Losing a Battle but Winning the War: How Evidence Triumphs Over Grandstanding

By Ryan R. Van Osdol

As a litigation attorney, it is never a pleasant experience to inform a client that a motion was lost during a court appearance. On the flip side, I imagine that it is an equally unpleasant experience for a client to hear that the judge presiding over the case ruled against him or her on a particular issue. However, as a recent case taught me, it is important to keep focused on the final outcome of a matter, as opposed to the skirmishes that may occur in between, because the evidence presented to the court will ultimately determine how the judge rules on the merits of your case.

I began working on this particular matter about four and a half years ago. The case involved a plaintiff who alleged in his complaint that four individual defendants defrauded him out of his company via a failed merger agreement. Specifically, the plaintiff claimed that the four individuals participated in a scheme to merge the plaintiff’s company into the defendants’ company. After the merger agreements were executed, the plaintiff alleged that the defendants stripped the plaintiff’s company of its assets and returned the plaintiff’s business to him with no assets and substantial debt. The plaintiff sought a multi-million dollar judgment against the four defendants and their business.

DiMonte & Lizak represented one of the individual defendants.

After three years of discovery, I felt that we were in a strong position. The testimony from the depositions showed a failed business idea rather than a scheme to defraud. None of the defendants received any money from the failed merger attempt. In fact, some of the defendants lost significant amounts of money.

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Julia received her J.D. from Loyola University Chicago School of Law, and her B.A. from the University of Illinois at Chicago. Julia is also an active member of the Illinois State Bar Association. She serves on the Board of Directors for the Harwood-Heights Norridge Chamber of Commerce. She is also active in the Park Ridge Chamber of Commerce.

James J. Riebandt Joins DiMonte & Lizak, LLC

DiMonte & Lizak is proud to announce that Julia Jensen Smolka has been promoted to partner. As a commercial and bankruptcy litigation attorney, she defends preference actions, prepares consumer and commercial bankruptcy petitions. Julia advocates creditors’ rights in bankruptcies as well as prosecuting and defending breach of contract suits. She has extensive litigation and collection experience and considerable experience in perfecting, prosecuting and defending mechanic’s liens and construction litigation claims.

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James J. Riebandt joins DiMonte & Lizak, LLC.

DiMonte & Lizak, LLC welcomes James J. Riebandt, previously of the firm Riebandt & DeWald, P.C., who joined the firm effective January 1, 2013. Mr. Riebandt’s addition brings another experienced transactional attorney to the firm. He graduated with high honors from the University of Notre Dame in 1972 and from De Paul University College of Law in 1975. His practice areas include business formation, representation, purchase and sale; commercial and residual real estate purchase, sale and leasing; and estate planning and administration.

Mr. Riebandt began his career with Daley, Reilly and Daley in 1975. He formed the firm which eventually became Riebandt & DeWald, P.C. in 1978.

With the addition of Mr. Riebandt, the total number of attorneys at DiMonte & Lizak comes to 24. DiMonte & Lizak’s attorneys practice in most areas of the law, with attorneys dedicated to both litigation and transactional practice. The firm prides itself on its ability to represent clients in most areas of litigation, including commercial litigation, contract disputes, business and contract fraud, accounting actions, actions to dissolve corporations, partnerships and other businesses, construction and mechanic’s liens, employment matters before courts and state and federal administrative agencies, will contests, trust and probate litigation. DiMonte & Lizak attorneys represent clients in all aspects of real estate development and land use. The firm also provides transactional counsel to clients in corporate and business governance, sale, merger, acquisition of businesses, leasing, estate planning and probate, loan documentation and closings, and commercial and residual real estate transactions. DiMonte & Lizak also boasts a strong creditors’ rights and bankruptcy practice, representing debtors, creditors, and bankruptcy trustees in proceedings under Chapters 7, 11, and 13 of the Bankruptcy Code, non-bankruptcy insolvency and restructuring matters, fraudulent transfer litigation, and loan enforcement.

DiMonte & Lizak is conveniently located adjacent to the Kennedy Expressway between the Canfield and Cumberland exits in Park Ridge. Free parking is available right outside the firm’s building located at the intersection of Higgins Road and Washington Avenue.
Over the Cliff

By Patrick Owens

So we briefly fell off the “fiscal cliff” only to be pulled to safety by legislation agreed to by the Senate about 2:00 am on January 1st, 2013. The House reluctantly approved the bill and President Obama signed into law the American Taxpayer Relief Act of 2012 (“ATRA”) late on January 2, 2013. ATRA provides a few important gift and estate tax provisions as follows:

(1) Estate, gift and generation skipping transfer (“GST”) taxes are unified with an exemption of $5,000,000 indexed for inflation ($5,250,000 in 2013);

(2) Portability of estate and gift taxes continues; and

(3) The estate and gift tax rate is 40%.

Plus, the annual gift tax exclusion increased and the Illinois estate tax exemption increased:

(4) The estate tax annual exclusion increased to $14,000 per year per donee;

(5) The Illinois estate tax exclusion amount is $4,000,000.

This is good news for estate planning attorneys but more importantly good news for clients. For attorneys, we now have relative certainty of the estate, gift and GST tax exemptions so we can more definitively advise clients about their tax planning. For clients, more certainty and higher exemptions should mean less estate and gift tax to pay. Notwithstanding the higher estate, gift and GST tax exemptions, ATRA increased income taxes for most individuals (not just “the rich”) and income taxes will likely continue to increase, so income tax planning will become more and more important in the upcoming years.

If Congress did not act, the estate, gift and GST exclusions would have, and very temporarily did, revert back to a $1,000,000 exclusion amount and a top rate of 55%. This would have created some chaos in the estate planning world. For larger estates, the combined federal and Illinois estate tax rate amounts to approximately 48.3%. Notwithstanding the beneficial increases in the exemption amounts, estate planning should not be ignored. We can now spend more time and effort planning for the important transition of wealth to the next generation in a more effective and efficient manner. ATRA allows us to focus more on families, and less on estate tax centric planning. Income tax planning and asset protection planning will be key discussions.

ATRA also extended Portability of the estate and gift tax exemptions. Portability provides that if a spouse passes away and does not fully utilize his or her applicable exclusion amount, then the surviving spouse may use that exemption. Although Portability is a positive for those who have not planned and for those who have an exclusion amount to carry over, there are a few caveats. First, Illinois Estate Taxes are not portable. Second, a federal estate tax return must be timely filed to claim portability and third, the GST tax exemption is not portable.

Additionally, for clients who structured trusts and gifted assets in 2012, the planning continues to hold great value with all future appreciation now excluded from your estates and if a grantor type trust was used, also allowing trust assets to grow tax free to the trust since the taxes are paid by the grantor. Further, there are many administrative follow up issues including:

- Trust administration to ensure compliance with the terms of the trust;
- Filing of federal gift tax returns (Form 709s);
- If a formula gift was used, following up with business appraisers to ensure the proper percentage is gifted.

Finally, although ATRA makes all of the changes (permanent), (permanent) lasts only until Congress decides to change the tax laws again.
D&L Attorney Ryan Van Osdol Receives Back-to-Back Honor

DiMonte & Lizak, LLC is proud to announce that Ryan Van Osdol has been named to the 2013 Illinois Super Lawyers Rising Stars list as one of the top attorneys in Illinois for 2013.

Ryan also received this honor in 2012, making it the second year in a row that he was nominated and recognized by other Illinois attorneys for this prestigious award.

No more than 2.5 percent of attorneys in Illinois are selected to the Rising Stars list. Super Lawyers is a rating service of outstanding attorneys from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. Attorneys cannot pay to be listed as a Super Lawyers(Rising Star. The annual selections are made using a rigorous multi-phased process that includes a statewide survey of attorneys, an independent research evaluation of candidates, and peer reviews by practice area.

Ryan has practiced at DiMonte & Lizak, LLC since September 2008. He focuses his practice on business litigation, construction litigation and various other aspects of commercial litigation. While the majority of his clients are medium-sized local business owners, Ryan has successfully represented a wide range of clients in trial courts, appellate courts, and in alternative dispute resolution proceedings. He completed a 12 day trial this summer, in which he and partner David Arena successfully defended a client against claims of fraud, breach of a merger agreement and piercing the corporate veil. Ryan was recently admitted to the trial bar for the Northern District of Illinois and is a member of the Illinois State Bar Association(s Commercial Banking, Collections and Bankruptcy Committee.

For more information about Ryan, his experience and his practice areas, go to http://www.dimontelaw.com/van_osdol_ryan.html, or feel free to contact him at 847-698-9600.

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a substantial amount of money in their attempt to get the business off the ground, which ultimately never happened. Moreover, the deposition testimony of third-party witnesses contradicted the plaintiff’s deposition testimony. Therefore, it appeared that the plaintiff was falsifying some of his “facts” in order to make his case seem stronger than it actually was.

In the months leading to trial, the plaintiff filed a motion for summary judgment and argued that the court should enter a judgment against all of the defendants without the need for a trial. During oral argument on the summary judgment motion, the plaintiff’s counsel misrepresented the facts of the case and argued positions that were not supported by the evidence that had been produced during the discovery phase of the litigation. I argued to the court that the plaintiff’s positions were not only unsupported, but were a blatant misrepresentation of the facts. After hearing argument, the court entered an order finding that “overwhelming evidence supports plaintiff’s arguments”, but reserved ruling on the motion until after trial.

This language appeared to be very damaging. I couldn’t believe the court overlooked the discrepancies between plaintiff’s testimony and that of disinterested third parties. I couldn’t believe the court had reached a substantially different conclusion regarding the quality of the evidence than the conclusion I had reached. I didn’t know how to explain the language in the order to the client. So, I spoke to my trial partner on this case, David Arena, and he gave me some very prudent advice.

David told me that once the trial begins, the only thing that matters is the evidence presented to the court. He told me to forget about what the other attorney said during oral arguments, because the attorney will not be testifying at trial. I decided to take this advice. David and I informed the client of the summary judgment order and began focusing our efforts on preparing for trial.

During the plaintiff’s presentation of evidence at trial, every important portion of the plaintiff’s testimony was again contradicted by the testimony of the other witnesses. After the plaintiff rested his case, our trial team and our client discussed how to proceed in light of the fact that the evidence presented appeared to make plaintiff seem untrustworthy. We all reached the same conclusion that I had reached at the close of discovery- the evidence showed a failed business idea rather than a scheme to defraud and that the plaintiff was being less than truthful in his testimony. Further, all of the defendants’ most compelling evidence was presented during the plaintiff’s case, because the plaintiff called the defendants’ most favorable witnesses during his case. Therefore, we decided not to present a defense case and argued that the judge should rule in the defendants’ favor because the plaintiff failed to meet his burden of proof on his claims.

After the trial concluded, we waited a painstaking 6 months for the court’s ruling. In late December 2012, the judge issue a twenty page written opinion, wherein the court reached the same conclusions we had reached. In fact, the judge’s analysis regarding the quality of evidence was identical to that of our trial team. He referred to the plaintiff’s testimony as “misleading and disingenuous”, “just not credible” and even found that “plaintiff’s unclean hand in this regard bars the equitable relief that he seeks against the named defendants.” Ultimately, the court entered judgment in favor of the defendants on all counts. It was a pleasant experience to see that after presentation of the evidence, the court had reached the same conclusion that I had at the close of discovery.

David was right- the evidence presented at trial triumphed over plaintiff’s attorney’s grandstanding during motion hearings. As both attorneys and clients, it is important to keep this perspective during the course of contested litigation. If there is strong evidence in support of your case, don’t worry about your opponent’s grandstanding, because the evidence will come out at trial.
An experienced, multi-practice law firm working as a team to provide practical counsel and quality services.

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