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THE LEGAL PAD

Practice of Excellence

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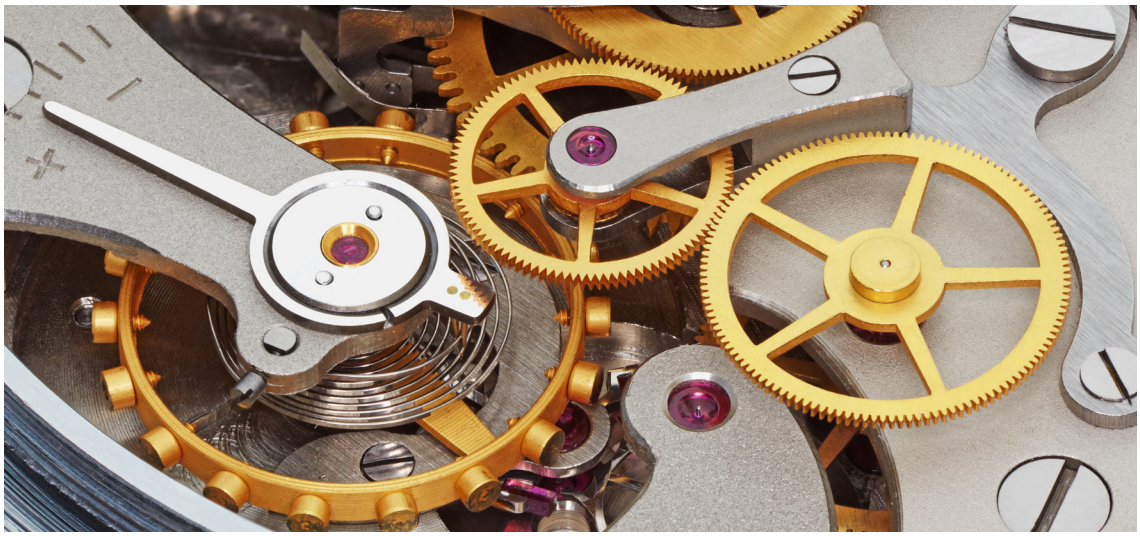
A Newsletter of Current Business and Legal Matters

In This Issue:

Does Your Contract Mean What You Think?

By Joseph A. "Joe" Davies



Every few years, a case is decided that reminds us of the necessity of making sure that you do not just read your contract before you sign it, but making sure that you read it (and, more importantly, understand it) from the perspective of a disinterested judge or jury, with no previous understanding of the relationship between you and the other party to the agreement. What may seem abundantly clear or obvious to you may not actually be reflected in the contract itself. Earlier this year, the North Carolina Court of Appeals issued an unpublished decision in a case called Pattison Outdoor Advertising, LP v. Elevator Channel, Inc. While the exact details of the contract between the companies are unimportant, some background is necessary. Essentially, the parties had entered into a services agreement which included various dispute resolution procedures, including several steps from informal mediation through binding arbitration. For whatever reason, the parties decided to rescind that agreement, and did so by executing a memorandum of understanding, releasing each other from all obligations under the previous agreement, with the exception of the return of money that had been paid under the agreement.

After the plaintiff sued to get the money returned, the defendant claimed that it was required to pursue the dispute resolution procedures provided in the original agreement. The plaintiff argued that those provisions were released by the memorandum of understanding, and both the trial court and the Court of Appeals agreed. It is apparent that the defendant fully believed that the dispute resolution provision should have survived the memorandum of understanding, but the plain language of that contract itself said otherwise. The key point here is to always attempt to review your contract from an outsider's perspective; attempt to keep in mind that a judge or jury deciding what it means will not know nearly as much about your business or your relationship with the other party, as you do. Having a lawyer review a contract can be extremely helpful in this regard, as he or she will not be nearly as familiar with the relationship as you are, and may point out things that you have overlooked.

Covenants Not To Compete and Social Media. How Might this Impact Your Business?

By James R. Vann

Covenants not to compete or non-compete provisions are fairly common in business today. Many business owners desire to protect their business by having employees sign agreements where the employee promises not to unfairly compete with their business, solicit customers to other companies and/or solicit former fellow employees.

The desire of the business owner to protect their business makes sense. The business owner generally has worked hard to establish the business, fill the niche, service customers and grow the business. Placing employees in a position to provide service and/or sales to the customers is built upon trust. The great employers often teach, train and educate employees on how to improve what they do and how they do it. That is generally a benefit for the customer, employee and employer.

Sometimes the employment relationship may end with the employee going to work for a competitor. That is where the former employer gets nervous. The former employer has a legitimate business interest in protecting their trade secrets, customer lists, pricing, business strategies and ongoing employment relationships with their current employees. Often times this is accomplished through covenants not to compete, covenants not to disclose and covenants not to solicit other employees.

With the popularity and growth of social media such as Linkedin and Facebook, it has become more difficult for the employer to protect their business relationship with their customers. It is becoming more commonplace for employers to monitor social media sights of their employee and former employees. Social media is a prime target where employees or former employees can easily disseminate information about their employer which could cause damage to the employer.

The trend is growing where employers are calling out former employees for allegedly violating restrictive covenants in their use of social media. Court results have been mixed as the courts begin to apply the law to the new technology.

Linkedin has become a staple in the business community for connecting and building relationships with customers. Thus, the former employee could have an instant connection with the customers and/or vendors of a former employer upon leaving and going to work for a competing business. Depending upon what the former employee posts or publishes may depend upon whether a breach of the restrictive covenants has occurred.

Before social media, it would take a lot longer for word of mouth to get around that a former employee had left. Now, it could be the same day. Many employers are rightfully concerned that the relationship with key customers and/or vendors could be harmed by the change.

Some employers have gone so far as to enter into agreements with employees where the employer has full access and control of the social media sights specifically. There could be positions within the company where that type of control is logical. It is important to think through what the employer is trying to protect and how best to do so.

Courts are working to apply the current law to the new technology and there is a wide variance in the opinions across the country thus far. Often times, the court will closely review the written restrictive covenant in an attempt to determine how it should be applied.

Employers should ensure that they are acting in a reasonable manner in efforts to protect the business. A review of current restrictive covenants certainly makes sense. Reasonableness is always an important factor in evaluating a former employment relationship where a restrictive covenant is applicable.

The employment relationship generally begins on a foundation of trust and respect. It should also end that way if at all possible. Employees should be considerate of the investment the former employer has made and respect the covenants agreed to while working with the former employer. The former employer should carefully consider the interests they are trying to protect and determine what is reasonable under the circumstances.

If you have any questions, please feel free to contact us.

Improving Outcomes When Customers File Bankruptcy

By James A "Jim" Beck

Generally, the filing of a bankruptcy by a customer is a negative occurrence. Most creditors see a bankruptcy notice and believe it means that any debt owed by the customer will have to be written off as bad debt. Fortunately, that is not always the case, and in many cases funds may be recovered by a creditor. There are also situations in which a creditor may be required to return funds to the debtor's bankruptcy estate, but there are ways to minimize that risk.

Some bankruptcy cases involve a situation where the debtor has no assets, in which case creditors will not receive any funds and the debt will most likely be discharged. In other cases, assets will be liquidated and funds distributed per the bankruptcy statutes. In a corporate reorganization, the debtor continues its operations under the supervision of the court and restructures its debt, often paying creditors some or all of the debt that is owed. It is important to know what type of case has been filed and to monitor each case as it progresses through the bankruptcy process.

In all cases, it is advisable for a creditor to review the initial filings, including the petition and schedules, to make sure its debt is listed correctly, to obtain information about the debtor's specific assets and obligations, and to determine if any questions arise or issues need to be resolved. As the case progresses, reviewing the various filings is necessary to make sure the treatment of the claim is appropriate and not questioned, and to allow the creditor an opportunity to object or respond to any motions that are filed.

Occasionally, a creditor will receive an adversary proceeding complaint for the recovery of an alleged preference payment or unauthorized post-petition payment. In most cases, the payment amount that the trustee demands can be negotiated. However, it is important that a creditor be able to show a strong defense to the claim. The most important aspect of formulating a defense to either of these claims is keeping good records of correspondence, agreements, and payments.

An avoidable preference is a transfer of a debtor's interest in property for the benefit of a creditor during the ninety days prior to the bankruptcy filing for or on account of a debt owed by the debtor and the transfer allowed the creditor to receive more that it would receive in a Chapter 7 liquidation. Generally, it is not difficult for the trustee to prove those elements. However, there are several defenses to this type of claim. A payment is not avoidable by the trustee (i.e. the creditor does not have to pay it back) if the payment was made in the ordinary course of business, was a contemporaneous exchange for new value, constitutes subsequent new value, or if the creditor's position was not improved by the transfer. A creditor's ability to document its defense through establishing the payment history, terms, standard course of dealing, and specific circumstances regarding the payment in question is the key to achieving the best possible outcome.

Similarly, a trustee can recover a post-petition payment of a pre-petition debt. This type of claim is more difficult to defend, because such payments must either be explicitly approved by the court or the creditor has to prove the payment was in the ordinary course. In order to proactively protect itself in these situations, it is recommended that prior to accepting a post-petition payment of any kind, a creditor should determine whether the payment is allowed by an existing court order, and if it is not, seek court approval prior to accepting the payment.

Bankruptcy can a frustrating process for a creditor, but it is not always the end of all hope for the collection of a past due account. As a result, a creditor should not simply ignore the case, and should take appropriate steps to minimize the risks associated with preference claims and other avoidable transfers. If your business needs help improving outcomes in bankruptcy matters, please contact our attorneys.

Top 6 Negotiation Tips Learned From Business Clients

By James R. Vann

We all negotiate in business, at home or in your personal life. Negotiating has been around since biblical days and is a natural part of life. As I have represented clients and especially business clients, it has been a pleasure to watch and learn from experienced business men and women as they negotiate terms and conditions of business transactions. The following are the top 6 negotiation tips I have learned thus far.

No. 6: Be Willing to Walk Away: Being willing to walk away without an agreement can be an effective negotiating skill although it can cause stress if an agreement is needed. I have watched as clients show a willingness to walk away from the negotiating table without a deal. Often, this draws the opposing party closer to the table. If one party walks away from the negotiating discussion, the negotiation can continue later if the parties are interested. Obviously, as with all aspects of negotiation, timing is everything.

No. 5: Use Silence and Timing as an Advantage: Silence can be an effective tool in negotiating. From sitting at a table and spending lots of time listening to the other side and not interrupting with counterpoints or simply contemplating the next move, remaining silent for a period of time can be effective. I remember one particular client that mastered this technique. I watched him on many occasions explain his position and calmly make his "ask" for what he needed and then sit there and look at the opposing party as they squirmed in his silence. More times than not, it worked for him.

No. 4: Bundle Options: We all have experienced the bundling of services and pricing from other vendors. Well, it can be a successful tool in negotiating in business too. If there are several issues to be negotiated and one topic is not getting resolved, bundling it with other items to be negotiated can create a win-win for all involved. Often times, including an issue with others can create value for the other party.

No. 3: Focusing on One Item of Interest: If there is primarily one thing you want to accomplish in negotiation and the other side knows it, this could create a harder bargaining position for you. Thus, keep your "poker face" when you are discussing the item of interest. Proceed with caution if your discussion keeps coming back to the one thing you really want in the transaction. Many times, I have seen clients mention something they really want but not make a big deal about it. Often times, they get what they need plus other value.

No. 2: Add Value to the Other Party: Knowing what the other side needs or wants can often create value for you and give you a benefit in negotiating. If you can offer a service or product that the other side deems to be of value to them, it might not be that costly to you and that added value could put the finishing touches on the agreement.

No.1: Honesty in Dealings: Honesty in negotiating is always a winning approach. Even if the negotiation falls apart, you will be known to be fair and honest. Your reputation is worth more than a short term victory. I have witnessed clients sticking to the truth even though it might cost more but, in the long run, the agreement reached proves beneficial and they are well respected in the community.

If you have any questions regarding negotiation or need help with a business transaction, please feel free to contact me.

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