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Under New Law Not Everything Is Automatic

By Steven M. Szymanski

Have you ever found yourself in the situation where you thought that the contract you entered into was set to expire at the end of the month only to find that the fine print automatically renewed and extended the contract? Unfortunately, your options are to either ride the contract out for the extension period and terminate the contract in accordance with its termination provisions, or attempt to negotiate a termination of the contract with the other party. Neither of these options is preferable, but the contract is clear that you have acquired an unintended renewal and extension.

Many contracts contain automatic renewal or extension provisions. Typically, these provisions renew or extend the existing contract for a specified term. Automatic renewal or extension provisions can be overlooked because they may appear in the "boiler plate" provisions of the contract. 2009 Wisconsin Act 192 created Section 134.49 of the Wisconsin Statutes which requires businesses to notify customers of automatic renewal/extension provisions in business contracts. Section 134.49 became effective on May 1, 2011 and generally impacts business contracts involving equipment and services.

Section 134.49 applies to "business contracts" which are defined as contracts entered into for the lease of business equipment, if any of the business equipment is used primarily in this state, or for providing business services. Further, to be a "business contract," the contract must be for the direct benefit of the end user of the business equipment or services. Section 134.49 excludes certain contracts from the definition of "business contracts." Some of those contracts include contracts for the lease or purchase of real property, contracts for the lease of equipment or purchase of services that are for personal, family or household purposes, contracts that permit a customer to terminate an automatically renewed or extended contract by giving the seller notice, but only if the contract does not require the customer to give notice more than one month in advance, and contracts to which a federal, state or local government is a party. Exceptions also exist for vehicle leases, telecommunications contracts as well as others.

For business contracts entered into, modified or renewed after May 1, 2001, Section 134.49 requires businesses to make certain disclosures to customers about renewal or extension provisions. The term "customer" means a person who conducts business in Wisconsin and who is the lessee under the business contract or purchaser under a business contract for the purchase of business services. Under the new law, businesses are required to provide an initial disclosure about the automatic renewal or extension provision and a reminder notice. The content of the initial disclosure and the reminder notice, and when and how the disclosure and notice must be given are specifically outlined in the statute. Businesses that fail to comply with Section 134.49 will not be able to enforce a renewal or extension provision in their business contract and the business contract will terminate at the end of its current term. In addition, the statute allows customers to bring an action or counterclaim for damages against a seller for violating the statute. Damages can include twice the amount of the damages incurred by customer, including the customer's reasonable attorney fees.

If you think this new law might apply to your business, then consider taking an inventory of your existing leases and contracts to determine whether they fall within the scope of a "business contract" and whether your business needs to comply with this new law. WBB

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INSIDE

Factors to Consider in Removing State Court Litigation to Federal Court

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One of the earliest decisions you need to make if you are ever a defendant in a civil lawsuit is whether to transfer the case from the court in which it was filed to a more preferable venue. Under certain circumstances, you as the defendant have the right to transfer the case from a state court to a federal court. That process is known as removal (because you are removing the case from the state court and transferring it to a federal court). This article examines the factors to consider in making the decision whether to remove your case.

The first question of course is whether the case is eligible for removal. There are two common bases for removing a case. The first basis is that the case involves a federal question—meaning that the dispute arises under the Constitution, laws or treaties of the (federal) United States. The second basis occurs when the plaintiff and defendant reside in different states, and the state in which the action is brought is not the defendant's home state. This is known as removal based on diversity of citizenship, because the plaintiff and defendant are citizens of diverse states. Diversity has long been a basis for removal on the theory that an out of state defendant might not get a fair shake in the state court in which the plaintiff resides. Federal courts, on the other hand, which are organized nationally and owe their allegiance to the federal government, are seen as more neutral to out of state defendants.

Assuming the case is eligible for removal, the next factor to consider is the relative quality of the judges in the state court versus the federal court to which the case would be removed. Wisconsin has two federal court districts; the Eastern District and the Western District. The Western District sits in Madison. The Eastern District is subdivided into two divisions; one in Green Bay and the other in Milwaukee. This is significant because there is only one District Judge in the Green Bay Division, and only two in the entire Western District. Defendants removing to either of these courts have a very good sense of what judge they will get. In making a decision on removal, you should review with your attorney the relative qualities of the state courts *from which* you would remove and the federal courts *to which* you would remove the case.

The third factor is procedural differences. Federal courts generally have a more rigid procedure—which usually requires the filing of more documents—than is required in Wisconsin state court. Thus, it can sometimes be more expensive to litigate in federal courts. On the other hand, the fact that all federal district courts in all 50 states have the same rules of procedure means that there are more legal decisions discussing federal practice than there are on Wisconsin practice, and thus the law is generally more defined in federal court. How this might help or hurt your case is something you should discuss with your attorney.

The fourth factor I call the "X-Factor", and takes into account the individual nature of your case. For instance, a case that hinges on a technical analysis of obscure points of law might better be defended in federal court, while a more simple case that turns on well settled legal issues might be litigated more cheaply in state court. One of the first conversations you should have with your attorney if you are a defendant in litigation is how the facts of your case influence the decision to remove.

Whether a case is litigated in state or federal court could make all the difference in how your case proceeds. There is no one right answer on removal, but careful discussion with your attorney of the issues involved is always a good idea, to help you make the decision that is right for you. WBB

The Challenges of Technological Communication in the Technology Age

By Sandy Swartzberg

I have been interested in technology as long as I can remember. I have been especially obsessed with how technology can help us communicate, organize and document more efficiently. Additionally, with every technological innovation, new challenges and pitfalls have arisen.

In the 1990s when e-mail came into existence, everyone hailed it as a major improvement. I first became aware of the difficulty of discovery involving e-mail when I was Judge Patricia Curley's Court Commissioner. I was appointed as a Special Master for discovery in the case of *W.R. Grace v. Krete*. The question was, "What e-mails by W.R. Grace were discoverable and how much trouble did W.R. Grace have to go through to produce these e-mails?"

The lesson in the *W.R. Grace* matter, which applies to all discoveries, is that most people still believe that if you hit the delete button on your computer the e-mail is gone. Given the multiple places the e-mails are stored, it is always safe to assume that an e-mail is never gone if somebody wants to take the trouble and expense to find it.

If electronic communications should become the subject of a lawsuit under the Federal Rules, the Court has the authority and duty to set the rules for discovery of electronically stored information. This form of discovery can be far more burdensome than the discovery of paper records. There are programs that are set up that will read through the entire discovery looking for keywords and often finding out information that the producing party was unaware of.

Additionally, most people are under the mistaken impression that when they delete something from their computer, it has been deleted. In actuality, very little "deleted" is actually deleted and it is usually just a matter of time, effort and money to find the deleted items. First of all, if it is not written over, it continues to reside on the hard disk of the computer that produced it. Second, if the computer is hooked up to a server, it continues to reside on the server and even if deleted from the server, it may continue to reside on backup tapes or backup servers.

Now with smart phones, tablet computers, the Cloud and the like, things may continue to reside on those devices or those servers. To make matters more confusing, do not forget if the document was sent to anyone, it will continue to reside on their system in the many multiple ways we discussed. Therefore, the best policy is not to put anything in electronic form which could cause substantial embarrassment or legal problems if widely disseminated.

Additionally, given e-mail and other forms of electronic storage, if you want to prove that you conveyed something, you need to be able to produce it quickly and easily, otherwise, other groups will assume you did not convey the information. Also remember most documents have timestamps on them. Therefore, you need a system where you can produce important communications easily and quickly.

So the question is, "What does a business or an individual do regarding the new electronic information technology world we live in?" The simple answer is that as a business or even as an individual, you need to have a policy as to what you produce electronically, how you save it and who has access to it.

The business that does not have such a policy in writing is running a substantial risk. Often businesses allow the individual who created the e-mails to decide what to keep and what not to keep. Allowing the individual to decide is very dangerous. If one individual decides that they are going to delete all of their e-mails and another individual in the same organization does not, it may look like the individual that deletes their e-mails were doing so for nefarious purposes. Even a statement of policy which says, "each individual in the organization gets to decide which certain types of records here and enumerated they keep or do not keep," is better than no policy at all.

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In addition to having a policy about what you keep and do not keep, every organization needs a policy about what can be transmitted and what cannot be transmitted. Numerous organizations lose valuable and confidential information by allowing persons that have access to their systems to send that information offsite to such things as a home computer or some other electronic storage device that the business has no control over.

If this article has scared you into thinking you need to have a policy...that is good! The good news is that there are numerous organizations, including Weiss Berzowski Brady LLP, which will assist you in preparing such a policy. WBB

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Anna M. Pepelnjak has just had an article published in the May issue of *The Wisconsin Lawyer.* You are invited to view her article on new developments in employment law regarding retaliation at the Wisconsin State Bar website (www.wisbar.org).

Registration for the upcoming Estate Planning Conference is now open. Topics for the conference include: Estate Planning Considerations for Blended Families, Practical Advice for Individual Trustees, and Business Succession Planning at the Drafting Stage.

Watch the WBB website for further information or contact Megan Wiseman, 414-270-2559 (mkw@wbb-law.com)

2012 Schedule of Events

ESTATE PLANNING CONFERENCE
June 5, 2012

30TH ANNUAL TAX & BUSINESS SEMINAR
September 26, 2012

EMPLOYMENT LAW CONFERENCE
October 17, 2012

All upcoming conferences for 2012 are to be held at the Wisconsin Club at 900 W. Wisconsin Ave., Milwaukee.

Please check our website (wbb-law.com) for more event information.