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LIMITS ON MUNICIPAL LIABILITY

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CONTRACTING FOR COMPETITIVE ADVANTAGE

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Limits on Municipal Liability

Patrick Kelly, a Chicago Police Officer, and his friend, Michael LaPorta, spent an evening at bars drinking. At 4:00 in the morning they retired to Officer Kelly's home where an argument ensued, apparently about Kelly's mistreatment of his dog. LaPorta announced that he was leaving. As LaPorta was leaving, Kelly was accused of pulling out his service revolver and shooting LaPorta in the back of the head, causing catastrophic and permanent injuries to LaPorta. LaPorta is severely disabled and requires 24/7 care.

LaPorta's estate sued the City of Chicago under 42 U.S.C. § 1983, which provides a federal remedy against government actors who violate the Constitutional rights of others. Under LaPorta's theory of the case, the City of Chicago had inadequate policies in place to prevent the shooting. LaPorta argued, successfully to the jury, that the City's failures were as follows: (1) the City did not have an "early warning system" to identify officers who were likely to engage in misconduct; (2) the City did not investigate and discipline officers who engaged in misconduct; and (3) the City permitted the Police Department to perpetuate a "code of silence" that deters officers from reporting misconduct by other officers. LaPorta's theory was that these policy failures produced a culture in the CPD of covering up and tolerating misconduct, which led Officer Kelly to believe that he could shoot LaPorta with impunity.

LaPorta's lawyers took the case to trial, and the jury awarded LaPorta \$44.7 million in damages for pain and suffering and medical care. I was serving as the Corporation Counsel, the head of the Law Department for the City of Chicago, at the time and I approved an appeal to the Seventh Circuit Court of Appeals. The Seventh Circuit reversed and remanded the case and ordered the district court to enter judgment in favor of the City.

The appellate court held that the lower court should have granted the City's motion for judgment as a matter of law because Officer Kelly's transgression was not committed "under the color state law." Officer Kelly was not acting as a Chicago Police Officer when he shot and grievously injured Michael LaPorta. He was acting as a private citizen. Pursuant to § 1983, the action taken must be "related in some way to the performance of the duties of the state office." *Barnes v. City of Centralia*, 943 F.3d 826, 831 (7th Cir. 2019).

The Court of Appeals has listed three types of actions that support municipal liability under § 1983: "(1) an express policy that causes a constitutional deprivation when enforced; (2) a widespread practice that is so permanent and well-settled that it constitutes a custom or practice; or (3) an allegation that the constitutional injury was caused by a person with final policymaking authority." *Spiegel v. McClintic*, 916 F.3d 611, 617 (7th Cir. 2019).

The United States Supreme Court has held that "... Congress did not intend municipalities to be held liable unless *deliberate* action attributable to the municipality directly caused a deprivation of federal rights." *Bd. Of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 415 (1997). Officer Kelly was not acting under color of state law when he shot LaPorta. Kelly was not on duty, and he was not performing any law enforcement function. Kelly's actions were those of a private citizen, and a municipality cannot be held liable for private actions taken by private citizens, even if the private citizen happens to be a municipal employee.

LaPorta's claim against the City is premised on the Fourteenth Amendment right to a due process liberty interest in bodily integrity. "[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989).

While this is a tragic story, especially for Michael LaPorta and his family, were the case decided otherwise, every municipality would be liable for all private actions of all of its employees. If an employee of the Department of Streets and Sanitation gets into a bar fight with another patron, during which the patron is injured or even killed, the sanitation worker's employer cannot be held responsible for that. Such liability could bankrupt every city and town in the United States.

Again, this is a tragic consequence for the LaPorta family, but the decision is a correct one. It preserves financial integrity of our towns and cities. The law so requires.

If you have any questions, please contact Mark Flessner at (312) 648-2300 or by e-mail at mark.flessner@sfbbg.com.



Contracting for Competitive Advantage

Case Success Story

Firm partners Norm Finkel and Rich Goldwasser scored yet another victory in court – this time on behalf of a beneficiary of a trust estate – after a Zoom trial. The trustee attempted to reduce the beneficiary's distribution with the principal and interest due on a 20-year-old loan. The Court ruled that the trustee's claim on the note was time-barred and that the Firm's client was due her full share of the trust estate. The Court also awarded the client damages, finding that the trustee breached his fiduciary duties by misappropriating trust funds. This represents the Firm's third Zoom trial since August, 2020 and its third win.

Notable Publications

"How To Gift Assets Before The Pending Biden Tax Plan" (*Forbes*, July 23, 2021, Bruce Bell)

"Recorded Zoom conference not the same as admissible video deposition" (*Chicago Daily Law Bulletin*, July 15, 2021, Phil Zisook)

"How To Get A Tax Break By Investing In Poor Areas" (*Forbes*, July 6, 2021, Bruce Bell)

"Attorneys Beware: Zoom Depositions Are Likely Inadmissible" (*Law360*, June 21, 2021, Phil Zisook)

Welcome New Attorney

We are happy to announce that in May 2021, Adam Maxwell joined SFBBG as an associate. Adam, formerly with Greiman, Rome & Greismeyer, will continue to focus his practice on employment issues and litigation. Adam is available to consult on a wide range of employment and business issues impacting employees and management alike.

Recognized Achievements

Michael Kim was recognized in June 2021 in *Chicago Lawyer Magazine's* Diversity issue as a Leading Lawyer.

Norm Finkel was selected to become a Fellow by the Litigation Counsel of America (LCA). Fellows are selected based upon excellence and accomplishment in litigation, and superior ethical reputation.

Danielle Pearlman was named to the tenth annual "Double Chai in the Chi: 36 under 36" list of movers and shakers in Chicago who are making major contributions through their work, in their free time, and in the Jewish community and beyond. The list is compiled annually by JUF's Young Leadership Division and Oy!Chicago.

Guest Speaker

Earlier this year, Adam Glazer, Gerry Newman and Matt Tyrrell were invited to speak at the Electronic Representatives Association's 2021 Virtual Conference on various legal issues impacting the modern workplace. Adam, Gerry and Matt participated on a panel addressing nefarious attacks on a business and other legal issues, including cybersecurity, unemployment fraud, changing tax laws, intellectual property and confidentiality challenges, COVID-19 workplace vaccination policies, and worker's compensation implications for remote employees.

Attorneys are regularly confronted with handling contract disputes, and while that can be frustrating in itself, to compound the problem, disputes frequently arise because contractual language is unclear and difficult to understand. While a dispute will certainly interrupt the flow of business, it can also be very costly to resolve. Improving and normalizing contracts contributes to easier selection, better service, and faster speed in transactions, and is a straightforward and often-overlooked way to gain long-term competitive advantage in the marketplace.

At their best, well-drafted contracts grease the gears that turn through the course of a relationship—they reduce friction and help protect businesses from damage. Spending time to simplify, negotiate, and maintain contracts for recurrent transactions provides potent leverage over competitors who have not done so. In this article, we identify and briefly examine a few components of a well-drafted contract, and touch upon some of the most impactful tweaks that can be made to better protect a company's business interests, no matter the industry.

Using Clear, Direct Language

Whether the agreement is a partnership agreement, a commercial lease, an employment contract, or a contract to secure a piece of a company's supply chain, the overarching purpose of a well-drafted agreement is to provide clarity with respect to expectations and obligations, to avoid disputes, and to allocate risk. These goals are best accomplished by using plain English – which means using short, clear sentences and everyday words without unnecessary industry jargon. In our experience, that usually involves several edits and careful review.

Negotiate Favorable Terms on the Most Impactful Provisions

Some of the most important and impactful provisions of a contract include indemnification, limits of liability, and termination. We touch on each of these briefly.

Indemnification

Indemnification is one of the most confusing, misunderstood, and dangerous concepts that can be included in a contract, but it is one of the best ways to protect yourself and shift liability to another party. We like to think of indemnification like it is insurance issued by the party you are contracting with, and you can draft and negotiate terms to make sure your insurance covers the risks you want insured. Questions to consider include who and what is covered, and for what kind of claims? How do I file a claim and what kind of control do I have over claim management? What are limits to the recovery?

Limits of Liability

Each industry uses a different approach to limits of liability; most often we see liability capped to the amount paid under the contract, or otherwise to the value of a purchase order. Those types of limits are sometimes sufficient, but other times the parties may need to procure insurance to cover a higher potential liability risk. There are numerous alternatives in drafting and negotiating limits of liability, but in each case, it is important to think through the different circumstances where things could go wrong, as well as the relative likelihood of risk and the factors that could increase or reduce that risk, and then adjust the relationship or the limit of liability to align with the company's considered calculations.

Termination

Things do not always go as planned, and it is prudent to have the ability to "cut and run" as may be necessary. A well-drafted termination provision defines the circumstances under which a party may end the contract, irrespective of the original term. Termination provisions are highly specific to the transaction and can allow for absolute discretion to terminate, build in notice periods, or allow for the payment of a fee to terminate the contract early, among other options.

Actively Manage and Oversee Implementation of Contracts

Contracts generally lay the foundation for how business is conducted throughout the relationship, so it is important to have a plan to manage the lifecycle of these agreements. It is best to assign a person to organize and actively monitor the relationships and terms of the agreements to make sure everything is happening as it should. Otherwise, the benefits negotiated into the relationship may be lost. Not only will active monitoring allow a business to confirm that a deal is on track, it allows a business to plan for termination or renewal, and will provide an early warning system if a problem arises.

Conclusion

It is no secret that speed is a significant variable of success in business today. It is vitally important to use well-drafted agreements that the parties understand and that work for the company's business—they help avoid misunderstandings that derail projects and immerse a party in litigation --- and instead facilitate collaboration, innovation, and expansion. The company that can effectively make, paper, and effectively manage a deal or transaction is the company that wins business over its rivals. Well-drafted agreements set a business for success and provide a long-term competitive advantage in the market.

If you have any questions, please contact Adam Maxwell at (312) 648-2300 or by e-mail at adam.maxwell@sfbbg.com.