejected any argument that the rule should be different just because the agreement is entered before or at the time the individual is hired.

With the *Fifield* holding, employers are at risk that a restrictive covenant will not be enforceable when continued employment is the sole consideration. In such case, an employee that resigns prior to his or her two year anniversary will be able to breach the agreement without legal consequence.

In *Fifield v. Premier*, the plaintiff was originally employed by Great American Insurance Company and was assigned to work exclusively for Premier Dealership Services (PDS), which was a subsidiary of Great American. When Great American sold PDS to Premier, Fifield was informed his employment would end. Premier, however, made an offer of employment that was conditioned upon Fifield's signing a non-solicitation and non-compete agreement which lasted two years and covered 50 states. Fifield negotiated the agreement to include the provision that if Fifield was terminated without cause during the first year of his employment, the restrictive covenant would not apply.

After three months of working for the defendant, Fifield voluntarily resigned and began working for a competing insurance firm. Premier then sued Fifield and his new employer to enforce the non-compete agreement; Fifield and his employer filed a Motion for Declaratory Relief, asking the court to find the agreement unenforceable. The trial court held in favor of Fifield, finding the agreement was unenforceable for lack of consideration. Premier appealed this decision.

Relying on precedent, the First Appellate District held it was irrelevant whether Fifield signed the restrictive covenant before or after he was hired because the two-year non-solicitation non-competition provisions clearly restricted Fifield's post-employment conduct. See *Brown & Brown, Inc. v. Mudron*, 379 Ill. App. 3d 724, 887 N.E.2d 437 (3d Dist. 2008); *Bires v. WalTom, LLC*, 662 F.Supp.2d 1019, 1030 (N.D.Ill. 2009). Continuing, the court found Fifield's employment for three months was insufficient consideration (even though he resigned), and that the non-compete agreement was therefore not enforceable.

It is possible that the *Fifield* decision will be appealed. Until that occurs, employers may wish to consider whether additional consideration should be offered to ensure the restrictive covenants are enforceable.

Tammy Hackmann has focused her practice on the defense of claims against public and private entities in the areas of employment law, commercial litigation, and civil rights defense. She is experienced in defending clients before the Illinois Human Rights Commission, the EEOC, and in state and federal courts.

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