

From the Attorneys of Strauss & Troy, Cincinnati, Ohio, and Northern Kentucky

Fall 1998
Vol. 3, No. 1

Protecting Your Business Assets in a Divorce

By: William S. Abernethy

Few people give much thought to the impact on a business when one of its owners gets divorced. If you own a business, you can't afford not to plan for such an event. Let's look at some of the issues that should concern you — and some possible solutions.



How is property divided in a divorce?

To understand the effect of divorce on a business, you must first understand how property is divided in a divorce. Only "marital property" is subject to being divided up between divorcing spouses. This usually includes everything the married couple acquires during the marriage, even if an asset is in one spouse's name. Generally, separate property, such as property owned before marriage, inheritance, and gifts, is excluded if it is able to be "traced" to existing assets.

In the nine "community property" states, each spouse is entitled to half of the marital assets no matter what. In most states, though, including Ohio and Kentucky, marital property is to be divided "equitably," which means fairly. The division of marital property in these states will often be the same as in a community property state (i.e., 50/50), but one spouse may get more than half the marital property — if the court concludes that's what is fair.

How Does That Affect Your Business?

Ownership interests in a business are usually considered marital property, even if one spouse has no involvement in establishing or running the business. Depending on the type of business and ownership interests involved, a divorce can cause a number of different problems.

The simplest scenario is that of the small business owner who gets divorced. The court will award the ownership interest in the business as part of the division of assets. What happens when you don't have the resources to buy your spouse out? Chances are, you will either have to sell the business to satisfy a court-ordered distribution of business assets, the spouse will be awarded other marital assets of value equal to the business, or there will be a long term payout to the spouse of the value of this business, with interest.

Another scenario is the small company run by a few business partners, or a close corporation. These are often family businesses. In this situation, one owner's divorce has the potential to impact not only the business, but the other owners. This means owners in such businesses must also protect against fallout from their business partner's divorce.

What Can You Do to Protect Your Business if You Divorce?

Unfortunately, the best time to address these issues is when you are least likely to think about it: before you get married or when you are still happily married.

Before you get married. The last thing most people want to consider when they are planning a wedding is a prenuptial agreement. Others simply think they are not rich enough to need one. But if you are one of the lucky few with substantial assets or who own a business before you get married, you should consider a prenuptial agreement. This is especially true in the case of a family-owned business, particularly if there are children of a prior marriage who may succeed in the operation of the business. *And*, to ensure that the couple does not cancel the agreement after they get married, the other business owners may want to sign it as well.

When you are already married. Very few states recognize post-nuptial agreements, which accomplish the same things as prenuptial agreements but are entered into after marriage. If you live in a state that recognizes post-nuptial agreements (and you don't already have a prenuptial agreement), you might want to examine this option.

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Liability for Criminal Attacks

In any event, if you or your spouse (or both) own a business, you should sit down with your spouse and/or business partners and talk about what will happen to the business if you get divorced. You are more likely to approach the subject fairly now than when you are already in the process of getting a divorce. The goal is to set up a buy-sell agreement spelling out the details of what happens to the business in a divorce, including which spouse retains control, which is required to sell out, how to determine the value of the business, and other terms of the purchase.

What If Your Partner Divorces?

Obviously, although you can't require a business partner to enter into a prenuptial agreement with his or her betrothed, nor can you require a buy-sell agreement between your business partners and their spouses, it is extremely beneficial to use your best efforts to effectuate such an agreement.

You can enter into a buy-sell agreement with your business partners that covers divorce as well as any other departure of an owner from the business. By doing so, you can establish the value of the ownership interest of each owner and structure the terms of the sale in the event of a divorce. You can also include a clause in your business's organizational documents prohibiting voluntary or involuntary transfers of ownership interests without the written consent of all owners.

Corporations might also want to consider a voting trust agreement, which is an agreement between stock holders that voting rights will be vested in a trustee to control corporate business affairs. This could prevent angry spouses who obtain stock in a divorce from using their votes to adversely affect the company's policies and operations.

Finally, you should adopt a written policy protecting against the improper disclosure of trade secrets and other confidential business information. Courts will usually honor such policies if they are drafted correctly.

If you have any questions or concerns about how you can protect your business from potential intrusion by a spouse, please feel free to contact William S. Abernethy at Strauss & Troy.

Commercial Landlords: Are You Liable When Criminal Attacks Happen on Your Property?

By: August T. Janszen

Most business owners know to clean up spills as soon as they learn about them and to be concerned about other potentially dangerous conditions on their premises. Why? Because chances are that a customer who falls down the stairs will sue, claiming that there was a slippery substance on the stairs, the stairs were too narrow or too steep, and so on.



But what responsibility do commercial landlords have to protect their tenants and their tenants' patrons from criminal attacks? This is a deceptively complex question. It is also part of a rapidly expanding — yet still unsettled — area of the law of premises liability.

In general, "premises liability" law holds property owners or occupiers responsible for injuries sustained on their premises. Liability is usually based on the property owner or occupier's negligence in creating the dangerous condition, allowing it to exist, or failing to warn the patron about it.

In the past, most courts did not hold property owners liable for injuries caused by criminal attacks on their property. But this general rule is gradually being eroded.

Courts are increasingly willing to hold property owners responsible when they should have *anticipated* or *foreseen* the possibility of a criminal attack, but did not take reasonable security measures to prevent it. This can mean that the property owner knew about either a specific danger (such as when an irate customer makes a threat) or a general danger (such as increasing criminal activity in the area). The duty imposed on the property owner is higher in the former case than in the latter.

Most cases involve a property owner who knew about prior similar crimes on or near the premises. For example, a supermarket could be liable for injuries suffered by a patron who was attacked in its parking lot if the store knew that previous attacks had occurred in or near the lot but did not implement reasonable security measures to prevent future attacks.

Commercial Landlords

Whether a commercial landlord has a duty to provide security for leased property largely depends on the extent to which the landlord (as opposed to the tenant) retains control over the property. For example, a mall owner might be liable for attacks that occur in a mall restroom, but not for attacks that occur in a mall tenant's restroom.

Different courts apply different standards to determine whether a landlord has sufficient control over the premises to be held liable for criminal attacks. Some ask whether the landlord retained or exercised general rights of control over the property, while others impose liability only if the landlord specifically retained or exercised control over the safety and security of the premises.

In any event, commercial landlords should consider including a provision in leases that shifts responsibility for common area security to their lessees.

Landlords may also be liable when:

- they staff unqualified or an insufficient number of security personnel,
- a security guard negligently fails to perform his duties,
- they fail to implement adequate security policies and training procedures for security personnel, or
- their negligence otherwise causes the injury (for example, when they negligently allow a master key to get into the wrong hands).

It is important to note that landlords may be liable for implementing *negligent* security measures even if they would not have been required to implement those measures in the first place. But commercial landlords should not let this deter them from implementing such measures, because the

increasing trend is to hold them responsible when patrons are attacked on their leased property.

Forming Contracts on the Internet

By: Marshall K. Dosker

As use of the Internet continues to grow, businesses and consumers are entering into on-line contracts in ever-increasing numbers. Like any other transaction, a contract formed on the Internet must comply with basic contract principles. As a result, courts and legislatures are starting to adapt conventional contract law to the unique issues involved in conducting business in cyberspace. Let's take a brief look at some of the issues involved in this cutting edge area of the law.



The Basics of Contract Law

The basics of contract law — offer, acceptance, and consideration — apply to contracts formed on the Internet the same as to any other contract. An *offer* is, simply, any manifestation of the offeror's willingness to enter into an agreement. *Acceptance* occurs when the person to whom the offer was made consents to the terms and conditions of the offer. A contract is formed when an offer is accepted. But in order to be valid, the contract also must be supported by *consideration* — that is, something of value that is transferred from one party to the other (e.g., money, goods, services).

In addition to general contract principles, most states have adopted the Uniform Commercial Code (UCC). Article 2 of the UCC governs the sale of goods, both between merchants and consumers and between two merchants. (Article 2 does not apply to businesses that primarily offer services as opposed to goods.) A "merchant" is a person who deals in the kind of goods that are being bought or sold pursuant to the contract covered by the UCC.

All states require certain types of contracts to be in writing — for example, contracts for the sale of real property, for a person to assume the debt of another, and for performance of an obligation that cannot be completed within one year. And the UCC requires written contracts for the sale of more than \$500 in goods. And — apart from these state law requirements — there are sound business reasons for any contract to be in writing.

Contracting On-Line

Can a contract that is entered into in a completely on-line transaction satisfy the basic requirements of contract law? Is the downloading of information an acceptance of an offer? Can a web page or e-mail message be considered a written contract? How does a person "sign" an electronic contract? What state's laws apply in the event of a contract dispute?

There are no certain answers to any of these questions — but there are some early indicators in the form of court rulings, new laws, and proposed legislation.

Court Rulings. Several recent court rulings have helped define the types of on-line agreements that will be legally binding. In the case of *Compuserve, Inc. v. Patterson*, the parties entered into an on-line interactive agreement called a "Shareware Registration Agreement," which was placed on-line by Compuserve. The parties subsequently became embroiled in a trademark infringement dispute.

The federal court of appeals had no difficulty concluding that the interactive electronic document was a *written* contract. Although the issue was whether the lower court had jurisdiction over Patterson, the court of appeals used the fact that the parties had entered into a written contract as evidence that such jurisdiction existed. The court held that Compuserve made an offer of services, which Patterson accepted by affirmatively typing in "agree" in response to various terms and conditions that appeared in the electronic document.

Three other recent rulings appear to pave the way for legal recognition of "click wrap" agreements, in which an Internet user consents to certain terms and conditions by clicking on an on-screen "I Agree" box. The first two cases — *ProCD v. Zeidenberg* and *Hill v. Gateway 2000* — involved shrink wrap licenses, which typically provide that a consumer who buys software agrees to the terms of the license by simply opening the box. The third case — *Hotmail Corp. v. Van Money Pie Inc.* — examined the enforceability of click wrap agreements.

In *ProCD v. Zeidenberg*, a federal court ruled that shrink wrap licenses are generally enforceable. The terms and conditions in *ProCD* were conspicuously displayed on the box, as well as on the computer screen each time the buyer used the software. The court upheld the terms of the shrink wrap license, ruling that the buyer accepted the terms and conditions when he opened the box of software.

In *Hill v. Gateway 2000*, the same federal court ruled that a buyer was bound by terms and conditions found *inside* a box containing computer hardware. The terms and conditions stated that they would govern the sales transaction if the buyer failed to return the computer equipment within 30 days. The buyer argued that he had not read the terms and conditions thoroughly and should not be bound by them. However, the court ruled that since the buyer did not return the equipment within 30 days, the seller's offer was accepted, and the terms and conditions contained in the box became legally binding.

But the *Hotmail* case is apparently the only case to date that specifically addresses click wrap agreements. The court in *Hotmail* specifically relied on the *ProCD* and *Gateway* shrink wrap cases to conclude that a similar click wrap agreement was also an enforceable written contract. However, the fact that a particular click wrap agreement is enforceable does not mean that all such agreements are enforceable. As with any other contract, click wrap agreements are still subject to standard contract defenses — for instance, that the agreement was a contract of adhesion or that it did not comply with UCC requirements.

Legislative Action. Of course, many of the legal issues surrounding electronic contracts could be eliminated simply by having both parties sign the contract. But obtaining a signature can be a problem on the Internet. To address this problem, Utah became the first state to pass a digital signature law in 1995. Only three states have not at least considered some form of electronic communication law, and over 30 states have passed an electronic or digital signature statute. While those laws vary considerably, all set forth criteria by which an electronic and/or digital signature (which is simply an electronic signature that incorporates a

security measure, such as encryption) will be recognized as a legal signature.

In addition, Congress has recently introduced four different bills that address electronic authentication, but has stopped short of proposing a federal law that would pre-empt state law on the subject. Still, the federal initiatives seem to indicate a concern that inconsistent state laws on electronic authentication are a threat to electronic commerce.

UCC Changes. Two legal organizations that are responsible for drafting uniform state laws (such as the UCC) have prepared a new UCC Article 2B to answer some of the issues discussed in this article. Article 2B sets forth specific requirements for click wrap agreements and other on-line transactions to be enforceable. In general — as with every con-

tract — Article 2B places the burden on the parties to the contract to read it, and failure to do so will not relieve any party of his or her contractual obligations.

A final version of Article 2B is expected to be available later this year. It must then be adopted by a state's legislature before it will take effect in a particular state. Since every state has adopted at least part of the existing version of the UCC, the new Article 2B may be just around the corner in your state.

Courts and legislatures are not well known for responding quickly to new technology. Therefore, it will most likely be a long time before all the legal issues concerning contracting on the Internet are settled. In the meantime, if you have questions, please feel free to contact Marshall K. Dosker at Strauss & Troy.

Certain states, including KY, do not certify specialties of legal practice. Certain states, including OH, do not provide for recognition as a specialist in any area or field of law, except for patent, trademark or admiralty. IMPACT is published quarterly to provide information of general interest and not to provide legal advice concerning any specific situation. If you wish additional or more specific information, please contact one of the attorneys at Strauss & Troy.

Strauss & Troy

2100 PNC Center
201 East Fifth Street
Cincinnati, Ohio 45202-4186
(513) 621-2120 • Fax: (513) 241-8259

50 East RiverCenter Blvd.
Suite 1400
Covington, KY 41011
(513) 621-8900 • (513) 629-9444

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NEWS OF THE FIRM

ATTORNEYS ON THE MOVE

Mark H. Berliant has been selected for inclusion in the 1999-2000 edition of *The Best Lawyers in America*[®], the definitive referral guide for the legal profession. This is the second consecutive edition in which he has appeared. *Best Lawyers* selections are based solely on an exhaustive peer-review survey; only those lawyers who earned the consensus support of their peers are included.



Mark H. Berliant

Paul B. Calico made a presentation on Pre-suit Mediation and Common Pleas Mediation to the Cincinnati Bar Association Common Pleas Court Committee. Attorneys Stephen P. Calardo and Norton B. Roberts also made presentations. Mr. Calardo founded Hamilton County's pilot pre-suit mediation program under the auspices of the Ohio Supreme Court, and Ms. Roberts is the Common Pleas Court's new mediator, working with attorneys and their clients in an attempt to resolve existing cases. Paul Calico is active in both areas and works with Calardo and Roberts to explain these new procedures to practicing attorneys. Additionally (for the second year), Paul has been named as the Chairman of the CBA Employment Law Committee's Subcommittee on Noncompetition Agreements. Also, Paul was recently quoted extensively in a *Forest Hills Journal* article involving the requested transfer of some 125 Anderson Township homes from the Cincinnati School District to the Forest Hills Local School District. Paul represents the families in the case.



Paul B. Calico

William S. Abernethy was inducted into the Wyoming High School Sports Hall of Fame for his exceptional ability and performance in basketball.



William S. Abernethy

Gordon H. Hood and **Paul J. Theissen** were among those honored by the Northern Kentucky Bar Association at the Senior Member Reception/Dinner. The honorees were attorneys who are 70 years of age or over and/or who have practiced law for at least 45 years.



Gordon H. Hood



Paul J. Theissen

Steven E. Stuhlbarg has received two separate awards recognizing his performance in a community theater production: An "Orchid" (best acting award) from the Greater Cincinnati area Association of Community Theaters ("ACT"), and an "Excellence in Acting" award from the Ohio Community Theater Association ("OCTA"). The play, "*Conversations With My Father*," by Herb Gardner, was produced by the Stagecrafters Theater Group last fall. Steve traveled to Akron with the group over Labor Day weekend to perform an excerpt of the play at an OCTA-sponsored statewide community theater competition.



Steven E. Stuhlbarg

Marilyn J. Maag contributed a portion of an article on *Estate Security* in the August issue of *Cincinnati Magazine*, discussing factors that motivate individuals to create wills.



Marilyn J. Maag

MAD Team Update

Strauss & Troy's Make A Difference (MAD) Team was recently presented with an award from the Winton Place Youth Center for the Team's efforts in supplying thirty families associated with the Center with first aid kits for their homes. Each kit contained a wide variety of supplies, including a thermometer, rubber gloves, antiseptics, antibiotic ointments, band aids, gauze bandages, and more. We would also like to take this opportunity to recognize the contribution of Target Stores on Beechmont Avenue for donating a \$25.00 gift certificate to the MAD Team for the purchase of medical supplies, and a special thanks to the Target Pharmacy for purchasing a few of the medical supplies at cost.

Summer's over, and another group of thirty children from the Inner City Youth Opportunities have returned home with memories that will

last a lifetime — such as doing the Moose Trot, the crazy jump into the pool, dizzy bat, and singing silly songs. They'll remember the chocolate s'mores, the camp's hand-clapping song and waking in the morning to the sounds of crows scratching on the cabin roof. And they'll remember the generosity of the Strauss & Troy staff and the MAD Team for making it possible for them to have this wonderful experience. Each summer the MAD Team, in conjunction with the Riverfront Kiwanis of Northern Kentucky and Loveland's Prime Valet Cleaners (which donates drycleaning for all the sleeping bags) sends five children per week for a period of six weeks to experience the joys of camping. Donations to Strauss & Troy's Dress Down Day each Friday enable us to provide sleeping bags, beach towels, backpacks and personal care items (tissue, shampoo, comb, toothbrush/paste, bug spray, sunblock, lotion),

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CLIENT SPOTLIGHT

Sturkey's Restaurant

In June 1998, Paul and Pam Sturkey created a successful, unique restaurant in historic Wyoming, Ohio. Once the original Firehouse, Sturkey's of Wyoming is now a contemporary, casual American restaurant showcasing the best of Paul and Pam's culinary talents. Paul and Pam studied at the prestigious Culinary Institute of America and both have excellent local and national reputations in the fine dining segment of the restaurant industry.

Paul Sturkey, after graduating in 1980, opened two restaurants in Cincinnati's Westin Hotel. In 1985 he reopened the renovated Cincinnati Club downtown, where his concept for the Phoenix Restaurant led to its selection by *Esquire* magazine as one of the Top Ten Best Restaurants in America in 1988. Paul was instrumental in the revitalization of another downtown Cincinnati institution that became the award-winning Pigalls Café. He was Executive Chef and subsequently General Manager of the Wetherington Golf and Country Club in West Chester, Ohio. In addition, Paul was a founder of the Greater Cincinnati Culinary Arts Academy and served on the faculty for five years. Paul has been featured on local radio and TV with specialty recipes of the season. His reputation, however, is not just local — nationally, Paul has represented Cincinnati in a chili cook-off in Dallas, Texas and he was featured on a *Good Morning America* segment.

Pam Sturkey's background is equally impressive. Her baking skills took her across the country where she served as pastry specialist in bakeries, catering services and country clubs including The Lodge at Vail, Colorado, the award-winning The Bavarian Pastry Shop in Cleveland and the Hyde Park Country Club.

Paul and Pam combine their unique talents at **Sturkey's of Wyoming**, located at 400 Wyoming Avenue (Phone: 821-9200), where they offer freshly prepared items from gourmet salads and sandwiches to fresh fish, lamb and veal dishes, all beautifully presented. Pam's exquis-



ite pastries range from homemade cookies to unique fried chocolate truffles. The restaurant also houses a warm and friendly bar with extensive wine and beer lists as well as TVs for following sporting events. More than a great restaurant, Sturkey's also offers private event rooms, expert catering, wedding planning and gourmet dinners.

Continued from front

flashlight and disposable camera for each child. Each child also received a goodie bag with candy, supplies for writing home, etc. They also received a Camp mascot stuffed animal, Camp Ernst T-shirt and a photo with their cabin mates. Many of these children had never been camping and were overwhelmed with the experience. We are extremely proud of the donations and the hard work of the MAD Team that makes all this possible.

On August 18th the MAD Team co-sponsored the second successful blood drive this year with the PNC Building and Chemed Center. The following Strauss & Troy personnel have been awarded pins commemorating their donations to Hoxworth Blood Center: Paul Calico 4 gallons; Tony Barlow 2 gallons; Amy Rahe 1 gallon; and Tom Rink 1 gallon.

The MAD Team members are now in the planning stage for this year's annual holiday giving project. Each year this huge project provides gifts and clothing for a group of children and household supplies and clothing for their mothers, in addition to a party and a visit with Santa. This project has always succeeded in giving much joy to families that would not otherwise have such terrific holidays.



Make a Difference Team receiving recognition from Winton Place Youth Center Representative.