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Richard H. Fimoff
Direct: 312.456.0185
rfimoff@rsplaw.com

CUBS WIN WORLD SERIES – *About as likely as the Cubs filing bankruptcy.*

Much has been made about the off-again, on-again sale of the Chicago Cubs by the Tribune.

We have a winner of the bidding war! Negotiations are going fine! Cubs' parent, the Tribune, files bankruptcy! Tribune's bankruptcy won't affect the sale! The deal is done! Last minute hang ups! The deal's not done. New bidder group contacted!

Just when it seems that the situation couldn't get any more melodramatic, the Cubs dropped the ultimate bomb: the Cubs might file for bankruptcy!

The Cubs filing bankruptcy? How can that be? The Cubs are a money making machine. They sell out all of their home games. They are showcased on WGN, the superstation. They have fans across the country, across the world. They are the darlings of the underdogs. The "Lovable Losers."

Why would the Cubs file bankruptcy? Because bankruptcy is no longer simply a means of liquidating an economically ailing company's assets and equitably distributing the proceeds to its creditors, its original intention. Today, bankruptcy, and especially Chapter 11 reorganization, is recognized as a valuable business tool, used for strategic purposes, sometimes totally unrelated to the financial health of the debtor company.

How did this transmogrification occur?

ROBBINS, SALOMON & PATT, LTD.

25 East Washington Street
10th Floor
Chicago IL 60602
Phone: (312) 782-9000
Fax: (312) 782-6690

2222 Chestnut Avenue
Suite 101
Glenview IL 60026
Phone: (847) 729-7300
Fax: (847) 729-7390

www.rsplaw.com

The answer lies in the unique power of the United States Bankruptcy Court to facilitate the sale of a company's assets in a way that no one else can.

The Bankruptcy Code provides a way to expeditiously sell a company's assets, while avoiding many of the hurdles and constraints normally associated with large, complex commercial transactions. Issues like compliance with multiple jurisdictions' requirements for asset transfers, differing assignments of rights, filing requirements and other normal local and state transactional requirements can be avoided or minimized in a sale conducted when a company is in bankruptcy. Such a sale can be closed in a fraction of the time required to close a sale outside of bankruptcy.

A company in bankruptcy can sell its assets free and clear of all claims and liens. As long as the bankruptcy court approves the sale, the sale can take place without the consent of creditors, both secured and unsecured; without the consent of governmental agencies; without

obtaining releases of liens and mortgages; and with the elimination of the possibility of any successor liability for the buyer.

Also both the buyer and the seller may assume or may reject executory contracts made by the seller – essentially any contract which requires additional future performance by both parties to the contract. Generally, the bankruptcy judge will accept the business judgment of a debtor company as to whether an executory contract is or is not beneficial. If the court finds that performance of the contract is not in the company's best interest, the contract can be rejected. Under certain circumstances, a buyer of a baseball team in bankruptcy could reject the contracts of underperforming ball players (fill in your own list of names here).

Given the proven benefits of selling a company's assets through a bankruptcy sale, the Cubs just might file bankruptcy before they win the World Series.

✦ *Richard H. Fimoff*



Barry Glazer
Direct: 312.456.0187
bglazer@rsplaw.com

COMMERCIAL LOAN WORKOUTS: *EXTEND, AMEND OR PRETEND?*

To say the least, many commercial real estate projects are now in deep financial distress. Businesses are failing or downsizing, leading to vacancies, lower rents and falling property values. As a result, an increasing number of commercial real estate loans are going into default.

Every loan provides for legal and equitable remedies to the lender in the event of a default. These include an increase in the rate of interest, acceleration of the debt and court proceedings like foreclosure. Putting aside whether it makes legal sense, does a court proceeding make economic sense? Traditionally, the answer always was: sometimes yes and sometimes no. Increasingly today, the answer is: no.

The objective of loan enforcement is to maximize recovery. In stable economic times, the lender can foreclose its loan and resell the property for a price that exceeds

the amount of the debt. On the other hand, in tough economic times, with declining property values and a very slow resale market, a lender has to consider whether it will be able to sell the property after foreclosure for an amount sufficient to pay off the debt. What will the lender do with the property after foreclosure if it cannot sell it? Does it have the expertise to manage and operate the project? Will it incur unwanted expenses or liability if it becomes the owner of the project?

For both the lender and the borrower, the current real estate recession presents three options for dealing with defaulted loans: extend, amend or pretend. They can extend the loan, to buy more time. They can amend the loan, to provide loan terms that are achievable. Or they can pretend they don't have a problem. The third option – pretending there is no problem – is seldom a good one.



R. Kymn Harp
Direct: 312.456.0378
rkharp@rsplaw.com

The right course of action may depend upon why the borrower is in default. Is it because of conduct that the lender can solve, like diversion of funds or poor project management, or is it a result of economic forces beyond the borrower's control?

If the reason for the default is not something the lender can readily fix by taking control of the project, a loan modification may be the best solution. Modifications may include extending the repayment schedule, or amending the interest rate or other loan terms to reflect current economic reality.

Alternatively, if the lender believes the borrower is diverting funds, or that the borrower is unwilling or unable to operate the project properly, it may be

appropriate for the lender to seek the appointment of a receiver to protect its collateral, and proceed with foreclosure or other loan enforcement proceedings. In deciding upon enforcement, the lender must always consider the additional risk that the borrower may file bankruptcy, and determine what that may mean to the lender's ability to maximize its recovery.

In considering whether to extend or amend a commercial loan, the agreed upon solution must make good business sense for both the borrower and the lender. If not, the parties are only pretending to have solved the problem, with a virtual guarantee that the problem will not go away.

✦ *Barry Glazer and R. Kymn Harp*



Donna M. Shaw
Direct: 312.456.0377
dshaw@rsplaw.com

ILLINOIS ADOPTS THE UNIFORM ENVIRONMENTAL COVENANTS ACT

Illinois has enacted a law called the Uniform Environmental Covenants Act which sets a legal framework for creating and enforcing risk based clean up controls developed under any federal or state environmental remediation program, including a state voluntary clean-up program.

Risk-based remediation means that a contaminated site is cleaned up to a level determined by potential environmental risks posed by a particular use, rather than to unrestricted use. The latter is usually cost prohibitive. The necessary controls developed as part of the remediation plan for controlling and protecting the public from the potential risks posed by the residual contamination remaining in the property are called activity and use limitations.

Examples of these limitations include maintenance of physical structures such as concrete cap barriers, prohibitions on drilling for groundwater, restricting site use and required monitoring, reporting or operating procedures regarding the site. The activity and use limitations are documented in an environmental covenant signed by the regulatory agency and the property's owner, which is recorded with the Recorder of Deeds.

If the environmental covenant complies with the requirements of the Uniform Environmental Covenants Act, it will benefit and bind subsequent owners and other interested parties in the property.

Some of the significant features of this new law are:

- *The Illinois EPA must establish and maintain a registry containing all environmental covenants.*
- *The law contains protections that seek to ensure the validity of a covenant, by guarding against amendments or terminations of use restrictions without the consent of affected parties.*
- *The law protects covenants against certain future events that might otherwise extinguish or impair them, such as foreclosure of a tax lien, adverse possession or extinguishment under marketable title acts.*
- *A properly recorded environmental covenant is subject to a prior recorded mortgage unless the parties obtain a subordination agreement from the prior mortgagee.*

- *An environmental covenant does not override land uses prohibited by local zoning law, but may impose restraints more stringent than local zoning law.*
- *The regulatory agency, original owner, current owner, any person to whom the covenant expressly grants power to enforce and the municipality where the property is located may enforce the covenants in court by injunctions.*
- *The law does not invalidate or regulate any environmental covenants executed by parties prior to the law's enactment.*



Robert J. Trizna
Direct: 312.456.0190
rtrizna@rsplaw.com

IT'S NOT A TRADE SECRET UNLESS YOU KEEP IT A SECRET

The law provides two basic ways to protect a business' secrets. One way is to make the secret known to the world, but patent or copyright it under federal law. The other way is to keep the secret confidential and treat it as a "trade secret" under state law.

The most famous examples of trade secrets, never patented, are the formula for Coca Cola (reportedly locked in a safe and known only to two Coke executives at any one time) and the list of 11 herbs and spices in Kentucky Fried Chicken's original recipe (reportedly mixed at two separate locations and blended at a third).

Most trade secrets tend toward the more mundane: plans and specifications, processes, tools, mechanisms, and data like customer lists and profit margins.

All these things can be protected under the Uniform Trade Secrets Act, adopted by the vast majority of states, including Illinois. Under this law, a trade secret can perpetually remain the property of the company that devised it. Contrast that with a patent or copyright that is valid only for a limited time.

But a trade secret remains the property of the company only if it is actually kept confidential and reasonable efforts are made to keep it a secret by limiting knowledge to the business owner and such persons to whom the owner must necessarily confide in order to use the secret.

By assuring the viability and long term enforceability of environmental covenants, this new law should lessen liability concerns of sellers, purchasers and lenders associated with the redevelopment and sale of contaminated sites. The goal is to return previously abandoned properties to the stream of commerce.

✦ *Donna M. Shaw*

Anything containing trade secrets should be stamped or otherwise identified as "Confidential" or "Secret." It should not be left unattended but should be kept under lock and key. Its dissemination should be restricted on a need-to-know basis. If the confidential information is computerized, it should be password protected with the password disclosed only on a need-to-know basis.

Everyone having access to the trade secret – including the business's officers and owners – should sign a confidentiality/non-disclosure agreement. The same goes for customers or suppliers with whom any trade secret information may be shared.

Should a trade secret be misappropriated or stolen, prompt legal action can bolster its trade secret nature and minimize harm to the owner. Although money damages are available, immediately seeking a restraining order to enjoin the sale, use or destruction of the trade secret is recommended. That tends to show not only that the trade secret is legitimate, but that the harm likely to result from the misappropriation is both substantial and irreparable.

The lesson of trade secrets is simple: If you have them you need to protect them aggressively, or you may not have them for long.

✦ *Robert J. Trizna*



Robert M. Winter
Direct: 312.456.0374
rwinter@rsplaw.com

HOMEOWNERS VS. CONTRACTORS; LET'S PLAY FAIR.

Conventional wisdom holds that homeowners wear the white hat and that home remodeling contractors wear the black hat. The homeowner is generally seen as the good guy who merely wants what's fair. The contractor is the fast-talking, shady character, working the angles and looking to take advantage of the unsophisticated homeowner.

Within that framework, the Illinois legislature enacted a law in 2000 to protect uninformed homeowners from sharp-witted contractors: the Home Repair and Remodeling Act, 815 ILCS 513. The evil to be eliminated was the verbal contract to remodel or repair a home made by a contractor who orally promised one thing and then supplied another, or who quoted one price and then charged another. The legislature felt that when there was no written contract containing a description of the work to be done or the price to be paid, the homeowner was left to debate, dispute, litigate and oftentimes pay whatever unfair amount the contractor claimed was verbally agreed upon.

Believing such disreputable conduct was widespread, the legislature mandated that if a remodeling project involves more than \$1,000 and the contract is verbal, it is unlawful. No longer could a contractor verbally quote one price to get the job, and then later claim a much higher price when it came time to pay. After 2000, remodeling contracts above \$1,000 would have to be in writing to be lawful.

This meant that on any repair or remodeling project over \$1,000, if the contractor failed to get a signed written contract, the contractor could not enforce his unlawful oral contract and the homeowner would get the remodeling project for free! "How could that be?" you ask. Before you run out and take advantage of some poor unsuspecting contractor, read on.

After the Home Repair Act took effect, the following occurred. A contractor named K. Miller Construction Co. claimed that one Joseph McGinniss, a seasoned real estate attorney, who was also a friend and prior customer of Miller's, asked Miller to perform substantial remodeling work on McGinniss' Chicago property. The project ran in excess of \$500,000. Miller had to take out a major loan to fund the job. When the work was finished, McGinniss refused to pay, claiming that Miller could not enforce his contract against McGinniss because it was not in writing, and therefore was unlawful under the Home Repair Act.

This was not the first time a homeowner had used the Home Repair Act to avoid paying a contractor. In 2003, Dan Smith Building Services had been hired by Cory Bogard to build an addition to Bogard's home in downstate Casey, Illinois. Smith completed the project in 2004 at a cost of more than \$25,000, but Smith had failed to get a written contract signed by Bogard. Bogard refused to pay the \$10,000 balance owed. The Circuit Court and the Appellate Court agreed with Bogard that he did not have to pay, because there was no written contract. The contractor was simply up the proverbial creek without a paddle.

On the other hand, K. Miller Construction Co. in its case against McGinniss was represented by Robbins, Salomon & Patt, Ltd. (shameless plug) and the outcome was completely different. The Appellate Court agreed with the argument made on behalf of the contractor that, while the oral contract might be unlawful, the Home Repair Act did not repeal the age old equitable doctrine of *quantum meruit*. That's a principle of law going back to 17th century England that says that a contractor who has no contract should still be able to recover for the reasonable value of his services. *Quantum meruit* translated from Latin means "as much as he deserves."

Under this law, anyone who renders services to another and reasonably expects that he will be paid is entitled to be paid the fair value of the services rendered, even though there is no contract. And so in the case of *Miller v. McGinniss*, the Appellate Court held that while the Home Repair Act prohibits all claims based on oral contracts in excess of \$1,000, it does not preclude claims under *quantum meruit* for the fair value of the work performed. As the law stands now, because of the *Miller* case, the Home Repair and Remodeling Act – as applied in Cook County courts – protects homeowners from unscrupulous contractors who try to overcharge where there is no written contract, and at the same time protects honest, hardworking contractors from those who would try to use the Home Repair Act in a way that was never intended.

To homeowners and contractors alike we say: put the terms of your agreement in writing. But if you fail to do so, the contractor in Cook County will still be entitled to the fair value of the work done.

✦ Robert M. Winter



Richard Lee Stavins
Direct: 312.456.0371
rstavins@rsplaw.com

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GREAT URBAN LEGENDS OF THE LAW

Fact or Fiction?

#1: Finders keepers, losers weepers.

A: Fiction.

Since 1874, Illinois has had a statute (called the Estrays and Lost Property Act) which describes in excruciating detail what the finder of lost property is required to do. Although no one ever complies with this law, there it sits at 765 ILCS 1020, waiting to be used someday. The tenor of the statute most definitely is not finders keepers, losers weepers. The tenor is find the owner.

The law states unequivocally that if any person finds any lost goods or money, he must give the found property to the rightful owner at no charge.

What about where the finder doesn't know who the owner is? In that case, the finder is supposed to file an affidavit with the Circuit Court describing what he found and turn the property over to the Court Clerk. The Court Clerk is then supposed to turn it over to the County Clerk.

The County Clerk is then supposed to run an advertisement three times in a local newspaper, to try to find the owner. If the owner comes forward, he gets his property back. If he doesn't come forward, the property goes to the finder one year later if it is worth \$100 or more and six months later if it's worth less than \$100.

Fact or Fiction?

#2: It's ok to mess-up the company's computer a little bit if you get fired or quit.

A: Fiction.

It is a felony in Illinois to alter, delete, remove or damage any computer file without the permission of the owner. 720 ILCS 5/16D-3(a)(3). The law is worded broadly enough to encompass the all too familiar scene of a disgruntled ex-employee messing up the company's computer records before walking out the door.

RECENT ANNOUNCEMENTS

All the news you can use...

ACHIEVEMENTS OF NOTE

Larry Woodard is the new editor in chief of Illinois Condominium Law, a research text for attorneys published by the Illinois Institute of Continuing Legal Education.

Crystal Kontny was a guest lecturer on negotiation of commercial leases at Chicago-Kent College of Law.

Andrés Gallegos was appointed co-chairman of the Health Law Committee of the Business Law Section of the American Bar Association. This summer, he moderated a program on healthcare reform at the ABA convention in Chicago.

Vitaly Gashpar served as a judge at the John Marshall Law School's information and privacy law international moot court competition.

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