GETTING DOWN TO BUSINESS

HEYL ROYSTER
BUSINESS & COMMERCIAL LITIGATION NEWSLETTER

Spring 2014

WELCOME LETTER

Dear Friends, Clients, and Colleagues:

If you are reading this hardcopy edition of our newsletter for businesses and about business-related legal issues, it is likely because we don't have your email address. Going forward, we can continue to send you this hardcopy version, but if you send your email address to tbertschy@heylroyster.com you will get our newsletters articles on a more timely basis, as well as periodic e-blasts with alerts, updates, seminar invitations, and other information you may find of interest.

In addition to this edition's articles, I'd like to share some of the firm's recent client successes, where we:

- Assisted our client, the Regional Transportation Authority ("RTA") in the case of *Hartney Fuel Oil Company, et al. v. Hamer, et al.* in which the Illinois Supreme Court adopted the position Heyl Royster advocated respecting how sales should be sourced for sales tax purposes, and which also led to the Illinois Department of Revenue's proposed permanent rule changes relating to tax sourcing.
- Successfully defended a major pharmacy in a three-day jury trial against a $1 million claim by a 90+ year old plaintiff who alleged she contracted a serious bacterial infection as a result of the pharmacy's error in filling her prescription. Plaintiff's medical bills totaled more than $230,000 as a result of 11 months of medical treatment including multiple hospitalizations and nursing home care.
- Helped landowners protect their property values by defeating an application pending before a zoning board of appeals for a special use permit by a landscaping and snow removal business. The proposed business would have constructed a 4,000 sf building and would have had at least 12 employees entering and exiting the property daily.
- Defended the rights of a regional agricultural cooperative in a zoning trial, with the court awarding it the right to construct its requested grain storage facility.
- Succeeded in having our client, a utilities company, dismissed from a lawsuit brought by AT&T for damaging one of their underground cables during excavation by our client.

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.

Sincerely,

Tim Bertschy, Chair
Business and Commercial Litigation Practice

Lunch & Learn Seminar

Medical Cannabis: A Primer for Employers and Governmental Entities

The Illinois Compassionate Use of Medical Cannabis Pilot Program Act became effective on January 1, 2014. While much of the Act will be governed by state agencies, there are immediate concerns that any employer should be aware of, as well as specific matters that local public bodies must address, such as zoning issues. The first session of this seminar/webinar will be focused on what employers need to know about the Act, and the second session will address issues specific to governmental entities. Attendees are invited to attend the first and second sessions, or just the first session (if the second session is not relevant to your profession).

Please join us from 11:30 a.m. – 1:00 p.m. for a seminar and lunch at the location nearest you

Peoria: (Also via webinar on this date only.) Wednesday, April 30, 2014

Urbana: Monday, May 5, 2014

Rockford: Tuesday, May 13, 2014

Lunch will be provided to those attending in person.

Contact Rachel Ford to register at rford@heylroyster.com or 309-677-9514

We hope to see you there!

SENDER BEWARE: HOW YOUR EMAILS OR LETTERS MAY BE RULED A BINDING CONTRACT

By: Stacy Crabtree
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Often when we think of a contract, we think of the multi-page document that is plagued with legal jargon and minuscule print, followed by signature lines, and then sometimes followed by even more documents nicknamed "schedules" or "annexes" that in some way modify or supplement everything in the previous pages. But courts do not necessarily require contracts to take on this formal appearance in order to be enforceable.

In order to create a binding contract, courts require the following four elements: (1) an offer, (2) acceptance of that offer, (3) consideration (meaning payment or other benefit to one party or a detriment to another party), and (4) definite certain terms. If there is no formal, written contract, then courts will require a fifth element: demonstration of an intent by the parties to be bound by a contract. This fifth element is an objective standard, so it has nothing to do with what you actually intended, and everything to do with the language actually used by the parties and how a reasonable person (really, a judge) would interpret it. *See Alyasmen Group, LLC v. MS Rialto Raintree Village IL, LLC,* 2011 IL App (1st) 102875-U. As a result, courts in Illinois and other states have on more than one occasion found all of these required elements to be present in emails or letters sent by unsuspecting business people.

In one somewhat surprising case, business partners exchanged emails about how to close a joint real estate business venture and distribute earnings from completed real estate transactions. Less than one month after the partners reached an agreement by email as to how earnings would be distributed, the partners signed a written contract with terms different than what was agreed to in the emails. One of those business partners later sued to enforce the agreement set forth in the emails. Upon review of the case, the court determined that the business partners expressed the intent to be bound by the emails where one of them stated in his email, "this is final and agreed to," and even offered to print out and sign a copy of the emails. Furthermore, the terms of the agreement were sufficiently definite and consideration existed such that the judge ruled the emails could constitute a binding contract aside from the actual signed, written contract. *Bryant v. Way*, C.A. No. 11C-01-164 RRC, 2011 WL 2163606 (Del. Sup. Ct. May 25, 2011).

Courts seem most eager to rule emails are binding contracts when the emails relate to the settlement of an ongoing dispute. An employer was able to enforce an agreement reached through email with an employee regarding settlement of that employees' employment discrimination claim in *Todd v. Kohl's Department Store*, No. 08-CV-3827, 2010 WL 3720265 (N.D. Ill. Sept. 15, 2010). Similarly, in *Protherapy Associates, LLC v. AFS of Bastian, Inc.*, No. 6:10CV0017, 2010 WL 2696638 (W.D. Va. July 7, 2010), a judge ruled an email setting forth payment terms in settlement of a dispute between a provider of physical therapy services and nursing homes was enforceable against the nursing homes.

Emails are not the only correspondence exposed to potentially being ruled an enforceable contract. Letters of intent generally are used to express the intent of two parties to enter into a written agreement in the future, but these too could be construed as an enforceable contract. The Illinois Supreme Court found that one letter of intent between a general contractor and subcontractor was ambiguous as to whether the parties intended it to be a binding contract and as a result ruled that the trial court must hold an evidentiary hearing to determine whether the letter of intent would in fact be binding. *Quake Const., Inc. v. American Airlines, Inc.*, 141 Ill. 2d 281 (1990). Regardless of the outcome, the parties most certainly incurred legal fees and expenses for a court to rule on whether a letter was an enforceable contract.

So how can you prevent your emails and letters from becoming your next contractual obligation? If you are negotiating or making an offer to someone via email, include a disclaimer in your email that makes it clear the negotiations or offer are contingent on the parties signing a written contract. Don't bury this disclaimer at the bottom of the email in fine print; intentionally include it in the body of the email so there is no denying

your intent. If you are negotiating by a letter of intent or sending some other correspondence such as an offer of employment, use language to make it clear that the letter is not intended to create a binding contract. And as always, if there is any uncertainty, have an attorney do a quick review of before you sign or hit send – your legal fees will be far less for a precursory review than later if you are sued for breach of contract.

Stacy Crabtree represents clients in commercial and contract law, as well as tort litigation. Her clients include businesses large and small, and she regularly works onsite with a Fortune 50 manufacturing company assisting with vendor agreements, open-source software and freeware licenses, and compliance issues.

Corporate Documentation for Small and Mid-Sized Businesses

By: Greg Rastatter
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This article describes the documentation generally required for the formation of a corporation or limited liability company. While corporate documents may be drafted and filed without a lawyer, some of the more involved agreements and documentation may be overlooked in the absence of proper representation. This article discusses some of those often-overlooked documents and the reasons they are important for your business.

The most common forms of the business organization are corporations (with a Subchapter S tax election) and limited liability companies (LLCs). The documents needed to form and operate the various types of entities are largely the same, although they may have different names. For example, the document that technically forms a corporation is called the Articles of Incorporation, whereas a similar document is referred to as the Articles of Organization for an LLC. Similarly, Bylaws, as outlined below, form the governing document for management of a corporation and are referred to as an Operating Agreement in the context of an LLC.

The Articles of Incorporation (sometimes called a charter) form the corporation. This document states the company name, its registered agent (i.e., the person or company on whom service of documents may be made), the purpose of the organization, and the number of stock shares that the corporation will authorize. More often than not, this document is rather perfunctory and merely states that the purpose of the organization is "the transaction of any or all lawful business for which corporations may be incorporated under the Illinois Business Corporation Act." Nevertheless, the Articles must be amended by a later action if the corporation decides to change its name or authorize additional stock shares. The fact that the corporation has authorized a certain number of shares does not reflect the actual ownership of the company, rather stock shares must still be "issued" to the corporation's owners.

The second foundational document for a corporation is the Bylaws. This is essentially the constitution of the organization. It sets forth the location of the corporate offices and provides specifications as to what actions may be taken by shareholders, directors, and officers, as well as what constitutes a quorum and a successful vote for each group on various matters. In terms of the governance of the organization, the stockholders, as owners of the company, are generally less involved in the day-to-day operations as compared with directors and officers. The board of directors is more involved in the day-to-day operations and often meets regularly. The officers are the most involved, "on the ground," individuals who run the day-to-day operations of the company. Officers may be employees hired by the board of directors.

Careful consideration must be given to how an organization wants to run itself when drafting the Bylaws. This is something that is frequently overlooked, and companies find themselves in a situation where they desire to take certain corporate action but are prevented from doing so by an overly restrictive set of Bylaws or a set of Bylaws that does not match the practical realities of the particular company.

In addition to the Bylaws of the organization, the shareholders and board of directors must have an

initial meeting which documents various initial actions. For example, in the meeting of the shareholders, the directors are elected, and the Articles of Incorporation are approved by the company. In the initial board of directors meeting, the bylaws are adopted and officers are elected. Additionally, the company is authorized by the initial board of directors meeting to issue shares to shareholders. Careful minutes should be kept of these initial meetings, as the meetings are required under Illinois law. Further, the corporate shield of liability, an important reason for formation, requires that corporate formalities be maintained, including meeting and authorizing various corporate actions in the proper manner.

One of the most important documents, often overlooked in the absence of counsel, is a shareholders' agreement. This is a contract between each shareholder and the company with regard to the ownership, transfer and sale of their stock shares. In the absence of a shareholders' agreement, the shares owned by a given shareholder are treated like any other asset of that shareholder. When one shareholder passes away, for example, it can often be challenging for the corporation to deal with the transition of those shares under either the will of the deceased shareholder or the statute governing inheritance. Further, the individual who inherits those shares may be someone the corporation does not desire to be a shareholder. These are the types of issues that are dealt with in the shareholders' agreement. Often the shareholders' agreement will provide that, in the event a shareholder passes away or becomes disabled, the company has a right to buy those shares under certain agreed terms.

A shareholders' agreement often provides for so-called "go-along, take-along" requirements.

Similarly, a shareholders' agreement will typically specify that, in the event any shareholder desires to transfer or sell his or her shares, he or she must first offer those shares to the corporation at the same price or at some other price designated by the parties. A shareholders' agreement often provides for so-called "go-along, take-along" requirements. A "take-along" provision provides that when a certain percentage of the shareholders desire to sell their shares of the company, they can require the minority shareholders to participate in the sale under the same terms. Similarly, a "go-along" provision provides that a group of minority shareholders may require that they be included in any sale of the majority of the shareholders' shares.

Another important document is a subscription agreement, a contract between a single shareholder and the company. Similar to the shareholders' agreement, a subscription agreement sets forth certain restrictions on the transfer of stock. However, it also contains certain representations by the shareholder, such as that the shareholder is accepting the risk of the investment and cannot therefore later complain as to having not received sufficient information (a securities law issue).

There are several additional documents beyond the scope of this article that should be considered in corporate formation. Certain documentation is necessary where, for example, an initial employee of the corporation may acquire ownership over time by providing sweat equity in the early stages of a company's development. Often such arrangements will be placed into either an Operating Agreement or other documents which provide that where the company meets certain benchmarks over time, the founding individual may acquire shares under a given formula.

At Heyl Royster, we work with your business from the early stages of corporate formation to ensure the initial documents are in proper order and provide a sound foundation for the company to grow and expand. Proper formation and documentation is important so as to provide sufficient control over time. We can also analyze your existing corporate documents and provide recommendations for updating them and adding documents that may be desired based on the needs of your company, including such matters as succession planning.

Greg Rastatter is a partner in the firm's Peoria office. He handles many aspects of commercial business advisement, from determining the most advantageous legal structure for a business organization and ensuring the business client is legally protected as an ongoing concern, to negotiating contracts and advising on mergers and acquisitions. Greg also advises hospitals and medical groups on compliance standards and in their contracts with physicians and other professionals.

Sale of Goods - Disclaiming of Warranties and Consequential Damages

By: Mark McClenathan
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Illinois law allows sellers to limit their risk and exposure by disclaiming, among other things, warranties and damages. Under the Uniform Commercial Code (the "UCC" – adopted in Illinois and 48 other states), a seller of goods can disclaim all warranties, both express and implied, and within limits, certain damages allegedly caused by the use of goods. In addition to the UCC, there are other laws, including consumer protection laws, that must be considered when disclaiming warranties and modifying or limiting damages, to ensure that the desired provisions are enforceable under Illinois law. This article encourages sellers to look carefully at their sales contracts, and other documents used in a transaction (such as the backside of an invoice, a transmittal from the seller accepting an offer to purchase, or even a bill of lading), to avoid potential liabilities.

The UCC

Article 2 of the UCC deals with the sale of goods only (not services), including warranties that are imposed as part of the sale, as a matter of law. It is important to understand what those warranties are, and how to disclaim those warranties. Disclaimers are strictly construed against the party drafting the contract, so it is important to use careful consideration when drafting disclaimers, as well as other contract terms and conditions so as not to negate the disclaimers.

Express warranties are affirmative promises about the quality and features of the goods being sold. Illinois courts have found that brochures and advertisements may constitute express warranties. Also, an express warranty can be created when using samples or models.

The UCC imposes two types of *implied* warranties: a warranty of "*merchantability*" of the goods being sold, and a warranty that the goods are "*fit for a particular purpose*." Implied warranties become part of a sale transaction unless legally excluded, to allow buyers to purchase goods and be confident that they meet certain minimum standards.

How can a seller "disclaim" express or implied warranties?

First, all warranty disclaimers must be in writing and conspicuous. Illinois courts favor disclaimers that are set off from the rest of the document and highlighted by a heading. A disclaimer "buried" or "lost" in the fine print or hidden in the other terms and conditions of the contract is not enforceable. Moreover, the disclaimer should be printed in all "caps" (capital letters), bold or dark letters, larger font than the letters around it, and maybe in a different color ink if possible, or a combination thereof. And when a contract requires the signature of the buyer, it is recommended that there should be a space for the buyer to provide his or her signature or initials next to the disclaimer, so there is no question that the buyer saw the disclaimer.

Second, in order to disclaim "implied" warranties, a seller must expressly exclude all types of implied warranties, including specifically a warranty of "merchantability," and a warranty that the goods are "fit for a particular purpose."

The UCC provides that it is acceptable to use expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty. But if the seller desires to disclaim warranties of merchantability, the disclaimer

must conspicuously mention merchantability. Similarly, a disclaimer of the "*fit for a particular purpose*" implied warranty should also be mentioned, though the UCC provides that language to exclude all implied warranties of fitness is sufficient if the contract provides that, "There are no warranties which extend beyond the description on the face hereof."

The following disclaimer has been upheld by Illinois courts to effectively exclude all express and implied warranties.

> **ALL WARRANTIES OF ANY KIND WHATSOEVER, EXPRESS, IMPLIED AND STATUTORY, ARE HEREBY DISCLAIMED. ALL IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE ARE HEREBY DISCLAIMED. THE MACHINERY (INCLUDING ANY ACCESSORIES AND COMPONENTS) IS SOLD 'AS IS.'**

A court has noted, for example:

- That the language specifically mentioned merchantability.
- Was written in a contrasting type set (large, bold letters).
- Sufficiently called the buyer's attention to the exclusion of all warranties.

If a standard sales contract (signed by all parties) is not used, it is recommended that the seller include similar language in his or her transmittal (email, letter, fax) accepting the offer to purchase and agreeing to provide the goods ordered, and/or other sales documents provided when the goods were shipped. This language should also be prominently displayed on the invoice.

A prudent seller will also include in any sales contract an explicit "integration clause" that provides that the contract is a complete expression of the parties' entire agreement. For example:

> **This agreement constitutes and contains the entire agreement between the parties. All prior or contemporaneous understandings or agreements between the parties, if any, whether written or oral or express or implied, are merged into and with this Agreement, which fully and conspicuously states and expresses the parties' understanding and agreement.**

This provision prevents the buyer from claiming to rely upon any prior or contemporaneous oral agreements that may have occurred between the parties that are not included in the final written contract. This applies not only to warranties but all other aspects of the contract, such as price and delivery date.

…a prudent seller will disclaim all consequential damages in all of its contracts.

Finally, the UCC also allows sellers to limit, alter or disclaim their exposure for damages recoverable under the UCC or for breach of any warranties provided. For example, the UCC allows a seller to expressly provide in a sales agreement that a buyer's remedy is limited to return of the goods and repayment of the price, or to repair and replace the non-conforming goods or parts. (It is recommended that such a remedy be considered, especially in the sale of consumer goods, since it is the "very essence of a sales contract that at least minimum adequate remedies be available;" otherwise, a provision for the limitation of damages may be found unconscionable and thus, unenforceable.)

More importantly, a prudent seller will disclaim all *consequential* damages in all of its contracts. The UCC provides:

> Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

The following contract provision was upheld in Illinois disclaiming any responsibility for consequential damages

for both the seller and the manufacturer:

> In no event shall Seller or the manufacturer of the [product] (including its officers, agents, employees, representatives, attorneys and parent, subsidiary and affiliated companies) be liable for damages of any nature, including without limitation, special, direct, indirect, incidental or consequential damages, whether or not relating to or in any manner resulting from or arising out of any nonconformity of the [product and accessories] to the warranty herein, any defect in material and workmanship, any performance or nonperformance by Seller of any of the obligations or delay of delivery or failure to deliver for whatever cause, other than damages expressly provided for above.

In conclusion, careful consideration must be made in the drafting of disclaimer provisions, and the placement of those terms in a sales contract, or in any document used in the sales transaction that incorporates the terms and conditions of the sale (including invoices or other sale documents if a traditional "sales contract" is not used) to protect the seller from liabilities down the road.

Mark McClenathan concentrates his practice in commercial and civil litigation, including business and corporate law, construction law, and real estate. Prior to Heyl Royster, Mark worked in the legal departments of the Defense Logistics Agency of the Department of Defense, Land O'Lakes, Inc., and 3M Corporation.

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