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Scam Alert! Corporate Minute Services Try to Take Advantage of Business Owners

By Jonathan P. Geen, Esq.

As most corporate shareholders/officers know full well, one of the primary reasons to incorporate is so that the potential personal liability of the company's owner(s) is eliminated or minimized. In order to effectively limit personal liability, corporations need to prepare and maintain timely and proper corporate minutes and follow other corporate formalities or else a court may view the corporation as a sham and allow the company's creditors to pierce the corporate veil and reach the shareholders' personal assets under the "alter ego doctrine."

While concern about the importance of maintaining corporate formalities is justified, a series of less than ethical businesses in California have decided to take advantage of corporations by sending them very official-looking notices suggesting that they have failed to comply with California corporations law. They send notices often with a very authentic-looking seal of some kind and with a title such as "Annual Minutes Disclosure Statement." They use official-sounding company names such as "California Corporate Compliance," and sometimes use offices right in downtown Sacramento, making it seem even more likely they are from or authorized by the California Secretary of State Corporations Division. They request the typical information that is listed in corporation minutes such as the entity's officers, directors and shareholders. They then request a fee that can be as high as \$500 or more. However, please be advised that these companies are scamming corporations throughout California that don't take the time to thoroughly read the form or consult with counsel. In fine print at the bottom of the form it states, "This product or service has not been approved or endorsed by any governmental agency and this offer is not being made by an agency of the government." Because of this disclaimer, these businesses have been allowed to continue scamming customers.

When one of our clients received such a form from one of these minute service businesses, we contacted the Secretary of State to report the deceptive practices. The Secretary of State thanked

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Jonathan P. Geen, Editor



Jonathan P. Geen is a partner in the San Diego office of Borton Petrini, LLP. He received his undergraduate degree from Columbia College of Columbia University in the City of New York, and received his J.D. from Northwestern University School of Law.

Jonathan has practiced law in Illinois, as well as California. He is experienced in both litigation and non-litigation matters. Jonathan is an experienced business litigator, having handled trials and appeals in varied litigation matters.

On the transactional side, Jonathan assists businesses in their business formation, and virtually all of their day-to-day operational issues, including the drafting of employee handbooks and policies, as well as other policies and forms to assist businesses in minimizing their risk.

He also is experienced in drafting and negotiating contracts; licensing, option, and employment agreements for a wide variety of industries, including the entertainment and sports industries.

WHY DOES MY BUSINESS NEED A LEGAL CHECKUP?

By Jonathan P. Geen

Every business in the state of California, whether small, medium or large, should seek legal advice not only when they start their business but on a regular basis thereafter. Business owners are well advised to obtain a “legal checkup” just as they obtain medical checkups on an annual basis.

Running a business is like walking through a legal mine field, particularly in California where there are more statutes than in any other state in the country and new laws, regulations and propositions are frequently enacted, many of which change the rules of the game for business. There are particular events in businesses that raise the potential for legal pitfalls that warrant a legal consultation in which businesses can explore options for minimizing risk.

INCEPTION

1. Forming a Business Entity

What kind of entity? General partnerships and sole proprietorships provide unlimited liability for business owners/partners. Only corporations and limited liability companies (LLCs) allow business owners to protect their personal assets.

2. Documenting Ownership/Control Issues

Does the business have partners or shareholders? Is there any documentation setting out rights and responsibilities and what happens if the partners get into a disagreement?

3. Selecting Business/Trade Names

Does the business have a name for its business that it is entitled to use under the law? Trademark rights and unfair trade practice provisions may prevent a business from using the name of its choice.

4. Entering into Real Estate Transactions

Is the business purchasing real estate on which the business will operate? Is the business signing a commercial lease? Preprinted commercial lease forms are notoriously pro-landlord.

5. Hiring Employees

Does the business have employment contracts with its employees? Confidentiality agreements for trade secrets? Is the company aware of all the legal requirements it has with regard to hiring employees and performing background checks? Does the business post all the necessary posters and provide employees with all necessary documentation under the law?

ONGOING BUSINESS

1. Drafting Contracts and Forms for Use with Customers/Clients

Do they provide the business with maximum protection both in terms of the fee due the business as well as the potential liability to the customer/client? (Same issues in reverse apply to supplier and other agreements businesses sign.)

2. Changes in Ownership/Control

Have new owners, partners, shareholders or managers joined or left the business? Do the agreements previously drafted and signed meet current circumstances and needs?

3. Creation of Protectible Intellectual Property

Does the business use a name, slogan or logo to distinguish its goods or services (trademark)? Has the business or its employees created original works of art, publications or computer programs (copyright)? Are there agreements in place to protect the company's interest in these works? Are trade secrets being properly protected?

4. Adding Employees

Does the business have an employee handbook and other employee policies and procedures that provide it with maximum protection?

5. Fulfilling Corporate Formalities

If a corporation or LLC fails to follow any necessary formalities, a court may subject business owners or shareholders to personal liability (alter ego).

6. Implementing Effective Dispute Resolution Techniques

A successful business will always have some kind of dispute arise at some point. Does it know how to resolve disputes quickly and cost effectively in order to maximize its success in a later court action?

7. Handling Insurance Matters

We assist businesses with insurance disputes and are retained by insurance companies to defend insureds.

ENDING A BUSINESS

1. Negotiating/Drafting Favorable Sales/Transfer Documentation

Does the sale agreement provide maximum benefit and protection to the seller?

2. Ensuring All Necessary Legal Steps Have Been Taken

Has business taken all necessary legal action to close the business so that liability ceases and business owners can move on to new ventures?

Scam Alert! Corporate Minute Services Try to Take Advantage of Business Owners

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us for our call, but admitted they were already well aware of these minute businesses and were still unsuccessfully trying to put these companies out of business. In the meantime, CAVEAT EMPTOR! The reason these businesses are continuing their deceptive practices is because some people are unwittingly responding to them.

While it is questionable that these companies can be trusted to prepare adequate corporate minutes in view of their deceptive notices to customers, the prices they charge are in no way justified. Our firm can prepare annual minutes for your company, and the kind of minutes that will help you satisfy your corporate formality requirements for considerably less than the annual fee being charged by these scam artists. Borton Petrini, LLP would be happy to assist you.



Steve Karcher



Steve Karcher is Senior Counsel in the Bakersfield office of Borton Petrini, LLP, to which he brings more than two decades of legal experience, together with 10 years experience successfully managing a small business, and 9 years managing a local branch law office. Steve specializes in creditor bankruptcy, real estate, business, litigation, transactions, and corporate matters. He relies on his state-wide California and Federal trial, litigation and transaction experience to deliver results a client can believe in.

USING A STATUTORY OFFER TO COMPROMISE TO LIMIT EXPOSURE TO ATTORNEY FEES

By Steve Karcher, Esq.

Many contracts, often signed without a careful review, contain language allowing an award of attorney's fees to the prevailing party in litigation, as provided under Code of Civil Procedure section 1717 et seq. Sometimes clients find themselves locked in a difficult legal battle, where they feel they must press on, even while worrying that the other side will prevail, and will benefit from an award of their attorney's fees. While no lawyer can guarantee the outcome of a suit, it is possible to control the risk of an adverse attorney's fees award, through the use of statutory settlement tools.

Code of Civil Procedure section 998 is very complicated, and there are dozens of cases interpreting it. In fact, lawyers and courts struggle with this statute every day, but everyone acknowledges that a 998 can be a powerful settlement weapon. It allows one party to shift to the other party some of the costs of litigation, if the one party makes a fair settlement offer, which is rejected by the other party. Where there is an attorney's fees clause in the contract at issue, even those fees can be shifted under 998.

Section 998 can help control the risk of an adverse judgment including attorney's fees. To take advantage of this option, the party seeking settlement must draft the 998 offer to specifically include both attorney's fees while also being careful to meet the other requirements of 998 (e.g., allowing the minimum time to respond, and setting forth a reasonable settlement amount based on what is known at the time of offer).

In using section 998 to minimize the risk of an adverse fees award, the Offeror must keep in mind that the prevailing party principles of Civil Code section 1717—governing attorney's fees clauses, do not have relevance in determining if a litigant obtains recovery of post-offer costs (routine, expert, and attorney's fees) under Code of Civil Procedure section 998. Indeed, both parties and the courts must be careful not to engraft "prevailing party" considerations onto a section 998 analysis of who was the successful litigant. "[U]nder section 998, the defendant's entitlement to costs derives not from its status as a prevailing party but from the plaintiff's failure to accept a reasonable settlement offer." (*Scott Co. v. Blount, Inc.*, (1999) 20 Cal.4th 1103, 1114.)

Because a defendant proffering a section 998 offer concedes it may not prevail, it makes no logical sense that "prevailing party" principles will be amalgamated into section 998. In *Ford v. Hunsberger* (June 18, 2008), a defendant moved for an award of attorney fees and costs under CCP 998, after plaintiff dismissed its breach of guarantee action against him. There, the court held that section 998 does not create an independent right to attorney fees; defendant's only avenue for the recovery of attorney fees was 1717(a), because the underlying contract contained a fee provision. However, that path to fees was blocked by subdivision 1717(b)(2), "which bars any award of contractual attorney fees where an action has been voluntarily dismissed." Thus, where a potential prevailing party dismisses his or her case, based on accepting a 998 offer of compromise, the claim for attorney's fees is impaired.

However, as established in *Ritzenthaler v. Fireside Thrift*, (2001), a section 998 compromise agreement will not automatically include a waiver of attorney fees. There, the Ritzenthalers sued Fireside for breach of implied covenant of good faith and fair dealing and for engaging in unfair business practices. Fireside sent the Ritzenthalers a 998 written offer to compromise, offering both to allow a \$2,001 judgment to be entered against it and to record a "Satisfaction of Judgment" with respect to its \$2,580 judgment against plaintiffs. The 998 stated that it was offered "in final settlement of all damages and injunctive claims." The Ritzenthalers accepted the 998, but then filed a CCP 1717 motion, seeking \$12,500 in attorney fees.

Fireside contended that its section 998 offer did not include the Ritzenthalers' attorney fees, but conceded that "[T]he general rule is that in an action on a contract which provides for the recovery of attorney fees by the prevailing party, a party who accepts an offer of compromise under section 998, may recover attorney fees after judgment where the compromise offer is silent on attorney fees." (See *Lanyi v. Goldblum*.) Therefore, the question was whether the section 998 compromise agreement was intended to encompass any attorney fees the Ritzenthalers otherwise might have recovered from Fireside. The answer was NO.

Thus, applying contract principles, a section 998 offer to compromise is "an offer to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated at that time." (§ 998(b).) If a 998 offer omits mention of a claim for attorney fees, that issue will not be part of the proposed compromise agreement; if the 998 specifically includes fees, if accepted, the potential for an adverse award of fees is cut off. (See, *Lanyi v. Goldblum*.) Where attorney's fees are mentioned in a 998 offer, those terms can control future risk for adverse fees, even where they are otherwise available to a party under CCP 1717.

SUMMARY OF RECENT APPELLATE CASES AFFECTING CORPORATIONS AND BUSINESS OWNERS

By Jonathan P. Geen

State

In the case of *Tritek Telecom, Inc. v. Superior Court (Mak)*, the Fourth District held that a corporate director does not have a right to access documents covered by the attorney-client privilege and that were generated in defense of a suit for damages that director filed against the corporation. The Court of Appeal refused to construe the "absolute right" provided under the Corporations Code to directors with regard to inspecting and copying all corporate books and records, including those protected by the attorney-client privilege to this specific scenario.

In the case of *Cardinal Health 301, Inc. v. Tico Electronics Corp.*, the Fourth District held that repair efforts by a device manufacturer will not toll the breach of warranty limitations period under the Uniform Commercial Code with respect to the device manufacturer's claims against another component manufacturer. The court found mere investigation into the reasons for failure of a component does not constitute repair efforts and will not toll the applicable statute of limitations under the UCC.

Federal

In the case of *Davis v. Pacific Capital Bank*, the Ninth Circuit Court of Appeals held that a flat finance charge imposed by a creditor and that does not vary with the term of the loan, is not interest, and the creditor therefore does not have to refund that portion of the charge that is unearned interest if the loan is terminated prematurely. 15 U.S.C. section 1615 requires that unearned interest be credited back to a debtor.

In the case of *In re Digimarc Corp.*, the Ninth Circuit held that individuals could not sue corporate officers for noncompliance with securities laws under section 304 of the Sarbanes-Oxley Act. This statutory section provides for forfeiture of certain bonuses and profits when corporate officers fail to comply with securities laws' reporting requirements.

DISCLAIMER: THE INFORMATION PROVIDED IN THIS UPDATE IS NOT A SUBSTITUTE FOR LEGAL ADVICE. READERS SHOULD BE ADVISED THAT IF THEY HAVE QUESTIONS ABOUT THIS OR ANY OTHER AREA OF BUSINESS LAW, THEY SHOULD SEEK THE ADVICE OF COMPETENT COUNSEL SPECIALIZING IN BUSINESS LAW.