

Avoiding a "Battle of the Forms" in the Sale of Goods

Sellers typically face greater potential liability than Buyers in sales contracts. The Buyer's primary obligation is usually limited to payment for the goods. In contrast, Sellers are subject to liabilities stemming from delivery of the goods, quality of the goods and sometimes even the Buyer's lost profits arising from a breach. By not tendering its terms and conditions before shipment of goods, a Seller may unwittingly accept onerous Buyer friendly terms typically contained in the Buyer's purchase order.

In many cases, parties often exchange conflicting terms and conditions in purchase orders, sales acknowledgements and invoices. This creates ambiguity over which terms control or the "battle of the forms." Negotiating the terms of the sale is the ideal way to avoid this issue, but is not always practical.

When a battle of the forms occurs, the Uniform Commercial Code ("UCC") provides that the contract consists of terms specifically agreed to by the parties (e.g., quantity and purchase price). The other terms are implied from the

applicable sections of the UCC. While UCC terms may not be as harmful as Buyer's terms, they do allow the Buyer to claim implied warranties, consequential damages and other remedies the Seller wishes to avoid.

While a Seller cannot completely avoid a battle of the forms, it can reduce its exposure. A Seller's terms should be included in quotations to prospective Buyers before receipt of any purchase order. The quotation should disclaim any Buyer's terms and conditions and note that any purchase order delivered after the quotation will be deemed acceptance of the Seller's terms. Likewise, the Seller's terms should be included in all sales acknowledgments, invoices, websites and catalogs. If terms are printed on the back of any document, Sellers should ensure that the facsimiles or photocopies include the back page. Terms and conditions should address issues such as risk of loss, warranties, limitations of liability, choice of law, venue, payment terms and remedies.

*by Kenneth W. Clingen and
Deven S. Kane*



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FIRM HIGHLIGHTS

CC&M welcomes **Eric J. Ryan** as its newest attorney. Eric concentrates his practice in complex commercial litigation and corporate law and comes to CC&M after working for a large Chicago law firm based in New York. Check out Eric's article on the Illinois decision *Ross v. May Company d/b/a Marshall Field's and Company* in this edition of the newsletter.

CC&M represented a client in the successful purchase of an insurance agency in Nevada. This purchase transaction involved attorney **Deven S. Kane** and corporate paralegal **Jean Erhardt**.

Steven A. Marderosian continues to rack up victories in the courtroom including defeating a motion to dismiss, winning a motion to dismiss, dismissing an insurance carrier's subrogation claim against a firm client related to home rehabilitation work, and seizing a defendant's bank account assets to pay a partial default judgment in favor of a CC&M client.

The Perils of Improperly Drafted Employee Handbooks

The First District Court of Appeals recently affirmed why it is critical to properly draft an employee manual or handbook the first time. In *Ross v. May Company d/b/a Marshall Field's and Company*, 377 Ill. App. 3d 387 (2007), the Court found that an employee had contractual rights under an employee handbook dating back to 1968, consequently, the Court affirmed that changes made to that handbook more than thirty years later did not apply to the Plaintiff/employee.

In reaching this decision, the Court reviewed the language of the 1968 employee handbook along with the employer's assurances over the years that the employee's job was secure. The Court determined that the employer had created an employment contract with the Plaintiff as a result of the language in the 1968 manual as well as through its assurances. Thus, the employer was bound to follow certain procedures as set forth in the 1968 handbook before terminating Plaintiff's employment.

Employers should take several lessons away from this case. First, an employer should ensure that

their employment handbook does not create a contract with their employees. Prominent, conspicuous, disclaimer language should be in every employee handbook along with language that employees are at-will. Employees should be required to acknowledge their receipt of the company's handbook and their at-will status.

Second, employers should never assume that a long-term employee is at-will subject to termination without cause or process if that employee was with the company before its employee handbook was properly drafted. An individualized assessment of a long-term employee's status is essential before an employer moves to unilaterally discipline or terminate a long-term employee. Further, it is always cost effective to conduct this assessment before an employer acts, not afterwards.

Because of the disproportionate bargaining power between employees and employers, courts are often eager to ignore the at-will employment doctrine and find contractual rights for employees under even the most tenuous of circumstances. In order to guard against the erosion of the at-will status of their employees, employers must engage in affirmative measures to protect their right to discipline and discharge employees. CCM can help your business take affirmative measures to protect its rights under the law.

by Eric J. Ryan

LLCs May Provide Stronger Liability Protection for Members and Managers

Limited Liability Companies are legal entities that exist separate and apart from their members and managers. In most instances, LLCs insulate their members and managers from personal liability for the LLC's debts, obligations and other liabilities. Failure of the LLC to observe corporate formalities in regard to management of the business or exercise of company powers, absent more, may not be grounds for the imposition of personal liability of a member or manager.

Indeed, the Illinois LLC Act specifically limits the liability of members or managers to cases where liability is assumed pursuant to the articles of organization and such liability has been consented to in a writing such as an operating agreement. See 805 Ill. Comp. Stat. Ann. 180/10-10. Accordingly, careful attention to the drafting of an LLC's operating agreement is critical to take advantage of the liability protections that the LLC statute has to offer.

When the Illinois LLC Act was amended in 1998, the Illinois legislature removed a provision that allowed a member or manager to be held personally liable to a third party for the LLC's debts. The absence of this provision sets an LLC apart from a corporation

where the unauthorized assumption of corporate powers can result in joint and several liability to an individual for the debts and liabilities incurred or arising as a result of an unauthorized assumption of powers. 805 ILCS 5/3.20.

Recent Illinois case law has cited the language of the Illinois LLC Act in denying personal liability of managers and members for an LLC's liabilities incurred after the LLC was administratively dissolved. Further, where a member or manager of an LLC exceeds the scope of his authority in wrapping up a business, he is not liable to a third party. While it is true that an LLC is more expensive than a corporation to form and maintain in Illinois (\$500 organization fee versus \$150 incorporation fee), LLC's may provide managers and members with more appropriate liability protection than other business entities.

by Colleen M. Healy

FIRM HIGHLIGHTS

Mary E. Callow and **Deven S. Kane** with the help of corporate paralegal **Jean Erhardt** assisted a client with the successful purchase of a pet care business in California.

Colleen M. Healy and **Deven S. Kane** with the help of paralegals **Jean Erhardt** and **Virginia Wilkinson** closed the purchase of a \$6.5 million dollar commercial property for a Canadian corporation including related loan documents.

CC&M represented the owner of a local medical services business in the disposition of ownership interest. This stock sale transaction involved attorneys **Colleen M. Healy** and **Deven S. Kane**.



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Clingen Callow & McLean, LLC

LLCs May Provide Stronger Liability Protection for Members and Managers



Colleen M. Healy, a partner at CC&M, concentrates her practice in corporate, real

estate, estate and succession planning, and banking law.

WHAT'S INSIDE? Articles & Contributors

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Kenneth W. Clingen, a partner in the firm, practices in the area of corporate law, mergers and acquisitions and estate and succession planning for business owners.

Deven S. Kane, an associate at CC&M, concentrates his practice in corporate, banking and securities transactional work. Mr. Kane's practice involves the representation of corporations, limited liability companies and their owners.



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