AN ILLINOIS LAW FIRM

GETTING DOWN TO BUSINESS

HEYL ROYSTER
BUSINESS & COMMERCIAL LITIGATION NEWSLETTER

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WELCOME LETTER

Dear Friends,

I am happy to present our latest edition of *Getting Down to Business*, the Heyl Royster Business & Commercial Litigation Newsletter. This edition contains articles addressing three very different topics that demonstrate the wide scope of issues we address in representing our clients.

First, Mitch Hedrick discusses the growing impact of vicarious liability on businesses. He touches on how such liability can be imposed on business organizations in surprising ways, and how employers should carefully weigh the use of employees and independent contractors in light of this reality. Our second article discusses the concept of "e-discovery," a red-hot topic in the business world. Mark Ludolph and Theresa Peverly (our e-discovery specialist) take you through e-discovery 101, including how to prepare for a lawsuit that seeks your electronic data. Our final article is authored by Mike Schag. Mike, a career Air Force Reserve officer and Military Judge, discusses the recently expanded Military Lending Act and the protections it provides to active-duty members of the military, active Reserve and National Guard personnel, and their families.

We hope you enjoy this edition of *Getting Down to Business* and encourage you to contact us with questions or suggestions for future editions. We strive to provide news and free educational seminars on topics of interest to the business community. Our attorneys in Peoria, Champaign, Chicago, Edwardsville, Rockford, and Springfield protect the rights of businesses. If you need assistance, whether in business formation and governance, contract formation and enforcement, employment policy development and implementation, or litigation of disputes through trial, we look forward to speaking with you. For more information on our firm and our diverse areas of practice, please see www.heylroyster.com.

John Heil
Editor and Co-Chair of the Business & Commercial Litigation Practice

BUT I DIDN'T DO ANYTHING WRONG, IT WAS MY EMPLOYEE!

The Impact of Vicarious Liability on Modern Employers

By: Mitch Hedrick, mhedrick@heylroyster.com

What Is Vicarious Liability?

Vicarious liability is a concept almost as old as the law itself, but it is as important now as ever. Generally speaking, vicarious liability is when one person – an individual, a partnership, or a corporation – is held responsible for the actions of someone else because of the relationship between them. It is a form of secondary, indirect liability imposed on one person for the direct acts of another. Under the theory of agency, a principal can be held liable in contract for promises made by its agent. Under the theory of *respondeat superior*, Latin for "let the master answer," a "master" can be held liable in tort for the improper conduct of

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its "servant" – though the term "master-servant" has generally been replaced with "employer-employee" in modern times.

Can Vicarious Liability Be Imposed On *Any* Business Organization?

Yes. Sole proprietorships, partnerships, and corporations can be held liable for the acts of their agents and employees.

Sole Proprietorships: Sole proprietors are the owners of their business, so they have the right to control all aspects of business operations. As the principal, master, and employer of all persons they choose to hire, they can be held liable for the conduct of their agents, servants, and/or employees.

Partnerships: Partnerships are when two or more people join together, combine their business ventures for mutual benefit, and have a community of interest in any profits earned. All owners of a partnership may be held liable for the conduct of any of their partners, agents, servants, or employees if the conduct is done in furtherance of the partnership's business.

Corporations: Corporations are organizations which are considered legally separate "persons" from their owner(s). They can sue and be sued for their role in any events or transactions. However, a corporation does not "act" in the same way an individual does – rather, the corporation only "acts" through its officers and employees. Thus, a corporation can be held liable for the conduct of any of its officers or employees – so long as the conduct is within the course or scope of the officer or employee's employment.

Agency

Generally, when an employer vests its employees or agents with authority to transact business with others, the employer is bound by the promises, agreements, or contracts made. In situations where the agent or employee has actual or apparent authority to act on behalf of his employer or principal, then the employer or principal is obligated to honor the promises made in the resulting agreements. For example, if an employee-carpenter – wearing a company polo shirt and hat – purchases lumber and nails for a customer's project using the employer's credit account, her construction contractor-employer must pay the lumber yard for the items purchased.

Conversely, there are some situations where the agent or employee, whether intentionally or unintentionally, fails to disclose that he is acting on behalf of a principal or employer. Failure to disclose an employer or principal results in the agent becoming personally liable to the other party – though the principal or employer is still responsible for honoring the agreement if the agent or employee asks them to do so. For example, if an employee-property manager responds to a tenant's complaint of a flooded basement and signs a contract with the water removal and restoration company – but fails to disclose that he is signing in his capacity as the manager for the employer-property owner – then the property manager is personally liable to the restoration company under the contract. The property manager can ask the employer-owner of the property to indemnify him – to honor the contract and pay the restoration company – and the employer-owner would be obligated to honor such a request.

Respondeat Superior

When an employer requires its employees to take actions in furtherance of business interests, the employees have a duty to exercise reasonable care and caution in doing so. An employee's failure to exercise reasonable care and caution, if it results in injury to another person, can result in liability for the employer. If the employee was acting "within the course and scope of his employment" at the time of the event that caused an injury, then the employer is liable as well.

For instance, if a florist-employer tells an employee to deliver a floral arrangement to a customer's wedding venue in a company vehicle and the employee causes a traffic accident on the way, the florist will likely be responsible for the employee's negligent conduct.

However, if the employee departs from the service of his employer, a "frolic and detour" in legal parlance, and causes an injury, then the employer is not liable. An example of this "frolic and detour" could be if the same florist's employee described above receives a call from a frantic relative and decides not to deliver the flowers immediately. Instead, the employee drives 15 miles the opposite direction toward his relative's home at a fast rate of speed and rear-ends another car. In this scenario, the florist would probably not be responsible for the employee's negligent conduct.

But What About Independent Contractors?

Although a principal or employer is responsible for the conduct of its agents and employees, it is *not* responsible for the conduct of an independent contractor. An independent contractor is a person who renders a service on behalf of another according to an agreement, but undertakes to produce a result without ceding control of the means by which the result is accomplished. In other words, an independent contractor is someone hired to accomplish a task or job on an employer's behalf, but is not directed or controlled by the employer on how to do it. The question of whether someone is an employee or an independent contractor depends largely on the right to control the work, but is a very fact intensive determination that takes into account many other factors.

Conclusion

Agents and employees are essential for the day-to-day operations of nearly every business. Most could not function without them. Thus, business leaders should be aware of both the benefits – enhanced ability to perform key business functions, and potential detriments – liability for the employee or agent's conduct, which can result from their organization's use of agents and employees. They should weigh the potential benefits of independent contractors (no liability) against the potential limitations (very little control) when considering whether to hire an employee vs. retain an independent contractor. That kind of decision requires thorough knowledge of the organization's capabilities, as well as a solid knowledge of the law. Vicarious liability may be ancient law, but its importance continues to grow in this complex, modern business environment.

Mitch Hedrick is an attorney with Heyl, Royster, Voelker & Allen, P.C. in its Peoria office. Mitch focuses his practice on trucking litigation, general tort litigation, and business and commercial litigation.

PREPARING FOR E-DISCOVERY 101

By: Theresa Peverly, e-Discovery Coordinator, tpeverly@heylroyster.com and

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It's 3:58 p.m. on a Friday. You have just been served with a Summons and Complaint in which your biggest customer is suing you for breach of contract. And the Complaint discusses all kinds of electronic documents – emails, texts, your website – what do you do?

You've been sued, so your first call should probably be to an attorney. But because laptops, smartphones, social media, and 24/7 connectivity have dramatically changed the nature of litigation, you are going to need proven e-Discovery expertise to get you through this.

E-Discovery is the process by which relevant electronic documents are preserved, collected and exchanged during litigation. This may include pdfs of key files, but also Microsoft Word documents, Excel spreadsheets, PowerPoint slides, emails, instant messages, website captures, photographs, audio or video files, phone records, and social media posts. However, the complexity of e-Discovery lies in the fact that electronic documents possess "metadata" – hidden information not visible on the face of a document. And, without the right skills and experience, it is very easy to alter or write-over a document's metadata, potentially destroying valuable evidence in your case. Examples of highly probative metadata include authorship, date created, date modified, and even GPS coordinates.

If this all sounds too high-tech for your business consider this: the requirement to produce electronically stored information ("ESI") was codified at the federal level in 2006[1] and in Illinois in 2014.[2] Currently, there are over 3,000 case opinions involving ESI and ESI-related issues nationwide. In terms of facing the need to produce electronic information in your next lawsuit… the future is now!

So what can you do to prepare for your first (or fourth, or fortieth) lawsuit involving ESI?

Draft your Data-Map

To best prepare for modern litigation, every organization should create a Data-Map. Simply put, a Data-Map lists all sources of potentially relevant ESI held by your organization. Think: email server, laptops, phones, hard copy storage, surveillance camera systems, the company's Facebook account, cloud storage, etc. Your Data-Map should include version information, who has access to each ESI source, and a point person who manages each source – even if you outsource such management. The Data-Map should be written, dated and it should be reviewed and updated regularly.

Understand and Review your Retention Schedules

A necessary companion to the Data-Map is your Retention Schedule (also known as Retention Guidelines or File Destruction Policies). Retention Schedules outline how long all data/documents will be kept by an organization, vary widely by industry, and may even vary by source (*e.g.*, hard copy files will be kept for five years, but surveillance camera footage will be kept for one year). While the drafting of the best schedule for your organization is a topic for another day, please note that the advent of e-Discovery does NOT necessitate that ALL documents be kept for ALL time. Industry regulations, tax laws and business necessity are key considerations.

[1] See the 2006 Amendments to the Federal Rules of Civil Procedure 16, 26, 33, 34, 37, and 45, and subsequent Amendments.

[2] See the 2014 Amendments to Illinois Supreme Court Rules 201, 214, and 218.

Implement a Litigation Hold Procedure

Which brings us to the topic of Litigation Holds. While Retention Schedules dictate the regular and normal schedule by which an organization's documents will be destroyed, a Litigation Hold suspends the Retention Schedule. More specifically, the Litigation Hold outlines the litigation at issue, identifies the type of documents, including ESI, that are relevant to the case, and clearly states that such documents must be preserved and protected from destruction or alteration in any way. Further, Litigation Holds stay in effect until the completion of the lawsuit.

E-Discovery – What to Expect

So back to that late Friday afternoon Complaint. What legal assistance can you expect?

An experienced lawyer can help you:

1. Draft a Hold Letter outlining how to best preserve ESI relevant to your case.
2. Collect ESI in a manner that is cost-effective, evidentiarily sound, and non-disruptive.
3. Strategize about ESI you may need from plaintiff or a third party to prove your case.
4. Move for a Protective Order if the relevant ESI contains sensitive or proprietary information (customer lists, trade secrets, HIPAA materials).
5. Draft and respond to written discovery requests with a keen eye toward the ESI that is necessary to advance/defend your case.

Not every firm has the technical resources, training and experience to help you through e-Discovery. Heyl Royster can help you with pre-litigation e-Discovery consulting, customizable e-Discovery education, and we're always here for you for those Friday afternoon Complaints, and all the steps thereafter.

Mark Ludolph is Co-chair of Heyl Royster's Business and Commercial Litigation Practice. He focuses his practice in commercial litigation and represents commercial lenders, financial institutions and other creditors in enforcing secured and unsecured claims in the state and federal courts.

Theresa Peverly has been a litigation paralegal for over 22 years, the last 10 of which were heavily focused on managing and consulting with case teams on complex e-discovery projects. She has worked with a wide variety of e-discovery tools/platforms and with many service vendors. Recently, Theresa became a Certified X1 Social Examiner.

The Expanded Military Lending Act Regulations

By: Mike Schag, mschag@heylroyster.com

The Military Lending Act's ("MLA") lending restrictions are expanded to apply to consumer credit card issuers and unsecured consumer lenders. Compliance in most areas was mandatory as of October 3, 2016, but as to credit cards the mandatory compliance date is October 3, 2017. This results from the July 21, 2015 Department of Defense ("DoD") final rule amending the Military Lending Act's regulations. Included are depository institutions not previously subject to the regulations. Compliance with the expanded regulations require adjustments to financial products offered to military members and their families.

The Act and its Amendments

The Military Lending Act, 10 U.S.C. § 987, originally became effective on October 1, 2007. It has been amended twice in 2013 and 2015. The MLA was

designed to deter loans that charged excessive fees and interest rates, disregarded a borrower's ability to repay, or those that established unrealistic payment schedules. It prohibits the securing of loans with checks, electronic access to bank accounts, vehicle titles or allotment of military pay.

Covered Borrowers

The MLA applies to active-duty military personnel, active Reserve and National Guard personnel serving on Title 10 orders, and their dependents with a valid military identification card. There is an active duty requirement, which means serving under a call or order of more than 30 days. Dependents are defined as those who individual who get over half support for 180 days immediately preceding an extension of credit. It does not cover retirees, unless they are also dependents of a covered borrower. The definition of "dependent" was expanded to achieve consistency with how that term is used for determining eligibility for medical care. *Cf.* 10 U.S.C. § 1072. As a result, same-sex spouses and certain unremarried former spouses may be covered.

The MLA's restrictions only apply to accounts opened while the service member or dependent is eligible, and the MLA's protections end when the consumer is no longer covered under the MLA. Lenders must use standard loan application language to determine if borrowers are covered servicemembers or dependents. Lenders can query a DoD database to verify active-duty status: https://mla.dmdc.osd.mil/; *see also* https://www.dmdc.osd.mil/appj/scra/.

Covered Subject Matter

The most recent amendment extends the protections of the MLA to a broader range of closed-end and open-end credit products. Now, nearly all credit products fall under the MLA with few exceptions. The revised its definition of "consumer credit" to now encompass credit offered or extended to a covered borrower for primarily personal, family, or household purposes, and that is (i) subject to a finance charge or (ii) payable by a written agreement in more than four installments. 12 C.F.R. 1026.1(c)(1)(iii). Credit cards and student loans are included as well as installment loans, vehicle title loans, payday loans, refund anticipation loans, deposit advance loans and open-end lines of credit. Exceptions are home purchase or refinance loans and auto loans secured by the purchased vehicle. However, the refinancing of an automobile loan is not exempt. A loan to buy personal property when the loan is secured by that property, is exempt.

The MAPR

The most prominent feature of the MLA is that it set an inclusive 36% military annual percentage ("MAPR") rate cap for loans made to covered servicemembers and their dependents. The MAPR is not the same as the interest rate on the loan, and it is also not the annual percentage rate disclosed pursuant to Regulation Z, which implements the Truth in Lending Act. The MAPR includes interest, fees, credit service charges, credit renewal charges, credit insurance premiums, and other fees assessed in connection with the loan. The regulations directing MAPR calculations are detailed, and credit cards have their own rules for assessing MAPR. For closed-end credit, the MAPR will be calculated at the time the loan is made or before. For open-ended credit agreements, the MAPR will be calculated with each billing cycle.

It is required that finance charges under Regulation Z and other charges covered as interest under the MLA be included in the 36% MAPR. Even if they would not be considered finance charges under Regulation Z, certain chares are required to be included in the MAPR. These include application, participation and annual fees as well as credit insurance premiums and fees for debt cancellation or debt suspension agreements. Also to be included are fees for credit-related ancillary products sold in connection with the credit transaction or account.

Remedies

A credit agreement prohibited under the MLA is void from inception. Covered borrowers can recover damages from creditors regulatory oversight comes from Section 108 Truth in Lending Act enforcement authority agencies. *See* 15 U.S.C. § 1601; 12 C.F.R. 226. There has been at least one class action certified under the MLA against automobile title loan companies on the basis of requiring interest in excess of the MAPR. Furthermore, the MLA authorizes government agencies to enforce the requirements of the MLA using restitution and administrative penalties ranging from $5000 per day to $25,000 per day to $1,000,0000 per day for first, second and third tier violations, respectively. While a majority of states permit payday lending, a few, including Illinois, also authorize state regulators to enforce the MLA. 815 ILCS 122/2-51.

Mike Schag is Chair of the Government Contracts and Military Law Practice Groups. He is the Chief Reserve Trial Judge of the Air Force, as a career Air Force Reserve Officer.

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