You are being watched. Every time you access the internet and peruse the halls of the world’s information database you leave a trail. This trail is bits of data, identifying where you have been and what you have looked at. This information is also being collected and used to predict where you will go and what you will look at. This practice is referred to as data mining and its practice has become ubiquitous among companies (and governments) with savvy marketing/internet teams. Used properly, this information provides a great service to the consumer and vendor alike, and has untold potential to improve the way we interact.

Anyone who has followed the Edward Snowden affair is not surprised by the revelation that you are leaving bits of data to be collected and analyzed when you access the internet. Despite the media attention that the practice of data mining has received of late, the law has yet to really sink its teeth into the obvious privacy implications that arise from its practice. The following will briefly discuss...

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**Should my Business be a Corporation or a Limited Liability Company?**

By: Lee T. Poteracki

At DiMonte & Lizak, our clients who are starting a business often ask us to advise them as to whether they should operate their business as a traditional corporation or as the newer type of entity, the limited liability company. Our recently deceased partner, Linscott R. Hanson was one of the authors of the Illinois Limited Liability Act, and our firm has always been comfortable recommending either the LLC or corporate entity for our clients.

When we advise our clients, we focus on the differences between corporations and LLCs regarding the following factors: Financial Cost, Management Flexibility, Income Tax Results and Liability Protection.

**FINANCIAL COST**

The Illinois Secretary of State is charged with administering registration of both corporations and LLCs. Their filing fees occur upon initial filing and annually upon renewal of both types of entity. The fees are lower for corporations: $175.00 for initial incorporation for a corporation vs. $500.00 for organization of an LLC, and $100.00 annual corporate renewal vs. $250.00 for annual LLC renewal.

Also, attorney's fees at organization are lower for corporations: with multiple partners, corporations typically require fairly standardized buy-sell agreements while LLCs require a more complicated and nuanced operating agreement. However, Illinois laws require more annual corporate documentation for corporations than for LLCs, so attorneys fees for proper annual reporting and meeting documentation are somewhat higher for corporations.

**MANAGEMENT FLEXIBILITY**

A major drawback for corporate ownership is inflexibility, especially in two person entities. With two equal business partners, our clients typically wish to share decision making. With a corporation, only one shareholder can be President, and the President determines business operation decisions. With equal owners, disagreements can lead to deadlock, and the non-president shareholder is unable to have a voice in management. With an LLC, both members can share management rights and duties and we typically draft dispute resolution procedures into the operating agreement or at least require unanimous consent for major decisions. This is why legal costs are higher to draft LLC initial documents: these documents can be more flexible and thus are more extensive and complicated to draft.

**INCOME TAX RESULTS**

LLCs have a disadvantage as to social security and medicare tax costs. While the LLC itself is not taxed on its income, its members report their share of the LLC’s income personally, and all income is employment income for social security and medicare tax purposes.

S-Corporations are more flexible - as long as the shareholders pay themselves a reasonable salary, the excess corporate profit above their salaries is taxable to the shareholders as a dividend and not as social security or medicare wages, thereby avoiding employment taxes on that excess income.
Unsigned Proposal Found Binding - The Last Hurrah

By: Alan L. Stefaniak

Whether an unsigned contract is binding depends. What it depends on are the facts. In September of last year I tried a case for a long time client who had given a proposal to manufacture and erect flexicore slabs for a warehouse building in Bloomington. The client’s proposal was never signed. In November, we received the trial court’s decision and prevailed. The trial judge found in our favor upon you know what, “the facts.”

I have represented this client for over thirty years. While it’s a family owned business during those thirty years I have worked with three different management groups. I am very proud that I was able to satisfy three different management teams and keep the client for all these years. Unfortunately with the downturn in the economy in 2008 and the profound effect the recession had on the construction industry the client ceased operations in 2010. At this time we had a couple of claims pending and were able to settle all but one. We had to go to trial on the last one involving the unsigned proposal. The trial took place in McLean County in Bloomington. We had a day and a half bench trial and the Judge found in our favor because I was able to prove that through the parties conduct the general contractor accepted my client’s proposal.

In March of 2008 the client issued a written proposal to manufacture and erect flexicore slabs for a 500,000 square foot warehouse building. Our salesman/estimator then wrote a letter acknowledging the order and asking for full sized copies of the plans and also the specifications for the project. The general sent them a few days later. While the client asked on several occasions that its proposal be signed and returned it never was.

Once my client received the full sized project drawings and specs, shop drawings were prepared and submitted to the general for review and approval. My client and the general then went through a six month process of shop drawing submittal, review, revision and resubmittal until the fourth set of shop drawings was approved. I subpoenaed the general’s project manager who no longer worked for the general as a witness in our case in chief. I was able to have him admit that many of the revisions to the shop drawings were due to changes being made in the building and what was finally submitted and approved met all the job requirements. In addition I was able to have him testify that one of the things the general required of subs it hired was to have the sub submit a certificate of insurance. I was then able to have my client’s business record admitted into evidence showing the general made a request for us to submit a certificate of insurance in early October of 2008 and that we did submit it.

The project for which these slabs were made was never completed because the owner filed bankruptcy. While my client manufactured the slabs they were not delivered and erected since the project went bust. The general didn’t want to pay for the slabs and his main defense was that there was no contract. The owner of the general contractor testified that subs are required to sign their standard form agreement which has a “no pay until I get paid” provision. On cross examination I brought out that they had no record of ever sending their standard form agreement to my client and no copy of such an agreement in their files.

The general also tried to establish that my client was taking the risk of manufacturing the slabs without a written contract being signed. However, I was able to show through emails that were sent back and forth the general knew my client was manufacturing the slabs even before the final set of shop drawings was approved and never took any action to stop my client. The President of my client testified that what was manufactured before the final set of shop drawings was approved was what she termed the “safe slabs”; those that would not change even if changes were made to the shop drawings.

The trial judge found in our favor and ruled that the conduct of my client and the general showed that my client’s written proposal was accepted. While the trial judge reduced the amount of damages we were seeking (not uncommon in a bench trial for a judge to give everybody something) he did find that because my client’s proposal was accepted the provision in the proposal for interest at 18% was binding as well as the provision for my client to recover the attorneys fees incurred.

As can be seen, when you have an unsigned contract it can be found to be binding depending on the “facts”. This case was the last one for a long time client. It was our LAST HURRAH and I am pleased we went out with a victory.

astefaniak@dimontelaw.com

Should My Business be a Corporation or a Limited Liability Company?

In addition, in the right circumstances, a corporation can choose not to be a “S-Corp” and pay its own taxes, but the owners’ deductible deferred (pension) compensation can reduce that corporate profit and benefit the owners through tax deferral.

LIABILITY PROTECTION

Our clients operate their businesses as LLCs or corporations primarily to protect their personal assets from the liability that can result from operating a business. Both corporations and LLCs accomplish that all-important goal. Though very difficult if an LLC or corporation is properly maintained and operated, in some instances it may be possible for creditors of a business operated as an LLC or corporation to attempt to “pierce the veil” to attach the personal assets of a shareholder or member to satisfy the business’ debt. Recent Illinois case law has made it clear that LLCs are superior to corporations in protecting owners of the business from such liability.

Every client and type of business involves unique considerations, but our firm explains and applies the above factors in advising our clients in choosing their entity.

lpoterek@dimontelaw.com
Derek Samz and Julia Smolka Present: Bankruptcy Basics from the Experts

Derek Samz and Julia Smolka were recently among the panel of presenters at this continuing legal education seminar sponsored by the Illinois State Bar Association. Derek’s presentation was regarding Chapter 7 bankruptcy procedure. Julia’s presentation was regarding representing creditors in bankruptcy proceedings.


David Arena, Alan Stefaniak and Jordan Finfer co-authored a chapter titled Subcontractor’s Claim for Lien. Abraham Brustein, Julia Smolka and Derek Samz authored a chapter titled Mechanics Liens in Bankruptcy. The latest edition of the IICLE Mechanics Lien in Illinois Practice Handbook was published earlier this month.

Margherita M. Albarello Speaks to Park Ridge Chamber of Commerce

Margherita M. Albarello recently spoke at the Park Ridge Chamber of Commerce Women In Business section on the topic of how to use restrictive covenant agreements to bring value to your business. If you are interested in more information on this topic, please call Margherita.

Data Mining: A Look Into the Future of Privacy Regulation

continued from front page

the privacy issues the law has addressed regarding data mining, and then suggest what the future of the law may hold.

In Sorrell v. IMS Health Inc., the United States Supreme Court found a Vermont statute that sought to prevent pharmaceutical companies from using information data mined from databases that showed the medications physicians prescribed, violated the first amendment. The Court’s ruling was based in large part on the fact that under the statute the State of Vermont granted itself access to the information so it could promote generic medications, but at the same time barring pharmaceutical companies from promoting their medications. There are two major lessons from the Sorrell decision. First, that efforts to protect data mined information will be subject to first amendment scrutiny, and thus must be consistent with the established precedents on first amendment protections. Second, that the law has a ways to go on addressing the myriad of privacy implications brought on by data mining.

The Sorrell court speculated on the future efforts to protect information obtained by data mining. Information that is data mined may be protected by statutes if those statutes are more even in their bar of the use of that information. Meaning, if the State of Vermont prevented its use of the medications physicians prescribed, in the same manner it prevented pharmaceutical companies, the statute may have been constitutional. The bigger issue for Dimonte & Lizak clients and consumers at large is: what about information you leave behind when you are on the internet looking for something as innocuous as new shoes (as opposed to medical related information). It is likely that the law will develop some protections for consumers, unlikely to prohibit the use of data mining entirely, but rather limiting how that information is used. Companies will likely be permitted to use information about things you like, to offer you other things you may like. This already occurs; when you shop for a Brooks Brother’s suit, you begin to see advertisements on your web pages for other suit makers. The limitations will likely occur within specific industries that have a higher propensity to use the information to commit fraud against its consumers. Another possibility is that certain web pages, and companies, may offer its consumers a way to opt-out of their information being data mined; this could be provided as a way to enhance a company’s relationships with its customer base.

The practice of data mining is here to stay and if used properly it provides a wonderful service to the world. As the practice further develops, and flaws with its use arise, the law will react and serve to instill standards, ideally permitting data mining to continue to provide benefits, while not impinging upon your constitutional rights.

jfinfer@dimontelaw.com
An experienced, multi-practice law firm working as a team to provide practical counsel and quality services.

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