

Get it in Writing

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The company argued that it was merely an “agreement to agree.” However, a jury eventually ruled that the agreement was valid, and that the telecommunications firm had breached the terms of the contract represented by the two notebook pages.

Four factors are usually considered in determining whether a “preliminary agreement” is binding. In this case, the first two clearly favored the fired executive: There was no explicit reservation of a right not to be bound (in fact, the handwritten agreement said the opposite) and the executive had partially performed the contract. The third factor is whether all of the terms of the alleged contract were agreed upon. On that point, the agreement, although it may have lacked some details, addressed all of the essentials for a binding contract.

The final factor is whether the agreement was a type of contract that is usually committed to writing in a formal manner. When millions are at stake, as was the case here, it may be unusual to seal the deal with a handwritten document, in outline form, and drafted on the spot by one of the principals without benefit of legal counsel.

The agreement was not much to look at, barely surpassing in formality the proverbial agreement scribbled on a cocktail napkin.

However, that did not mean that the method was unprecedented and balanced against the other three, was not enough to discard the agreement and deprive the departed executive of the benefits of his bargain.

Legal Background

In *West v. IDT Corp.*, Nos. 05-4023, 06-2928, 06-3000 (3d Cir. July 20, 2007), the court reversed a summary judgment for the defendant and applied four factors used in *Adjustrite Sys., Inc. v. GAB Bus. Servs., Inc.*, 145 F.3d 543 (2d Cir. 1998), to determine whether a preliminary agreement is a binding contract. Visit NHBizLaw.com or MassBizLaw.com for more details.

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Rob Wolf earned his BS in Communications at Boston University and JD law degree cum laude from Franklin Pierce Law Center. His graduate business studies include the University of New Hampshire Whittemore School for Business and the Sawyer School at Suffolk University in Boston where he earned his MBA in Finance.



Rob Wolf is admitted in both the state and federal courts in Massachusetts and New Hampshire. Professional affiliations include the New Hampshire Bar Association, the Massachusetts Bar Association and the American Bar Association Law Practice Management Section in addition to the Turnaround Management Association and New England Business Brokers Association.

The LEGAL MUSE*

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Compilation of recent, interesting legal news, views and perspectives from the desk of Rob Wolf.

*v. *To ponder, consider or deliberate at length.*

(American Heritage Dictionary, Fourth Office Edition, 2000, Houghton Mifflin)

Welcome

My professional focus is business formation and organization, operations and financial management, restructurings, “turnarounds,” business mergers and acquisitions, liquidations and litigation; uniquely viewed from a legal and management perspective. On these pages, you’ll read monthly commentary and news on law-related business topics that should prove useful, informative, and/or simply interesting. More material is available at NHBizLaw.com or MassBizLaw.com.

Rob Wolf

EMPLOYER FORCED TO PAY UNAPPROVED OVERTIME

An enforcement action by the U.S. Department of Labor resulted in a ruling that nurses were employees, not independent contractors, of a staffing agency that provided them on a temporary basis to hospitals. After this ruling, the agency took action to attempt to deter unauthorized overtime by the nurses and to avoid having to pay time and a half for such hours. It adopted a policy, printed on all of the nurses’ time sheets, stating that the nurses had to notify the agency in advance of any hours exceeding 40 hours a week. If they did not, the notice stated that the nurses would be paid for such time only at their regular rate.

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GET IT IN WRITING

When an Internet executive held a meeting with the chairman of a telecommunications company, the agenda was a new business idea that the Internet executive had. The discussion was transformed into a recruitment when the telecommunications executive suggested that the idea should be pursued within the company he headed. For two men in the upper echelons of high-tech businesses, they then chose a decidedly low-tech way to memorialize their agreement. The end result, however, shows how substance can sometimes triumph over form in the law of contracts formation.

The agreement was not much to look at, barely surpassing in formality the proverbial agreement scribbled on a cocktail napkin.

At the end of their meeting, the executive simply wrote out the agreement by hand on two notebook pages, and both men signed it.

The writing included specifics as to how the newly hired executive would be compensated, the terms on which he could quit if he became unhappy, and what would happen if intellectual property involved in the deal could not be transferred to the telecommunications firm. It also included the statement that “[t]he parties will complete formal contracts as soon as possible but this is binding.” This would turn out to be pivotal language in the litigation that followed.

Unfortunately, the new arrangement quickly went downhill, and after about six months the new employee was fired. The relationship ended with the “formal contracts” never having been drafted and executed. When the former employee sued for breach of contract and other wrongs, more than six years of litigation ensued, with two trials and two appeals.

Much of the case focused on whether the handwritten agreement that started everything was a valid, binding contract.

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SHAINES &
McEACHERN, PA
Attorneys at Law

282 Corporate Drive
Pease International Tradeport
Portsmouth, NH 03802-0360
NH tel 603-436-3110
NH Fax 603-436-2993
<http://www.shaines.com>

8 Faneuil Hall Marketplace
3rd Floor
Boston, MA 02109
MA tel 617-973-6494
MA fax 617-507-6393
<http://www.nhbizlaw.com>
<http://www.massbizlaw.com>

Employer Forced to Pay Unapproved Overtime

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When nurses who had worked overtime hours at hospitals without notifying the agency ahead of time sought to recover pay at the overtime rate, they prevailed despite not having followed the employer's policy. A federal court ruled that the agency had not done enough to meet its duty under the federal Fair Labor Standards Act to "make every effort" to prevent performance of unauthorized overtime work of which it had knowledge. The agency's knowledge was present, albeit after the fact, as was evidenced by the nurses' time sheets showing the unauthorized overtime that was worked

Suggestions from the Court

Although the agency suffered a defeat in the litigation, the court's opinion offered suggestions for alternative approaches that it or other similarly situated employers can take in the future to deter unauthorized overtime while complying with federal law. In short, employers desiring to prevent unauthorized overtime by their employees must do so by "getting tough" with the employees through enforcement of sufficiently strong

disciplinary policies, and not simply by declining to pay for the unauthorized overtime hours.

For example, an employer could keep a daily, unverified tally of its employees' hours and reassign shifts later in the week that would otherwise result in overtime, or it could refuse to assign employees who habitually disregard an overtime rule. Whereas the agency had admitted that a nurse who disregarded its preapproval rule faced no adverse consequences beyond getting only straight-time wages for the ensuing overtime, if it were serious about preventing unauthorized overtime, said the court, the agency would discipline nurses who violate the rule.

According to the court, an employer could even entirely disavow overtime hours, announcing a policy that it will not, under any circumstances, employ an individual for more than 40 hours in a week. Under such a policy, any hours over the limit would not be compensated for the employee.

Legal Background

In Chao v. Gotham Registry, Inc., 514 F.3d 280 (2d Cir. 2008), the court found the employer had sufficient knowledge employees were working overtime to give rise to a duty to prevent additional hours to avoid paying over overtime. Visit NHBizLaw.com or MassBizLaw.com for more details.

LAWYER'S APPROVAL FOR ACCEPTANCE OF OFFER IN SALE OF BUSINESS

When the owners of a party store received an offer to purchase not the entire property, but only their liquor license and fixtures, they accepted the offer, but on the condition that their attorney approve the deal. Before the attorney's review of the first offer, the owners received a better offer from another potential buyer, this time for the entire property, including the license, the fixtures, the real property, and the business itself.

The second offer was for about five times as much money as the first offer. The owners also accepted this offer, but again conditioned acceptance on approval by their attorney. The owners' attorney then reviewed both offers at the same time and, not surprisingly, approved the second, more favorable one. The disappointed party that had made the first offer sued the owners to enforce what it regarded as a completed contract for the sale of the license and fixtures. It contended that the sellers had waived the requirement of attorney approval by their bad faith in simultaneously submitting to the attorney two competing purchase agreements, both of which conditioned acceptance on approval by the attorney. The disappointed party further argued that, by procuring the second offer and prospective agreement, the sellers had wrongly hindered the fulfillment of the only condition remaining to be fulfilled on the first agreement—attorney approval. A court disagreed that there was any bad faith and upheld the contract formed when the second offer was accepted and approved by the sellers' attorney.

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Lawyer's Approval for Acceptance of Offer in Sale of Business

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While the plaintiff had been the first to make an offer of any kind, nothing in its potential contract prohibited the sellers from considering other offers. Nor were the sellers obliged to take the property off the market pending review of the first offer by legal counsel. Consideration and eventual full acceptance of the second offer was not legally impermissible where the first offer had been only conditionally accepted.

There was no limit on what aspects of the first agreement were subject to the attorney's approval. He was free to disapprove it, as he did, simply because there had been a better competing offer made by a competing buyer. Moreover, the sellers had not interfered with their attorney's actions, such as by instructing him to disapprove the first offer. In short, the sellers had not acted in bad

faith. They were guilty of nothing more than shrewd business moves during what the court described as a period of "dickering" that preceded the formation of an enforceable contract.

Legal Background

A condition precedent for a contract, like the one at issue in Harbor Park Mkt., Inc. v. Gronda, 277 Mich. App. 126, 743 N.W.2d 585 (2007), is a fact or event that the parties intend must take place before there is a right to performance. If the condition is not satisfied, there is no cause of action for a failure to perform the contract. Where a party prevents the occurrence of a condition, the party, in effect, waives the performance of the condition. In Gronda, in reversing the trial court, the court held that party store owners did not act in bad faith by simultaneously submitting to their attorney competing purchase agreements. Visit NHBizLaw.com or MassBizLaw.com for more details.

In the News . . .

Sales of Small Businesses on the Rise

September 5, 2008 - The economy is struggling, but sales and valuations of small companies are up. According to BizBuySell's latest quarterly Insight Report on nationwide sales trends shows a 48% jump in the number of businesses listed on its network that sold during the first half of 2008, compared to the year-earlier period. A total of 3,894 businesses found buyers, up from 2,640 in the first half of 2007. <http://kamaloko.blogspot.com/2008/09/sales-of-small-businesses-on-rise.html>

Distress Soon Could Hit U.S. Commercial Property

September 8, 2008 - U.S. commercial real estate prices are likely to tumble over the next 12 to 18 months as more borrowers default on their loans and regulators crack down on banks, pushing even more properties onto the market. Used with permission No. 3.5398-48573. <http://www.reuters.com/article/idUSN0843252220080908>

A New Banking Crisis for Britain and Europe?

September 3, 2008 - British bankers have begun to hoard their reserves and have become reluctant to engage in the usual interbank lending process. The resulting freeze in liquidity and tightening of credit may result. <http://digiteconomy.wordpress.com/2008/09/03/a-new-banking-crisis-for-britain-and-europe/>

Next Month

⇒ **Get it in Writing Part 2: why every contract should have collection and attorney fee cost provisions!**

⇒ **Home Improvement Scams**
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