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THE LEGAL PAD

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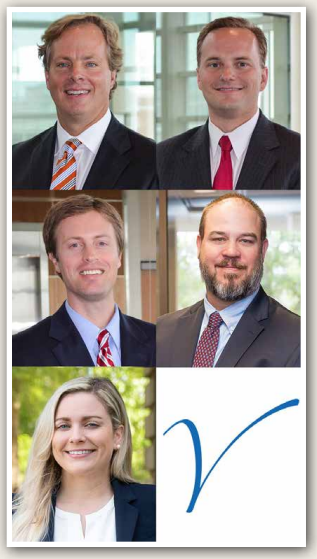
A Newsletter of Current Business and Legal Matters



In This Issue:

Can You Represent Your Business in District Court? The Answer is Now a Definite Maybe

By Joseph A. Davies

Before October 2017, if you asked any trial lawyer in North Carolina whether a company could represent itself in court, the answer would have been "Only in small claims court." Most lawyers would have even been able to tell you the exact case that required companies to have an attorney represent them in court. That rule meant that if your company was sued in small claims court and won, the plaintiff could appeal to District Court and essentially require your company to hire an attorney to defend the case in the District Court. So, even though your company had not been the one to start the litigation and won before a magistrate, you would still have to spend the extra money to hire an attorney to represent you in District Court. That struck some people as unfair, including apparently some North Carolina legislators. Effective October 1, 2017, a new provision of North Carolina's General Statutes exempts a company involved in an appeal of a small claims action from the requirement of hiring an attorney to represent it in District Court. The new law is North Carolina General Statutes Section 7A-228(e).

Unfortunately, however, it appears that some lawyers (and even some judges) may not yet be aware of the new statute. We have gotten recent reports of company representatives being told that they cannot represent the company in district court, even on appeal from a small claims decision. Therefore, if you do choose to try to represent your company, you should plan on coming with a copy of the statute and, even then, being prepared to be told that you need to hire an attorney. Of course, the question of whether you should have an attorney representing your company in district court is much different than whether the law requires you to do so. Many lawyers put a lot of faith in the old saying that a lawyer that represents himself has a fool for a client and would therefore recommend that anyone involved in the court system should have an attorney, with the possible exception of small claims court. Because of the availability of a new trial in district court, the consequences of making a mistake in small claims court are significantly reduced. Once your company is in District Court, however, the stakes can become much higher. Even if you do choose to act as your company's lawyer (and the judge allows you to do so) you may be well-served in at least discussing the matter with your attorney first.

Starting a Family Business Things to Consider

By James R. Vann

Starting a family owned business from scratch can be an exciting and scary venture. The independence, generational legacy, challenges and opportunities and unknown possibilities are all alluring characteristics. Most entrepreneurs know that there will be many long days, daily challenges and hopefully a lot of rewards.

The Tough News: The resilience typical of family ventures is more and more often short-lived. "More than 30 percent of all family-owned businesses survive into the second generation. But only about 13 percent are passed onto the third generation." This is an unfortunate shift for family businesses as studies show these businesses models are often". . .more socially conscious, caring about providing jobs for people, treating workers fairly, offering greater opportunities for women, and being preferred by consumers. . . ." as well as having a "strong commitment to quality which is related to the soundness of the family name. . . ."

If you are contemplating starting a family business, here are a few practical and legal considerations.

1. Look for the natural fit with talent and gifts:

After speaking to some family business owners, one of the most common problems is children who want to use the family business as a backup option. They are not motivated to fight for the opportunity and, even if experienced, they believe the family should provide a position for them on request. This expectation of nepotism can create a seemingly unwinnable situation and potentially create a sizable rift in a family.

It is important to impress on your children that not only will they not be treated differently than other employees, but they might not even be the best fit for the company. For some, this might be the necessary push to prove themselves, for others it could distinguish if that family member is a better fit in a different industry. While it might be disappointing not seeing a child follow in your footsteps, it might be the best thing for them.

2. Get out in front

Assuming you hire your child, the next step begins right away. As with every area of life, it is vital to establish a clear reputation right from the beginning. If you let concerns about nepotism fester, you will be fighting an uphill battle for much longer.

One commonly suggested way to avoid this is to guarantee that the children are prepared for the job. "The conventional wisdom is that family members should spend two to five years working outside of the family business at another company in the same industry. . . . 'It is not always a good idea to bring someone into the family business right away, especially right after college, who is going to be over paid and over scrutinized.'"

While there is no perfect plan, anything you can do to equalize the playing field will benefit you, your child, and ultimately the business.

3. Work ethic is important

Aside from the practical considerations of the work environment, a new family business owner must consider the legal implications and labor laws just as much as any other business.

North Carolina places various restrictions on anyone under the age of 18. These include: when they can work, how long they can work, what type of jobs and equipment they can use, and necessary breaks. Even while certain aspects of this statute can be worked around with parent permission, it is essential to familiarize yourself with both state and federal law. Oftentimes, family businesses simply allow minor children to slip in some of their free time at the family business only to be hit with some substantial fees or even a lawsuit.

With these tips and a host of others in mind, you will be off to a good start with your new family business.

Can We Fix It? Material Breach and Right to Cure

By Lindsey B. Revels

As any business owner knows, contracts are the foundation of a company. Whether it's a leasing agreement for office space, a purchasing agreement for new equipment, or a contract for the sale of 1,000 widgets, contracts, and thus, contract law, inevitably permeate the inner workings of every business. Contracts typically dictate the terms of an agreement and the remedies available to the parties when one or both parties fails to perform. Whether the agreement involves a sale of goods or services, the contract is a safety net and an element of accountability for the parties involved. However, as we all know, contracts, even those written with the utmost specificity, cannot and will not prevent all disputes between the parties involved.

Imagine you, Bob Business Owner, enter into a written agreement with Chris Customer whereby you agree that your company, Bob's Business, will provide certain skilled services in exchange for Chris Customer's payment for those services. You and Chris Customer have signed the contract and Bob's Business begins providing skilled services. A few weeks later, Bob's Business has nearly completed the project and/or services as promised. However, the customer is now claiming defective performance and/or dissatisfaction with the services you provided, has terminated the contract and refuses to pay for the services rendered. This common scenario and leaves Bob Business Owner asking, "Can they do that?"

Generally, if either Bob's Business or Chris Customer commits a material breach of the contract, the non-breaching party (i.e., the party alleging breach) is excused from its obligation to perform further. A material breach substantially defeats the purpose of an agreement, or goes to the heart of the agreement, or can be characterized as a substantial failure to perform. Ultimately, whether a breach is "material" depends on the facts and circumstances of the case.

Some contracts specifically require a party to provide notice of an alleged breach to the breaching party and the breaching party has an opportunity to cure any alleged defects in performance. If the contract between Bob's Business and Chris Customer specifically mentions a notice requirement and an opportunity to cure, Chris Customer would need to provide Bob Business Owner and/or Bob's Business with notice of the alleged defects in Bob's Business's performance and provide an opportunity to "cure" or fix the issue(s). Chris Customer must provide such notice and opportunity to cure to Bob's Business prior to termination of the contract. Otherwise, Chris Customer cannot then recover damages from Bob Business Owner and/or Bob's Business for alleged breach of contract.

If the contract between Bob's Business and Chris Customer does not include specific terms regarding notice and/or opportunity to cure alleged defects in performance, North Carolina Courts have implied that Bob's Business may still have a right to notice of the alleged breach and a reasonable period within which to cure the alleged breach. Even when there has been a defective performance, and even if that defective performance amounts to a material breach, it may still be possible to cure the alleged defects without excusing the non-breaching party from performance. Even if the contract between Bob's Business and Chris Customer is void of any specific term regarding notice and/or time to cure alleged defect(s) in performance, Bob's Business may still have a right to cure the alleged defects in performance in a reasonable time and Chris Customer's obligation to pay for those services would not be discharged.

[1] See LCA Dev., LLC v. WMS Mgmt. Grp., LLC, 248 N.C. App. 121 (2016).
[2] See Crews v. Crews, No. COA18-42, 2019 N.C. App. LEXIS 185, at *13 (Ct. App. Mar. 5, 2019)
[3] Id.
[4] See id.

Proactive Collection Measures

By James A. "Jim" Beck

There are several ways to increase the likelihood of collecting an account just by being proactive at the outset when establishing an account for a new customer. Ideally, a new customer would be required to provide at least one personal guarantor on the account and a security interest in some or all of the company's assets.

It is difficult to overstate the importance of having well-drafted credit applications and personal guaranty provisions. Ensuring that the language in those documents establishes the terms you intend to establish and effectively binds the customer and personal guarantor to those terms can save you time, money, and frustration in the event of a dispute. Proper execution of the documents is also a key to improving the collectability of delinquent accounts. For example, it is generally necessary for there to be a signature for the customer and an additional signature for the guarantor, even if the same individual is executing the documents.

Gaining a security interest in the customer's or the guarantor's collateral is useful in a variety of ways. Specifically, a security interest can provide an identifiable asset or group of assets that can be immediately recoverable upon default, enable your company to be treated as a secured creditor in the event of a bankruptcy, and can provide leverage in negotiating a resolution to a past due account.

In order to obtain a security interest, a security agreement is required. Including certain language in the credit application can suffice to make the contract a security agreement. Once a security agreement is executed, the creditor should file a UCC filing statement with the Secretary of State. Note that the more specific you are in identifying and describing the collateral, the better chance you have at recovering it.

If the customer owns a vehicle or other property registered with the Department of Motor Vehicles such as a trailer, another way to obtain some security on the account is by requiring the customer to grant a lien on the vehicle. The lien is noted on the vehicle title and the vehicle cannot be transferred without satisfying the lien.

Educating the individuals involved in establishing new accounts with respect to filling out the credit application and obtaining signatures is another important aspect of being proactive.

It is wise to undertake a periodic review of your customer accounts to make sure all of your customers' contact information is updated, any assets securing the account are still owned by the customer and are free and clear of other encumbrances, and to make sure the customer has not changed the name or corporate structure of its business.

Taking some of these basic, proactive measures can help you focus in on problem accounts, improve the efficiency of your collection efforts, and maximize recovery of past due accounts.

Duty to Preserve and the Preservation Order

By James R. Vann and Caitlin Truelove

If you have been involved in a lawsuit before, you may remember seeing or receiving what is typically called a "preservation letter". What is this preservation letter and what does it do? A preservation letter may also be called a preservation order, a litigation hold, or a hold order. This is a letter instructing the recipient not to destroy, alter, or delete any documents helpful to the sender. This letter is critical in today's world where most documents are electronically stored. Computers and other technologies allow us to electronically store vast amounts of information. It also allows for the accidental or intentional deletion or alteration of such documents. This evidence must be preserved so that the court can make an informed decision on the case. For this reason, every party to the lawsuit has a duty to preserve evidence relevant to the claims of the lawsuit; however, the sending of a preservation letter is but one possible event triggering this duty.

Another event triggering this duty to preserver occurs when you reasonably anticipate litigation. When can you reasonably anticipate litigation? There are many situations which trigger reasonable anticipation of litigation; however, when a person files a complaint, or tells you or writes you about suing you or seeing you in court, your duty to preserve may have been triggered. When your I-am-about-to-be-sued-sense starts tingling, or you feel you should talk to your attorney, just in case, you should immediately stop any normal document disposal procedures immediately to prevent accusations of spoliation of evidence. You really want to be careful to prevent any accusations of spoliation of evidence being brought against you. What is spoliation of evidence and why is it so bad? When you are accused of spoliation of evidence you are being accused of tampering with or destroying evidence.

Precautions against spoliation must be taken as it is quite easy to inadvertently destroy or tamper with evidence, especially when it is electronically stored. The destruction of evidence may be subject to a variety of sanctions by the court. These sanctions can range from simple warnings to the dismissal of your case. If being sanctioned by the court for destruction of evidence sounds bad to you it sounds worse to the judge and jury.

So, what should you do to prevent accusations of spoliation? When you receive such a letter, or even before you receive such a letter, for reasons stated above, you should immediately stop deleting or altering any document that may be useful to the opposing party. If anyone else has access to these documents, you should also let them know that they must cease doing the same. If you know of or find out about any changes to any document helpful to litigation of this case, you should immediately note such changes and the who, what, when, where, and why of those changes, to be sent with the document upon discovery request. Possibly one of the best things to do is to have a set of instructions, plan, checklist, or manual, stating what should occur, especially with regards to documents, when this duty to preserve has been triggered.

It is recommended that you involve an attorney in the creation and implementation of such a set of instructions as the duty to preserve is shared by all parties to litigation and your attorney will know better than you what documents you have a duty to preserve.
If you have any questions regarding this topic, please feel free to contact us.

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