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Email Communications May Not Make a Binding Contract

With the growing prevalence of emails in business, most business people assume that an email communication can create a binding agreement. Few business people are printing out the contracts which are exchanged electronically, signing them and providing a hard copy to other parties in a business deal.

It has been expected that the Courts would follow the technology trend and adopt a business's assumption that an exchange of email communications evidencing an agreement would be sufficient to bind the party receiving such communications without objection.

However, in a recent Appellate Division decision, Bloom v. Platinum Fitness, Ltd., decided by the Court located in Manhattan, the commercial hub of the State, a Court ruled that certain emails were not sufficient to create a binding agreement. The Court wrote that "the record discloses that the parties never entered into a binding agreement, oral or written. The emails at issue were not signed by the Defendant and in any event did not indicate the parties had agreed to the major terms of the stock transfer. The June 5th email which did not originate with Defendant's officers did not state that the parties agreed upon the terms of

the purported agreement or that the agreement had been finalized. Moreover, there is no indication that the person who sent the email had the authority to bind the Defendant to the terms set forth in the email." While there are certainly other cases in which email communications have been found to be evidence of agreements, the cautionary tale here is clear: If the agreement is considered to be a binding agreement and transmitted only electronically, it must state certain things: (1) that the party providing the email is authorized to act for the company; (2) a recitation that the agreement represents the final agreement of the parties; and (3) that if the other party does not agree that this represents a final agreement on the terms, that party must respond electronically within a specified period of time,

While these principles are general contract principles, they take on added importance when there is not a hard copy signed in longhand and exchanged. ■

NEWS OF THE FIRM

Conor Brownell ~ As of the beginning of September, we will be joined by Conor Brownell who will be working as a litigation associate. He is a graduate of Cornell University and Case Western Reserve University School of Law. Since graduating in 2005 he has spent the last year as a Judicial Law Clerk for the Appellate Division, 3rd Judicial Department in Albany. During his law school years he received the Distinguished Scholar Award. ■



Robert E. Ganz was reelected in the Guilderland Library District for another 5 year term as Trustee. He was also reelected by the Board of Trustees as the President of the Library for the 3rd year. He is heavily involved in implementing initiatives to expand library services beyond those traditionally associated with public libraries and to create alternate sources of revenue to supplement the tax base of the library. ■

Richard Friedman began a second year as President of the Temple Israel Men's Club. He was also elected to the Board of Bet Shraga Hebrew Academy. He recently spoke at the annual Homer Perkin's graduation as a board member of Trinity Institution-Homer Perkins Center, Inc. ■

David Siegfeld recently attended a seminar on the new Medicaid rules and estate fiduciary tax planning issues. he has recently been appointed to a Endowment Funds Committee evaluating gifts. ■

Andrea Sibinich, after three years of service to the firm is relocating to Philadelphia at the end of the month. We have hired **Susan Elacqua** to serve as Rick's secretary and to administer the collection system. Susan brings many years of litigation and legal experience to the job. ■



Bankruptcy Amendments Help Creditors

It has been almost a year since the new Bankruptcy Law Amendments went into effect. The stated purpose of the Amendments was to make it more difficult to use bankruptcy to get rid of certain debts by certain kinds of debtors. For that reason, creditors will find the new bankruptcy laws more friendly than the old laws.



Bankruptcy law is complicated. Rather than spend pages describing each change and its origin, we want to highlight some major changes, with the hope that you will call us if you have questions.

1. Better treatment for trade creditors. If you sell goods to an insolvent debtor within 45 days before the bankruptcy filing date, you have the right to reclaim those goods within twenty days after the Bankruptcy Petition was filed. More important, if you cannot reclaim the goods (perhaps they were sold) the new Bankruptcy Law provides that a trade creditor who sold goods to a debtor in the ordinary course of business which goods were received by the debtor within twenty days before commencement of the Bankruptcy Case now has an administrative claim. That is, instead of being a lowly unsecured creditor, the trade creditor now jumps to the top of the pile with an administrative claim. These types of claims must be paid before secured and unsecured claims. A trade creditor who seeks an administrative claim for goods shipped on credit to a debtor need not make a demand for reclamation to preserve this claim.

2. Debtors have a harder time proving preference payments. A Bankruptcy Trustee can sue anyone who received payments from a Bankrupt debtor within ninety days prior to the time the Bankruptcy Action was filed. The debtor was presumed to be insolvent within that ninety-day period. If the Trustee can show that the creditor received more than he would have received if the Estate was liquidated under Chapter 7, the creditor must pay to the Trustee the amount the creditor received. Before the 2005 Amendments, these preference actions could be brought in the district where the Bankruptcy Petition was filed, such as Wilmington, Delaware, against creditors located throughout the United States, regardless of the dollar amount involved. There are several major changes which should limit these type of preference actions. First, a Trustee only can sue for a preference if the aggregate value equals or exceeds \$5,000.00. Second, if the preference is less than \$10,000.00, the action must be brought in the district where the creditor resides. Third, and perhaps most important, the Trustee will lose if the creditor can show that the payments were made in the ordinary course of business between this debtor and this creditor, according to ordinary business terms in the industry.

3. The Debtor loses a super discharge under Chapter 13. Some debts are simply not dischargeable in Bankruptcy. For example, if the debt is based on actual fraud, embezzlement, larceny or a breach of a fiduciary duty, and assuming the creditor can prove that, the debt is not discharged. The new 2005 amendments extend this concept to Chapter 13 Plans. Now, even if a debtor has a Chapter 13 Plan and successfully pays creditors over a period of time, a debt based on certain types of "bad acts" are still not discharged.

If someone who owes you money has filed a Bankruptcy Petition and you want to find out if you have any chance of recovery, call us right away. Bankruptcy law features short deadlines, so you must act quickly to preserve your rights. ■

Copyright Registrations for Websites

Internet websites are ubiquitous. Almost all businesses have websites and often family members or other non-business organizations maintain sites to use as a communications tool.

Copyright law, while it does not protect ideas, procedures or systems, can protect the creative content of a website. Copyright protection is available for websites if the owner/author wishes to file a Copyright Application with the U.S. Copyright Office. This can be important because having such a copyright registration on file is a prerequisite to taking copyright infringers to court and for the recovery of statutory damages which range from nominal awards to \$150,000.00.

Copyright registration can be accomplished without legal assistance in most cases. Instructions and forms are found at the copyright office's website www.copyright.gov.

What is important is to make application for copyright registration only for the original elements of a particular website, not for links to other entities, materials created by others or for matters that are in the public domain.

If copyright registration is sought, there must be a deposit (a sample) of the work which can be sent either by disk plus representative sample of the site's pages printed out, or a full hard copy reproduction of the entire work (all web pages) regardless of its length.

While website content often changes on a regular basis and therefore numerous registrations would have to be filed for adequate protection, if your website is going to remain relatively unchanging and is a valuable asset, you should seriously consider registering it for copyright protection. ■



Some Aspects of Life Insurance

In the course of our estate planning practice, we are often asked whether or not life insurance is “something I ought to have” or

“do I have enough life insurance.” The answers to those questions really must be considered on a case-by-case basis.

We generally advise our clients that insurance serves two major purposes. The primary purpose in estate planning is protection so that, if the assets that you have acquired during your lifetime are not sufficient to provide an ongoing source of support for your family in the event of your death, then insurance is certainly a valid and the most traditional way of purchasing that protection.

Another reason that we sometimes suggest that our clients consider purchasing life insurance policies is to effectively “reduce” the amount of estate tax that will be payable upon a decedent’s death. We are all aware that, at the current time, the Federal government imposes a transfer tax on the right to be able to leave property to our heirs. There is no tax imposed upon property passing to a surviving spouse but there is a tax on all amounts (currently in excess of \$2 million) which are paid to or for the benefit of any one or more persons other than a surviving spouse. In larger estates, the amount of tax could be substantial. For example, a unmarried person with an estate of \$5 million, who dies leaving his total estate to his children, will find that the tax imposed on that estate is over \$1 million.

Insurance can provide a way of reducing that amount by creating a fund to pay that tax. For example, if the decedent had purchased a \$1 million life insurance policy at a cost of \$5,000 a year and lived twenty years, the cost of that policy would have been \$100,000 and, upon death, the policy will pay \$1 million, which would be enough money to cover the tax due, thereby effectively reducing the tax from \$1 million to \$100,000. However, we must remember that, for purposes of determining the amount of Federal estate tax, the gross estate will include the proceeds of life insurance if they are receivable by your estate, are receivable by another for the benefit of your estate, you possess any of the incidents of ownership of the policy or, within three years of your death, you transferred a policy which met one of these three tests. The incidents of ownership does not mean that you have to own the policy yourself. Rather, it means that you have the right to control the economic benefits of the policy which include the power to change beneficiaries, to assign or revoke

an assignment of the policy, to obtain a loan against the policy, to pledge the policy for a loan or to surrender or cancel the policy. Therefore, in order to maximize the value of the proceeds payable on account of a decedent’s death, it is preferable that the policy be held in a trust often called an Irrevocable Life Insurance Trust or ILIT. If the irrevocable trust is properly drawn and properly administered, then the proceeds of the policy are not included in the decedent’s estate for tax purposes so that the full value of the policy is available. If the proceeds were payable to the estate, or if the policy was owned by the decedent, this would not be the case and, on the \$1 million policy there would be a tax due in an amount equivalent to the decedent’s marginal rate of somewhere between 33% to 45%.

The amount of insurance necessary is also something that needs to be carefully considered. For young families, in particular, it is important that a professional estimate be made of the amount of funds that the surviving family will need in order to be adequately supported and to take care of those events which you think are important such as college education, weddings, contributing the purchase of a house, etc. There are many factors which go into the cost of obtaining coverage such as an insured’s age, medical history, etc. and, therefore, a professional review of your needs and ability to afford appropriate coverages should be reviewed on a regular basis. If you have any questions about these matters, please contact us for further advice. ■

What We’re Up To



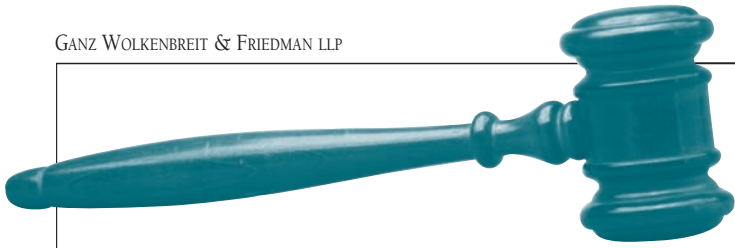
Chirag Kabrawala recently traveled, literally, around the world going to and coming from his cousin’s wedding in India. Back in the office, he has been developing a relationship with a local bank and is now doing closing and refinances for their mortgage department. ■

Rob Ganz has been asked by the New York State Bar Association to lead a small business continuing legal education seminar this coming November. He also recently included litigation in which he obtained from a landlord eight times the pre-litigation offer on a defaulted commercial lease agreement. He also was able to obtain a commercial property broker’s commission by obtaining an injunction against net proceeds leaving the closing table. ■

Jed Wolkenbreit continues to be involved in sophisticated estate planning and corporate transactions both in Albany and New York. ■

Richard Friedman has been busy with construction litigation, collections, and bankruptcy litigation. He has represented a new client that provides bad check insurance to wholesale vehicle auctioneers in New York, which has introduced us to more exotic forums like Brooklyn Supreme Court. ■

David Siegfeld, as a Court appointed guardian, has successfully negotiated a estate settlement saving the beneficiary tens of thousands of dollars. He has also been heavily involved in numerous commercial real estate sales and corporate refinancing transactions. ■



BEWARE : Forum Selection Clause!

A forum selection clause specifies the forum in which any dispute under a contract must be resolved. While signing a contract with such a clause may seem harmless enough, it can potentially lead to frustration, inconvenience, and additional expense down the road.

Normally, a person or business can be called into court only in the state in which he is physically present, or in which he has sufficient contacts such that he would expect that he may be called into court there. Such "sufficient contacts" might include doing substantial business in a state, or otherwise engaging in acts by which the person avails himself of the benefits of the laws of the state.

When a person signs a contract with a forum selection clause, he is agreeing to give up the protection of the normal rules. Instead, in the event of any problems in the course of the contract, he agrees to sue and be sued only in the forum chosen in the contract.

Imagine, for example, the case of a New York resident who has never been to California in her life, and does no business in that state. Normally, she could never be forced into court in California. That is, until she signs a contract with a company selling products nationally and which contains a forum selection clause which states that all disputes must be resolved in a California court. Now, not only can she be called into court in California if the vendor asserts non-payment, but also, if she has a dispute which she wants to resolve with regard to that contract (for example, the product does not work as warranted), she only can bring an action against the other party in California!

Fortunately for that consumer there is a New York statute which provides that in the case of individual consumers, the proper place for a court action against the consumer purchaser is where the consumer resides. That means that even if a New York individual consumer enters a contract with a forum selection clause that says all actions must be brought in a California court, that forum selection clause may be found to be void as against public policy and an action against the New York consumer will have to be brought in the county in which the New York consumer resides. However, that statute only protects individual consumers and does not protect small businesses. So, if a small business enters a contract with a forum selection clause, the clause is completely valid and enforceable.

Anyone who signs a contract should be aware of these types of provisions. Be certain that you understand the potential ramifications of the different contract clauses before signing your name on the dotted line! ■

What employers should know about their employees' JURY DUTY obligations

If your employee has been summoned for jury duty, please be aware that he or she has an obligation under New York State law to serve.

The New York State Judiciary Law contains provisions relating to jury service and has prohibitions against employers penalizing jurors for their service. It also sets forth the basis of payment for juror service fees.

New York law provides that an employee who is summoned to serve as a juror in State Court and who gives sufficient notice to his or her employer prior to serving "shall not on account of absence from employment by reason of such jury service be subject to discharge or penalty."

While employers are not obligated to pay full wages for periods of absence from employment due to state court jury service, the Juror Service Leave Law requires that "[a]n employer who employs *more than ten employees* shall not withhold the first \$40.00 of the daily wages of jurors during the first three days of jury service." In other words, an employer who employs ten or more employees must pay a worker on jury duty at least \$40.00 per day for the first three days of jury service. Thereafter no payments are required. Employers are, of course, free to continue to pay wages during the jury service period or the employer can count such time as leave time (except for the first \$40 for three days).

Failure to observe these rules may result in a finding of criminal contempt of court against the employer which is punishable by a fine of up to \$1,000, by imprisonment of up to thirty days, or by both.

Employers should also note that the Penal Law prohibits an employer from taking adverse employment action against an employee due to absences resulting from attendance as a witness at a criminal trial. However, an employee who is called as a witness is not entitled to compensation during the period of his attendance as a witness. Furthermore, the employee must notify the employer of his intent to appear as a witness before the day he is to be absent and the employer may request verification of his service from the party seeking his attendance as a witness. Failure to comply with this statute is a misdemeanor.

Please review your employee manuals to ensure that your company policy conforms with the law as described above. If you have any questions, please do not hesitate to give us a call. ■



DISCLAIMER Actual resolution of legal issues depends upon many factors, including variations of facts and the application of such facts to state and federal statutory and common law. This Newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this Newsletter.