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SENSIBLE SOLUTIONS

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About Our Law Firm

We are comprised of seasoned and dedicated professionals who familiarize themselves with our clients' industries as well as their legal issues. We strive to maintain long-term client relationships by keeping our clients fully informed and respecting their time and business resources.

Legal Practice Areas

- Banking and Creditors' Rights
- Condo-Community Association Representation
- Corporate and Other Business Transactions
- Defamation, Privacy and First Amendment
- Employee Benefits
- Employment Law
- Estate Planning, Probate and Trust Administration
- Health and Fitness Industry
- Independent Sales Representatives
- Intellectual Property Law
- Litigation and Alternative Dispute Resolution
- Mergers, Acquisitions and Business Sales
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- Real Estate Tax Reduction
- Securities, Futures and Derivatives
- Trade Associations

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Our New Legal World — Contactless Delivery of a Lawsuit

In 2024, participating in society – especially as we approach an election – means receiving all sorts of unwanted messages. These messages run the gamut from spam texts by politicians soliciting donations, to unsavory advertisements boosted onto your timeline, to any number of assorted e-mails that populate our respective inboxes. In Illinois, there is an additional message that you should be aware of, as the Illinois Supreme Court Rules now contemplate service of a lawsuit through social media, e-mail, or text message. Yes, you can now be properly served with a lawsuit in a direct message on Facebook (now known as Meta), Twitter (now known as X), Instagram, LinkedIn, or even Pinterest.

The Illinois Code of Civil Procedure has provided for service by special order of court for over two decades. *See* 735 ILCS 5/2-203.1. The Illinois Supreme Court has now extended service by special order of court to include social media, e-mail, or text message. Amended Supreme Court Rule 102 provides in pertinent part that "[i]f the court is satisfied that the defendant/respondent has access to and the ability to use the necessary technology to receive and read the summons and documents electronically, the following alternative methods of service or combination of methods of service may be ordered by the court…(A) Service by social media…(B) Service by e-mail…(C) Service by Text Message." *See* Ill. Sup. Ct. R. 102(f)(1).

Put simply, in Illinois, you can now be served by a text message, e-mail, or direct message, which provides a new meaning to the phrase "sliding into someone's DMs." To be clear, an attorney may not simply request service via alternative means after one unsuccessful effort by the Sheriff or a process server. Rather, Amended Rule 102 requires that a motion for service by special order of court be brought in accordance with Section 2-203.1 of the Illinois Code of Civil Procedure.

Section 2-203.1 applies when service cannot be made by serving someone personally, or serving an adult of the age 13 or upwards at the defendant's usual place of abode. If it proves impractical to serve someone in person or at home, Section 2-203.1 allows a party to move for service by special order of court. And a motion for service by special order of court – the necessary predicate to serving someone via social media, e-mail, or text message – must be accompanied by "an affidavit stating the nature and extent of the investigation made to determine the whereabouts of the defendant and the reasons why service is impractical" on a person individually, or at their abode. 735 ILCS 5/2-203.1. The affidavit in support of the motion for service by special order of court must also include "a specific statement showing that a diligent inquiry as to the location of the individual defendant was made and reasonable efforts to make service have been unsuccessful." *Id.*

In addition, Amended Rule 102 requires that, for service by text message, e-mail, or social media, the affidavit must include "the reasons the movant believes the defendant/respondent has recently sent and received transmissions from a specific e-mail address or telephone number or the defendant/respondent maintains an active social media account on the specific platform utilized for service." *See* Ill. Sup. Ct. R. 102(f)(2). So, if you want to serve someone via social media, you will need to affirm via affidavit that they use the platform through which you intend to serve them.

Service pursuant to Amended Rule 102 also requires specific language. While attorneys with a penchant for referencing early 2000's films would want to send a lawsuit with the unoriginal message "You Got Served[,]" that would not be proper under the rules. Amended Rule 102 requires that the message enclosing the summons, complaint, and other required documents must include the message "Important information—You have been sued. Read all of the documents attached to this message. To participate in the case, you must follow the instructions listed in the attached summons. If you do not, the court may decide the case without hearing from you, and you could lose the case." *See* Ill. Sup. Ct. R. 102(f)(1)(A).

The world has changed, and will continue to do so. In this era of Ring cameras and remote working, service on individuals has become more and more difficult. Amended Rule 102 reflects the Supreme Court's effort to keep up with the times.

For more information, please contract Andrew Johnson at (312) 648-2300 or by e-mail at andrew.johnson@sfbbg.com.

"Battle of the Forms" — A Primer

Case Success Story

Following an in-person, multi-day trial in the Circuit Court of Cook County, SFBBG attorneys Norm Finkel and Bill Klein prevailed in defending their clients, whose niece and nephew sued them, claiming that their uncles had unduly influenced their mother to wrongfully exclude the niece and nephew as beneficiaries under their grandmother's trust. The court held that the plaintiffs had failed to establish a fiduciary relationship or that either of the uncles had exercised any undue influence over the grandmother of the niece and nephew.

* * * * *

As we previously reported, on May 8, 2023, SFBBG attorneys Phil Zisook and Bill Klein prevailed in an Illinois Appellate Court defamation case, *Mauro Glorioso v Sun-Times Media Holdings, LLC, and Tim Novak*, 2023 IL App (1st) 211526. Zisook and Klein had argued that Sun-Times' articles defamed SFBBG's client, constituted false light invasion of privacy, and that the Complaint was not a "SLAPP" suit. The defendants' petition for rehearing in the Appellate Court was denied on September 18, 2023. On January 24, 2024, the Illinois Supreme Court granted the defendants' Petition for Leave to Appeal, which the Court very rarely grants. It is expected that the Court will clarify issues concerning the scope of the Illinois Citizen Participation Act. The Court last addressed the scope of the Act in *Sandholm v. Kuecker,* 2012 IL 11443*,* more than ten years ago.

Welcome Aboard!

The Firm is happy to announce the latest addition to our group of attorneys. Christian Manalli has joined the Estate Planning & Taxation practice group as a partner.

Speaking Engagement

Dan Beederman presented "Rep Succession Planning—Why it is Important for Reps and Their Manufacturers" to the Manufacturers' Agents of Cincinnati on November 3.

Published Articles

The *Chicago Daily Law Bulletin* published an article written by Marc Pawlus on January 31. The article, "Reporting Rules Debut under Corporate Transparency Act," was featured in our last newsletter.

For most business owners engaged in the sale of goods, a typical sales process no doubt consists of some variation of the following – parties agree upon the essential deal terms (*e.g.*, price, quantity, goods, etc.), buyer issues a purchase order, then seller subsequently processes the order and sends an invoice to the buyer. Every day, countless transactions are conducted on this basis without either party signing a single document. Lurking behind the seemingly perfunctory exchange of transaction documents, however, is a potential issue that could unwittingly expose your business to meaningful unintended consequences.

In most instances, each exchanged transaction document contains not only the essential deal terms, but also the terms and conditions governing the sale – usually contained in the fine print on the back of the document. Sometimes referred to as "boilerplate", these often-overlooked provisions contain meaningful concepts – things like warranties, remedies, and default. But in virtually all of these instances, the buyer's boilerplate is going to be different than the seller's. Often, the discrepancy goes unnoticed because there is not a dispute with respect to the transaction. What happens, however, when there *is* a dispute?

For example, let's say the seller's invoice contains provisions that, among other things, disclaim warranties with respect to the goods, designate a specific forum where disputes must be litigated, and limit remedies available to the buyer, but the buyer's purchase order is silent on these topics. To the extent the buyer later claims that the goods received were defective in some way, whose provisions ultimately govern the transaction? This common scenario is known as 'The Battle of the Forms.'

Since the buyer and seller exchanged documents containing additional and different terms, was a contract even formed in the first place, and if so, what were its terms? To answer these questions, the parties must look to Article 2 of the Uniform Commercial Code (UCC), but be forewarned – the answer is anything but satisfying.

Article 2 of the Uniform Commercial Code[1]

Is a Contract Formed?

Generally, a valid contract requires some form of an offer, acceptance, and consideration. So, if the acceptance contains altogether new or different terms than the offer, is there a valid contract? Prior to the UCC, this issue was decided under common law requiring the terms of an acceptance to be identical to the terms of the offer in order for a contract to be formed – known as the 'Mirror-Image Rule'. If the acceptance deviated in any way from the offer, it was considered a counteroffer and no contract was formed until the counteroffer was accepted. This often meant that the last document to be sent before the contract was performed governed the terms of the sale – known as the 'Last Shot Rule.'[2]

Article 2 of the UCC, however, attempted to remedy the often-arbitrary results under the last shot rule. The UCC generally recognizes the existence of a contract despite different terms between the offer and acceptance so long as the parties exchange documents demonstrating an intent to enter into a contract, *unless* a party expressly conditions its acceptance on the other party agreeing to the terms in the acceptance (in which case it is considered a counteroffer and no contract is formed). In fact, the UCC allows the recognition of a contract even in instances where there is no express acceptance, but the parties nonetheless perform as though a contract exists. However, the pertinent question still remains – what terms apply?

What Terms Apply?

With respect to the sale of goods between "merchants" (basically defined as business parties), the UCC provides that additional terms are automatically incorporated into the contract, except when: (1) the offer expressly limits acceptance to the terms of the offer; (2) the terms *materially* alter the contract; or (3) a party objects to the additional terms within a reasonable period of time.[3] The UCC provides exemplary provisions of what may constitute a material alteration, including provisions addressing warranties, indemnification, and damages, but even these are fact-specific analyses and subject to varying interpretation depending on the jurisdiction.

With respect to different and conflicting terms (*i.e.* those terms that expressly conflict with other terms in the contract), the majority rule is that they are read out of the agreement and supplemented by the UCC's default 'gap-filler' terms – known as the 'Knock-Out Rule.'[4] This means that parties who exchange documents with conflicting terms may find themselves being governed by provisions that one party or neither party intended. And unsurprisingly, the gap-filler terms typically favor the buyer.

Thoroughly unsatisfied yet? Rest assured, you are not alone.

Best Practices – Avoiding a 'Battle of the Forms'

If it is not already evident, settling contractual disputes through a battle of the forms is complex, time consuming, and expensive. And perhaps most importantly, it does not lend itself to predictable business outcomes to the extent disputes arise. One of the best strategies, therefore, is often to avoid a battle of the forms in the first place. Below are some best practices:

- Review any terms and conditions contained in the counterparty's documents, and notify them of any objections within a reasonable amount of time;
- Have a standard form of terms and conditions prepared, and understand their practical impact to the business;
- If possible, obtain a countersigned transaction document explicitly agreeing to your terms and conditions;
- Understand what terms are most important to your business and insist that those points are expressly agreed upon; and
- Include express language in your documents indicating that your offer or acceptance is conditional upon acceptance of your terms and conditions, including any additional or different terms.

One of the primary objectives of any good contracting process is two-fold – (1) help mitigate business risk, and (2) create more reliable dispute outcomes – neither of which are achieved by relying on a battle of the forms as a means of dispute resolution. Implementing some simple practices, therefore, can go a long way in making sure your business is better protected.

For more information, please contact Caleb Haydon at (312) 648-2300 or by e-mail at caleb.haydon@sfbbg.com.

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[1]This article summarizes the model UCC provisions, but each state has adopted its own version of the UCC, some of which contain different variations.
[2]The scope of this article is limited to the sale of goods between merchants – which is governed by Article 2 of the UCC. The UCC does not apply to the sale of services, which is governed by common law.
[3]If the contract is not between merchants, the UCC treats additional terms as proposals that do not become part of the contract unless expressly agreed upon.
[4]A minority of jurisdictions, including California, treat different terms the same as additional terms in that different terms automatically become part of a contract between merchants unless an applicable exception applies.