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TREE ENCROACHMENTS: GETTING TO THE ROOT OF THE PROBLEM

Trees are great, but they are a never ending source of falling dead branches, acorns, leaves, insects, sap, rotting fruit, broken driveways, fractured foundations and bitter disputes between neighbors. Indeed, “[t]he tree which moves some to tears of joy is in the eyes of others only a green thing that stands in the way.” ~ William Blake.

The first issue in a tree dispute is figuring out where, in the eyes of the law, the tree is located. A tree’s location is not determined by where the branches are, or how far the roots extend, but rather – as you might suspect – where the tree’s trunk comes out of the ground. If the trunk is on or touching the property line between you and your neighbor, the tree is known as a boundary tree, and you and your neighbor each own part of the tree, even if most of the trunk is only on one property. In this situation, neither you nor your neighbor has the right to cut down or harm the tree without the permission of the other. However, each has the right to prune those limbs and roots that are on his property, just as long as what is done does not seriously harm the tree.

If the tree’s trunk is completely on your neighbor’s property, and the tree’s branches or roots extend into your property, you have the right to prune the branches and remove the roots up to your property line at your own expense. This is one of the few situations in which people are allowed to use self help to fix a problem. There is no need to get a court order to take this action. However, you must not cause serious harm to the tree through your pruning and root removal. You could find yourself in trouble if you become overzealous and cause the tree to become unstable.

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Keep in mind that without your neighbor's permission, you do not have the right to trespass on your neighbor's property in order to prune the branches or roots of your trees – those whose trunks are solely on your property. Even leaning over the fence to reach onto your neighbor's property could be considered trespassing. Ordinarily, friendly neighbors don't care about trespassing onto the other's property. But, if you are thinking that this article applies to your problems with your neighbor, trespassing may be a major issue for you.

If your neighbor has a fruit tree with branches that extend onto your property, you might be tempted to harvest the fruit for your own enjoyment. However, the law says that the fruit on the tree's branches still belongs to the tree's owner, regardless of where those branches reach. But your neighbor does not have the right to trespass onto your property to pick his fruit. If you don't agree to allow your neighbor access to pick the fruit,

your neighbor would need a court order to come onto your land. In time, however, this dilemma solves itself when the fruit falls from the branches and becomes simple tree debris. Once the fruit hits the ground, it loses its value and you are free to dispose of it without your neighbor's permission.

While the law does not require you to do so, the best way to handle a tree encroachment problem is to talk pleasantly with your neighbor. This is not only the courteous thing to do, but it also can head off future legal issues by making sure you both understand any problems and can agree on a solution. However, if you cannot reach an agreement with your neighbor, make sure you have a clear understanding of where your particular situation fits within the law before taking the problem into your own hands.

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BICYCLES AND CARS: SHARING THE ROAD

Traffic laws relating to bicycles appeared almost contemporaneously with the bicycle itself. In 1901, before the automobile became the choice of transportation, an ordinance was passed in Rexburg, Idaho to regulate the speed with which cyclists could travel in various parts of town. Many things have changed since 1901, including the relationship between motorists and bicyclists.

What bicyclists need to remember

The Illinois vehicle code imposes on bicyclists the same responsibilities and gives them the same rights as drivers of motor vehicles. That means bicyclists must obey all traffic signs and signals. Particularly, bicyclists are notorious for disobeying red lights and stop signs. That is not only unlawful, but also dangerous. Bicyclists can be ticketed for violating traffic laws just like motorists, but seldom are.

Because bicycles are smaller and move slower than motor vehicles, some additional rules apply to cyclists. Cyclists must always travel as close to the right side of the road as they can do safely and every bicycle must be equipped with a functioning brake and front and rear lights if it is ridden at night. When riding in groups,

cyclists must ride no more than two abreast and when riding on a laned roadway, must contain themselves within one lane. Bicyclists must ride with, not against, the flow of traffic.

While Illinois does not have a mandatory helmet law for bicyclists, wearing one – law or no law – is a good idea.

What motorists need to remember

Motor vehicles are larger, faster and more dangerous than bicycles. For both to share the road safely, not only must motorists be alert to the presence of cyclists on the road, but they should also be aware of laws which regulate how they must operate their vehicle when a bicyclist is present. The Illinois "three-feet" law requires all motorists to allow at least three feet between their vehicle and a cyclist when passing. Additionally, motorists must not open car doors in paths of cyclists, turn right in front of a forward moving cyclist, or drive in lanes designated for cyclists.

Please remember these rules the next time you share the road.

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SO YOU WANNA BE A BANK DIRECTOR...

Once upon a time, long ago and far away in another galaxy (before September 11, 2001 to be precise), owning or running a bank held a lure to successful businessmen and professionals second only to that of becoming the proprietor of a trendy restaurant. No longer.

In those better times, monthly bank directors' meetings brought with them the aura of a social event, some business enlightenment, and food in various amounts and degrees of quality. All but the smallest and newest banks generally paid a director's fee which sometimes rose to the level of a fair hourly wage competitive with professional fees. Those who invested in banks hoped to emerge with an impressive capital gain in a few years and a bank directorship evidenced by business cards, a board fee and bragging rights. The remote risks inherent in being a bank director were rarely discussed and were rarely a deterrent to participation in bank governance.

All that has changed. While a director still does not guarantee the success of a bank, nor will he or she necessarily be liable for its operating losses, times are such that a director of a carelessly run institution may become a financial scapegoat upon whom both blame and financial responsibility will be placed.

Bank directors are governed mostly by state corporation law that requires them to exercise due care and loyalty to the bank's shareholders and the bank itself. The duty of due care mandates that directors be reasonably diligent, inquisitive and experienced in corporate management. They are now watched carefully for compliance.

All state and national banks have the benefit of a governmentally issued charter, and, of greater importance insurance with the Federal Deposit Insurance Corporation (FDIC). National regulators act as a bank watchdog and can inflict severe monetary punishment upon the directors of a misrun or failing bank. All banks must jealously guard their capital. In the best of times, bank capital must constantly be increased to maintain a minimum ratio between shareholder equity and the total assets of the institution. In bad times, capital must be replenished as loans fail to perform and other problems cause a loss of capital.

For most non-bankers, bank deposits are assets and the loans we make from banks are liabilities. For banks, it's 100% reversed: deposits are liabilities and loans are assets. If just 10% of the value of a bank's loan portfolio –

its assets – should become lost, an event not uncommon today, a bank could be declared insolvent.

Bank regulators may scold or admonish directors if they fail to administer their duties correctly. Regulators may subject a bank's board to a formal lecture, complete with slide show, power point presentations and not so interesting summaries of the presentation. If the bank's capital is less than adequate and the number of nonperforming loans is growing, the regulators will take action which may ultimately result in personal liability to the directors.

A periodic bank examination may result in a commitment letter signed by all of the directors promising specific corrections of violations. More draconian are formal recommendations set forth in a memorandum of understanding which describes major deficiencies in management and operations of the bank and prescribes required actions for the problems noted. The memorandum of understanding is often an embarrassing if not humiliating document. It will require specific actions including board supervision and approval of loans and other business and operational aspects of the bank.

Even more serious is the cease and desist order. This is an order by the regulators demanding that the bank stop engaging in certain activities. It imposes specific remedial actions upon the institution and its directors with specific deadlines for corrective action.

Bank regulators can also insist on the removal of officers and directors deemed to be inept or corrupt and issue capital directives as well. Regulators might order the bank to raise equity if it is undercapitalized. There may be tremendous pressure upon the directors to make personal capital contributions as the directors typically represent the larger shareholders. The unspoken threat is that absent a direct infusion of capital, the regulatory agencies might hold the directors personally liable for the bank's losses.

Beyond the bank's earnings performance and maintenance of its capital are regulations for which the board has ultimate compliance responsibility. While a director would not be expected to draft bank policies, the actions of a bank within the context of federal regulations are governed by internal written policies. Those policies should be reviewed and approved by the directors.

After September 11, 2001, bank regulators started taking a profound interest in money laundering and other suspicious activities. Originally concerned with global drug sales, money laundering prevention became far more important as the U.S. sought to staunch terrorist activities. Regulators hold directors personally liable for money-laundering mistakes. Non compliance and negligent supervision can also result in fines of \$25,000 per day, up to \$1,000,000. Those fines are in addition to restitution that directors can be made to pay for grievous mismanagement of a bank.

As if all this is not bad enough, a regulation of the Federal Reserve Board prohibits the preferential treatment a director as a customer of the bank. A director may borrow money from the bank he directs, but the terms must be no more advantageous than those offered a stranger to the institution for the same amount, rate, risk and collateral. The bank also must charge the director the same fees for overdrafts or related services as assessed against any other customer of the bank under similar circumstances.

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BEWARE OF THE ARBITRATION CLAUSE

If you have an arbitration clause in your commercial contract, it becomes the mandatory road map for the dispute resolution process. Unfortunately, it often maps a road to nowhere you want to go.

Arbitration can be a cheaper and quicker alternative to court, but those results are not automatic. To make arbitration effective, you have to consider the nature of any disputes that may arise and make sure your arbitration clause effectively addresses them. While off-the-rack solutions work for some disputes, others require special tailoring to achieve the proper fit.

There are three common obstacles to achieving a well-designed arbitration clause. First, you have to know it's there. Don't be the business operator who first discovers there was an arbitration clause in the contract when the arbitration demand or the motion to compel arbitration is received. As painful as it may be, read the last few paragraphs of your contracts where all the lawyer-speak resides before you sign them.

Second, don't assume that any arbitration proceeding will be better than any court proceeding. An arbitration under the wrong set of rules with an incompetent arbitrator held in Anchorage in January can be much more costly and painful than a court proceeding in downtown Chicago. If you are not going to take the time to design an appropriate arbitration clause, skip arbitration and stay in court. Better the devil you know.

Third, don't get caught up in the euphoria of the deal. When the relationship is new, no one (not even your attorney) wants to be the prophet of doom by considering a procedure to resolve disputes. But despite the optimism, spend the time to design a good arbitration clause – just in case.

Let's take a look at one problem that arises in many commercial relationships that is infrequently addressed in the arbitration clause. In many commercial relationships the damages are pretty well fixed at the time the dispute is being resolved. If you didn't get the goods you contracted for and you had to cover, you sue for the extra cost of cover and that amount is not going to change. Often, however, the damages are not fixed and may continue during the resolution process. For example, you hired an employee to develop customers in a particular area, but now she's a former employee and is running her own business selling to your customers. Under the law, you may have a right to a preliminary injunction to stop the losses during the dispute resolution process. However, the employment contract calls for arbitration but is silent about obtaining an injunction.

Can you still get into court and get an injunction despite the arbitration clause? Maybe, but at a minimum you have bought yourself a costly argument from your opponent. Will the arbitration organization you chose (assuming you actually chose one) give you emergency relief before the process is up and running? Maybe, if the organization offers that service and you actually provided for it in the arbitration clause. But again the result is neither certain nor cheap.

The better alternative is to spend some time up front designing an appropriate arbitration clause. For example, you could have avoided a myriad of expensive problems by simply adding: "Either party may seek preliminary injunctive relief from a court of competent jurisdiction in Chicago, Illinois, that is necessary to protect that party's rights or property pending the completion of arbitration."

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THE PERFECT STORM OF COST SAVINGS AND BUYING OPPORTUNITIES FOR FRANCHISEES

Financial hardship for the many creates windows of opportunity for a few. There now exists a combination of cost savings and buying opportunities that have never been seen before. One of the opportunities is in franchising.

Franchising distribution systems are a major economic force. Think about how many successful industries now depend on franchising to sell their products and services. In its infancy, franchising's pioneers looked to "mom and pop" operators (owning one or two stores), limiting the number of units they could own, believing this hands-on approach would result in the best operators.

As franchising grew, franchisers discovered that the best operators were not the moms and pops, but the large, professionally operated multi-unit operators. For the past 15 years, franchisers have been switching to multi-unit operators. But, because of the length of many franchise terms (some for 20 to 30 years), it is taking time to make the switch.

During the current economic downturn, multi-unit operators who are financially strong and have good backroom management are in a great position to expand through the acquisition of additional locations, many times at advantageous prices. Smaller moms and pops, poorly run and overleveraged multi-unit operators need a rescuer to help them out of their financial distress. Franchisers who have been forced to take back locations from failing operators are looking to make deals to have their stronger operators take over these failing locations. In either situation, pricing can be very advantageous.

Although borrowing money is difficult for new franchisees, profitable, multi-unit operators with a strong history of repaying their loans are still able to obtain financing. We recently assisted multi-unit operators obtain financing for new locations and restructure their existing lending relationship to allow them to expand significantly.

Retailing is being hit hard during this recession – consequently, retailers have had to close some choice locations. Opportunistic franchisees are cherry picking these shuttered locations, allowing them to expand into new key markets at reasonable costs.

Landlords who are losing additional tenants are sometimes willing to make rent concessions and, in some cases, contribute capital to a strong franchisee tenant for the purpose of improving the property. The landlord understands that improving the property for a good multi-unit operator can result in increased sales. These increased sales may result in higher future rents where a lease has a percentage rent clause based upon gross sales.

Even if there is no percentage rent clause, the landlord may be willing to agree to rent reductions and/or capital contributions if the landlord believes it will help improve his tenant's profit margin. Doing so reduces the risk of losing the tenant.

The current economic climate also creates an opportunity to reduce operating costs and increase profit margins. Franchisees are renegotiating contract rates with their vendors. The tight job market also creates opportunities for the multi-unit operator to hire more qualified employees.

For well-positioned franchisees who think creatively, this economy may have created the perfect storm to take advantage of a once in a lifetime opportunity to expand their business through a combination of cost savings and buying opportunities that may not repeat itself for at least another generation.

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GREAT URBAN LEGENDS OF THE LAW

Fact or Fiction?

The proper role of a judge is not to make law.

A: Pure fiction.

It is a cherished urban legend that judges should never make law; that they should only decide the case before them, without making law; that law should be made only by the legislature, not by judges; and that a judge who tries to make law is an evil "activist judge." This is nonsense.

There are two kinds of law in the United States and England (from which the American legal system stems): statutory law and judge made law. The latter (judge made law) usually goes by the name "common law." Statutory law is made by the legislature (the General Assembly in Illinois and the Congress in the federal system). On the other hand, vast bodies of law are judge made, or common law.

With a few minor and inconsequential exceptions, the bodies of law known as the law of contracts, trusts, real property, personal property, gifts, torts, personal injury, property damage and evidence and all constitutional law, are entirely judge made. Although now codified in statutes, the bodies of law pertaining to negotiable instruments and the sale of goods were originally judge made, created by activist judges.

The law of contracts is still all judge made. The fact that courts will enforce private agreements between individuals to the same extent that they will enforce statutes made by the legislature is the fundamental basis of capitalism; and it is pure judge made law. No statute says that courts shall enforce contracts. The body of law that sets forth that contracts must be obeyed, how contracts are formed, what kinds of contracts are legal, what kinds of contracts are illegal, what constitutes a breach of a

contract, what money must be paid by a party who breaches a contract, what conduct excuses a breach of contract, under what circumstances courts will incarcerate a person for breaching a contract, that minors may make contracts under some circumstances but not others – all of this is judge made law, made over the last several hundred years, and still being made every day by activist judges whose goal is to preserve, protect and defend the free enterprise system.

Why did judges make law in all these areas? Because legislators failed, refused or were afraid to pass statutes, and judges knew that law was necessary, and so they made law, and are still making law – for the betterment of all.

RECENT ANNOUNCEMENTS

All the news you can use...

ACHIEVEMENTS OF NOTE

Eric Patt and **Richard Stavins** authored an article in the Illinois Municipal Review, on the case of *Lacey vs. Village of Palatine*, which they recently won in the Supreme Court.

Paul Saharack has become a member of the board of directors and membership chairman of the Greater North Shore Financial and Estate Planning Council.

Kymn Harp is a member of the Association of Insolvency & Restructuring Advisors, a nationwide not-for-profit organization for attorneys and other professionals actively engaged in distressed asset transactions and loan workouts. Members work to achieve a better understanding of the insolvency and business turnaround environment.

Andres Gallegos authored "Electronic Medical Records Adoption by ESRD Facilities" and "Beyond Boilerplate: Obligations of ESRD Facilities Under Federal & State Anti-Discrimination Requirements." These two articles appeared in Renal Business Today, a national dialysis facility practice management journal.

Michael Hriljac authored an article entitled "New Regulations in the Physician Self-Referral Law," that appeared in Podiatry Management magazine. The article was originally published in the *Robbins, Salomon & Patt Quarterly*.

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