

The Silent Battle in Every Day Business Transactions



By: Christiaan D. Horton

Many small business owners and even owners of large companies do not realize they are at a silent battle in the marketplace. Sure, our economic slowdown has reminded everyone to be prepared for challenging times, but in day-to-day operations, how can this goal be accomplished? For starters, every owner of a business should have a good command of the “rules of engagement”. When it comes to the sale of goods, this is much more complex than most people realize.

Sales often begin with a request by a long-standing customer or a new client for a “quote” or estimate of cost. Many businesses do not take this initial opportunity to exercise their power and right to frame the Battlefield. The initial quote often does not include standard terms and conditions of sale (those terms that appear on the back of a form in small type and require a magnifying glass to read), and this is a missed opportunity that gives the buyer an advantage. Standard terms and conditions should be included with each quote or original writing from a seller to a buyer to adequately protect contract rights. The quote is usually the first volley in the battle, and buyers are likely to return fire whether or not standard terms and conditions are initially provided with a quote.

Basic Training.

Under common law, a contract is formed when an offer is accepted and the agreement is supported by consideration. This requires a “meeting of the minds” between the buyer and the seller, and if the terms of acceptance are not a “mirror image” of those offered, no contract is formed. Rather, the “acceptance” is deemed a counter-offer. The inquiry then shifts to part performance as the parties actions are scrutinized for contract formation. Did the buyer pay the price? Was the price accepted by the seller? These facts will support a contract between them, but what are the terms?

Quite often, the “last shot” rule under common law will invoke the terms that are contained in the counter-offer. Under this rule, those terms that are contained in the last document sent before contract performance (ie., before payment) will control the transaction. The party with the “last shot” wins.

Common law rules typically come into play when the subject of the contract involves services, real estate and lending contracts, but what happens when the contract involves the sale of goods covered by the Uniform Commercial Code?

Special Operations.

The UCC applies to goods only, and Missouri’s codified version that controls the “battle of the forms” is found at Section 400.2-207 of our

Revised Statutes. Parties selling goods turn to this provision for guidance on contract formation when both parties send Standard Terms and Conditions to the other. Building on our example above, the seller’s quote with its terms is typically followed by the buyer’s Purchase Order containing the buyer’s terms that in most instances drastically differ. This battle of the forms is what the UCC is designed to address. Section 400.2-207 usually ensures that there is a contract once the documents are exchanged by eliminating the mirror image and last shot rule under common law. The purchase order operates as “acceptance” even though it contains different terms, but which terms actually govern the contract between the parties?

The answer to this question will turn on whether the parties are both considered merchants under the UCC. If they are not, then additional terms will be construed as proposals and will not be binding. A “Merchant” is broadly defined as a person who deals in goods or by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction in question. So, if the parties are both merchants, then additional terms will become part of the contract. This approach favors the sophisticated knowledge and “training” of the parties in the transaction, but there are exceptions to this rule. If the offer expressly limits acceptance to the terms of the offer, if the terms materially alter the contract, or if notification of objection is provided within a reasonable time, additional terms will not be part of the deal. However, those terms that differ result in the application of the UCC “knock out” rule and are stricken from the contract and replaced by the default rules established by the UCC.

The Battle Plan.

Business owners must be aware of this battle and take precautionary steps. Reviewing quotes, purchase orders, and invoices after the fact usually leads to a realization that the enemy has engaged in a “sneak attack” and has shifted risks in the transaction that could cost the company thousands of dollars. Consider the “knock out” of an attorney fee provision that is originally designed to create a strong incentive for the performance of the contract. If a seller is forced to litigate the enforcement of payment without an attorney fee provision because it was knocked out, a significant cost to pursue the debt will be placed on the company that could have otherwise been avoided. What about a forum selection clause that is stricken forcing the Seller to sue in a distant jurisdiction, or an arbitration clause that is eliminated forcing costly and time-consuming litigation? Periodic review of Standard Terms and Conditions as well as policies and procedures in contract formation by a qualified attorney should alleviate exposure to these potential company losses and others, and will give business owners a much greater command on the Battlefield.

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529 Plans: Tax Favored Method To Save For Your Children or Grandchild's Educations



By: Jennifer K. Huckfeldt

What is a 529 Plan?

A "529 Plan" refers to the section of the Internal Revenue Code that permits a tax-advantaged method to invest for a child, grandchild, or other beneficiary's college expenses. There are two types of 529 Plans, (i) a tuition credit plan and (ii) a cash savings plan.

- **Tuition Credit Plan** - With the tuition credit plan, pre-paid tuition credits are purchased either from a specific college or from a tuition credit plan composed of a group of colleges. The credits can subsequently be utilized to pay the beneficiary's tuition at the college or a college that participates in the plan.
- **Cash Savings Plan** - The Cash Savings Plan is more frequently discussed and utilized. With these plans cash is contributed to a 529 Investment account that can subsequently be used by the beneficiary to attend any qualified post-secondary educational institution.

What is the Tax-Advantage of a 529 Plan?

Although a federal income tax deduction is not permitted for contributions to the plan, (i) the earnings on the 529 Plan account are NOT subject to income tax, and (ii) to the extent distributions are utilized for a "qualified higher education expense," the distributions (including the growth) are free from the federal income tax. Thus, the earnings on the account escape taxation if used for a permitted purpose.

In addition, Missouri allows an income tax deduction for Missouri residents up to a maximum of \$8,000 per taxpayer for contributions to Missouri's 529 Plan, and it does not tax the earning on the account if utilized for a qualified purpose.

What is a "Qualified Higher Education Expense" and what is a "Qualified Post-Secondary Educational Institution"?

- **Qualified Higher Education Expense** - Tuition, fees, books, supplies, required equipment, and room & board (subject to certain limitations) at a Qualified Post-Secondary Educational Institution.
- **Qualified Post-Secondary Educational Institution** - An accredited post-secondary educational institution offering credit towards a degree and certain vocational schools.

What happens if the distribution is NOT used for a "qualified higher education expense?"

The earnings portion of the non-qualified distribution are included in the recipient's income and are subject to a 10% penalty tax.

What if the beneficiary does not go to college?

The owner of the account can (i) change the beneficiary of the account, (ii) withdraw the funds and pay the tax and 10% penalty on the earnings, or (iii) retain the account for future use by the existing beneficiary. Note, there may be gift and generation skipping tax issues if the beneficiary is changed.

Is the 529 Account Included in the Account Owner's estate at death?

No, this is one of the unusual things about 529 Plans. Even though the account owner maintains control of the account, including the ability to change the beneficiary and name a successor account owner, the account is not included in the owner's estate at death (subject to the exception noted below).

Are contributions to 529 Plans subject to the Gift Tax or the Generation Skipping Tax?

A contribution is treated as a taxable gift by the donor to the extent it is in excess of the donor's remaining annual exclusion (\$13,000 for 2012) for the calendar year for that beneficiary. The transfer also may be subject to the generation skipping transfer tax if the beneficiary is a grandchild or other "skip person." However, there is a special rule that permits the donor to make a "five-year forward election" in the year of the contribution and recognize the transfer in excess of the annual exclusion ratably over the succeeding four years. If the account owner dies during the five years, the amount of the gift that has not been recognized is included in the account owner's gross estate.

Is there a limit on the amount that can be contributed to a 529 Plan?

Yes, the federal law requires that each state set limits on the amount that can be contributed to a beneficiary's account or accounts, as the purpose of the favorable tax treatment is for college savings, not retirement or other investment savings. In Missouri, the maximum contribution limit is \$235,000, but earnings may accrue on that amount.

If the donor is a resident of Missouri, are they only permitted to contribute to Missouri's 529 Plan?

No, a Missouri resident can contribute to any state's 529 Plan, but the Missouri \$8,000 income tax deduction is only permitted for contributions to Missouri's plan. In addition, Missouri has recently established a Matching Grant fund of up to \$500 for qualified donors and beneficiaries of a Missouri account.

Why would a Missouri resident choose to invest in another state's plan?

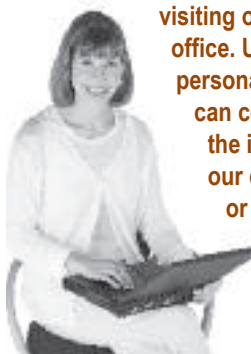
Again, each state establishes its own 529 Plan pursuant to the rules of the federal law permitting the plans. One requirement is that the state must provide the investment options among which the account owner can invest. What this means is that each state has different investment managers and investment options. For example, VanGuard is the investment manager for the MOST plan, and while there are numerous investment alternatives (currently 17) a donor may prefer the investment manager or investment options of another state's plan.

In summary 529 plans provide an income tax effective method for parents, grandparents and other relatives or donors to contribute and save for a beneficiary's higher education expenses.

Caveat: Consultation with a tax advisor is recommended, (i) as there can be additional income, gift, estate tax, and financial aid implications to the donor and/or beneficiary, (ii) because the 529 Plan law is always subject to modification, (iii) to determine if a 529 Plan is the most effective method for the donor and beneficiary, and (iv) to ensure the contribution is made in the most effective manner.

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Please feel free to utilize our wireless high-speed internet capabilities when visiting our Springfield office. Using your own personal laptop, you can connect to the internet in any of our conference rooms or in our reception area.





By: Frank C. Carnahan

The problems of poverty in Springfield and its impact on our children easily go unnoticed. The Springfield News-Leader recently published the third in a six part journalism project on poverty in Springfield and its impact on children, seeking to focus public attention and build on existing initiatives (see <http://www.news-leader.com/section/everychild>). CECB supports this effort, and wants to highlight two local entities make a substantial contribution to improving children's lives of our and help them grow up to be responsible and productive citizens. These organizations stand out especially because all the money they raise goes directly to benefit the recipients and administration expenses are covered by private funds.

Care To Learn

www.caretolearnfund.org, 417-862-7771

In 2007, Care to Learn Executive Director Morey Mechlin gave her tradition community comments to the Chamber of Commerce on leaving the Board, and described issues of children in poverty and that over half of Springfield school children are on free and reduced lunch. Doug Pitt was skeptical, but convinced after he talked to school superintendent Dr. Norman Ridder. Dr. Ridder told Doug that what would help most was if he had \$50,000 to meet immediate needs without red tape. Within 24 hours, Doug, his brother Brad through the Jolie-Pitt Foundation, and Jim D. Morris, stepped forward to provide funds, and then in 2008 formed the Care to Learn fund at the Community Foundation of the Ozarks.

Care to Learn provides immediate funding and action to meet any emergent health, hunger, or hygiene issue and restore a child's self-respect so they can get back in the classroom, usually on a same day basis, e.g., a toothbrush, coat, deodorant, or breakfast. They arrange transportation that parents can't provide to get children to needed dental care (a free dental care program is available, but you have to get there). Teenage girls stayed home one week a month because hygiene products can't be purchased with food stamps, so had approximately 25% higher absence than boys. Care to Learn provides funds to make hygiene products available at the schools, and girls' attendance figures

improved dramatically. They provide funds for medication, e.g., asthma (there is an increasing population with asthma) so kids can be in school and learn.

Ten chapters have formed in surrounding communities, each raising funds that stay in the local chapter, and Morey has spoken to other communities as far away as Springfield's Mexico sister city, Tlaquepaque, on the program's success. The Springfield chapter had a \$300,000 budget in 2011, and has a \$1MM endowment fund started. Care to Learn has no overhead because fund management is handled by CFO, they rely on professionals such as teachers, nurses and counselors in the schools to spot and report needs, e.g., if a child arrives at school hungry, and the staff is lean and paid for privately, so that 100% of donor funds are used to meet the needs of students.

Help Give Hope

www.helpgivehope.com, 417-209-7027

Help Give Hope is a 501(c)(3) charitable organization, whose mission is to assist needy families, in particular children, in southwest Missouri.

In 1980 Wade Palmer, Joe Kremer and Jim Crumpley collected toys for Toys for Tots. In 1981 they began to adopt individual families. By 1990, Help Give Hope was adopting approximately 45 families at Christmas, increasing to roughly 110 families by 2000, and 228 families in 2011. During the late 1990's Help Give Hope also started offering year-round assistance to children in need. In 2006 Murray Beairsto was hired as Executive Director and brought many years of professional experience. Under her leadership, Help Give Hope has experienced tremendous growth and many new successes. The original core group of volunteers and supporters largely remains intact and has since grown to include a Help Give Hope 'family' of nearly 800 supporters. In 2011 Bobby Allison donated a new 30,000 sq. ft. office-warehouse building that greatly facilitates operations that previously had to be set up at different locations each year.

The 2011 Christmas Project provided clothing, toys, furniture, appliances, food and automobiles to 228 families, including over 800 children. Help Give Hope also provides crisis assistance throughout the year to 40 to 70 families each month, helping with utility

bills, rental assistance, gasoline vouchers and educational help, and assists families to obtain reliable transportation so they can be employed and take care of life's daily tasks, operating one of the largest used car gifting programs in the Midwest. Since 2007, they have given away over 93 vehicles.

Help Give Hope receives no governmental assistance or funds, and all donations are private. It has no rent or mortgage, and all staff and workers are volunteers or are paid for privately, so 100% of all donations go directly to help the families in need. They home visit 430 families to identify the 230 or so families selected for each holiday season, striving to help people who are making an effort to improve their situation. Help Give Hope averages spending \$1,000 to \$1,500 per family and addresses all the family's needs, including furniture, appliances, clothing, toys, food, transportation, and more.

Taxable Amount of Vouchers Purchased From Deal Company



By: Frank C. Carnahan

In Letter Ruling No. LR 7156, dated October 1, 2012, the Missouri Department of Revenue discussed the amount that is subject to sales tax when a voucher such

as Groupon or Living Social is used, finding that the amount depends on the nature of the voucher. If the voucher offers a specific dollar value that may be used toward the purchase of unspecified products or services, the face value of the voucher must be included in gross receipts even if the amount paid for the voucher is less than the face value. If the voucher offers a specific product or service for the price paid for the voucher, the voucher price paid must be included in gross receipts.

The ruling specifically discussed a taxpayer offering a \$29 voucher for yoga classes through a third party deal company for one month of unlimited yoga classes valued at \$110. The Department of Revenue determined that the taxpayer should collect and remit Missouri sales tax on the price paid for the voucher, explain that in this case, customers pay \$29 for one month of unlimited yoga classes, not for a voucher worth \$29 for anything the taxpayer may sell. Thus, the taxpayer must include \$29 in gross receipts subject to tax.

If It Ain't Broke (for 70 Years), Don't Fix It: Please Vote No on Amendment 3



By: Rich Maltby

The Non-Partisan Court Plan (the "Plan") has produced a steady stream of competent judges at the trial, appellate and Supreme Court levels for seventy years in Missouri. The Plan continues to be a model for the nation as more than thirty other states have replicated some form of our judicial selection process. It is and remains the standard because the Plan continues to attract high-quality judges in the least political way and ultimately gives the people the final say through the voting process as to who will be their judges.

A recent effort funded largely by large non-Missouri corporations choosing to do business in Missouri seeks to up-end the Plan. Currently, the Plan is the foundation for a judiciary that is free to apply laws, is as free as reasonably possible from political or special interest pressures and is free from the fear of losing their judgeship for doing what the law requires. Our firm has joined the Springfield Chamber of Commerce, The Missouri Bar, the Springfield Metropolitan Bar Association, an impressive list of former Missouri Supreme Court judges who were appointed by both Republican and Democratic Governors, and a host of others to oppose the proposed Amendment 3 that will be on the ballot in November. We respectfully request that you consider doing the same. The ballot language speaks for itself as to the problems with the proposed new court plan and provides: "Shall the Missouri Constitution be amended to change the current non-partisan selection of supreme court and court of appeals judges to a process that gives the governor increased ability to: appoint a majority of the commission that selects these court nominees; and appoint all lawyers to the commission by removing the requirement that the governor's appointees be non-lawyers?" This is simply too much power for the governor and removes any checks and balance system on which our government was founded. It also gives too much power to one profession – us.

The current Plan works like this: Citizens and lawyers, along with a judge, work as a balanced team on judicial nominating commissions where they select the top three candidates for the governor to choose from to fill an open judgeship. The commissioners review the candi-

dates' character and community experience they bring to the bench and, with the aid of the lawyers and judge, evaluate the professional strengths and legal analysis skills. The Plan is good for business by keeping the rulings consistent rather than swinging in the political wind. The health of the state's business climate is dependent on the stability of its courts and whether a business owner even realizes it, risk management decisions are based on a stable judiciary that applies established law to facts and does not bend to political whims. Uncertainty of legal consequences cuts against a business owner's ability to make a decision in the company's best interest.

Amendment 3 gives future governors only two years into a single term to select four out of the seven commissioners, providing those four appointees with unchecked power given that those four would constitute a majority. The proposed Constitutional Amendment, which stems from Senate Joint Resolution 51, would, if approved by a vote of the people, have the effect of eliminating Missouri's merit-based judicial selection process. It would hand future governors ultimate control of the majority of commissioners who select the panel of candidates for the governor to choose from to fill an open judgeship.

The President of the United States does not have this type of unchecked control for purposes of filling vacancies on the United States Supreme Court. Only one state currently allows this level of unchecked gubernatorial control, which is Florida. Proponents in Missouri have failed to offer any compelling reason why Missouri's Plan should now follow Florida and depart from a system with a proven track record.

If the foregoing is not convincing enough, please also consider:

- The Plan produces appellate courts that are neither Republican nor Democrat. They are simply fair and impartial, which should be absolutely fundamental when entering a courtroom.
- The Plan prevents judges from campaigning and accepting campaign contributions. Quite candidly, it removes corruption or even perceived corruption from the courtroom.

- The best applicants are attracted to judicial positions because they understand they will be evaluated on merit, not politics.
- The commission is balanced by design to reduce the likelihood that any one person or interest will control.
- The Plan staggers the term of the governor's appointees again preventing one politician from having control over a majority of the commissioners.
- Judges, as peers, have the most experience and ability to evaluate a candidate's skills, knowledge and suitability for the bench. Their active involvement on the commission is imperative.
- The Plan is transparent to the public. There is no behind the scenes politicking.

It must be emphasized that under the current Plan, voters have the final say through judicial retention elections that are held at the general election following a judge's first twelve months on the bench and the end of each term. Thus if you are not happy with a judge under the current Plan, you hold the power to have that judge replaced. In short, the Plan works, and if it does not, the Plan allows the voters to fix it.

We strongly urge you to consider the foregoing before you head to the polls in November. Please help our firm in our representation of you by voting "No" on Amendment 3. If you have any questions about the Plan, please contact Rich Maltby or Chip Sheppard, both with CECB's Dispute Resolution Group.



Best Lawyers in America

CECB is pleased to announce that three of the firm's attorneys Clifford S. Brown, Thomas D. Peebles, Jr and Joseph "Chip" D. Sheppard, III were selected by their peers to be among the elite professionals for inclusion in the 2013 edition of The Best Lawyers in America. (Copyright 2012 by Woodward/White, Inc., of Aiken, SC).

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Cliff Brown was selected for inclusion in the practice area of Trust and Estates in Springfield, MO and was also selected in the area of Litigation – Trusts and Estates and was first honored in 1995. Cliff practices in the Estate

Planning Group and concentrates his practice in the areas of estate planning, probate, trust litigation and related tax matters. Cliff earned his law degree from the University of Missouri - Columbia School of Law in 1968



Chip Sheppard was selected for inclusion in The Best Lawyers in America. Chip is a Shareholder in the Litigation and Transactional Practice Groups and concentrates his practice in

the areas of business, real estate, securities and intellectual property dispute resolution and transactions. Chip received his law degree in 1983 from Southern Methodist University.



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planning and estate and trust administration. Tom earned his law degree in 1980 from the University of Missouri at Kansas City

More Flexible IRS Offer-in-Compromise Terms



By: Frank C. Carnahan

The IRS announced more flexible offer in compromise terms in IR-2012-53, May 21, 2012. Announced changes include:

1. The IRS now calculates a taxpayer's "reasonable collection potential" by looking at only 1 year of future income (down from 4 years) for offers paid in 5 or fewer months, and 2 years of future income (down from 5 years) for offers paid in 6 to 24 months. All offers must be fully paid within 24 months from the date the offer is accepted (longer term deferred OICs apparently are no longer available).
2. Taxpayers may repay their post high school student loans (proof of payment must be provided).
3. Taxpayers may pay state and local delinquent taxes based on percentage basis of tax owed to the state and IRS.
4. Allowable Living Expense allowance categories and amounts are expanded, and national standard expenses can include credit card payments and bank fees and charges.
5. Narrowed parameters and clarification of when a dissipated asset will be included in the calculation of reasonable collection potential.
6. Equity in income producing assets generally will not be included in the calculation of reasonable collection potential for on-going businesses.

In the News



CECB is pleased to announce that firm Shareholder John Price has been honored with a 2012 Gift of Time Award

from the City of Springfield and the Council of Churches of the Ozarks. Mr. Price was one of ten volunteers honored with the award for the countless hours contributed to make life better for friends and neighbors in the Ozarks.



Firm Shareholders Thomas D. Peebles Jr. and John M. Carnahan III recently participated in the KWTO Radio W Factor Program

hosted by Larry Freund, a long time friend of the firm. Both Tom and John spent an hour discussing recent changes in Estate and Tax planning as well as answering phone call questions from the audience. If your group needs a speaker on a legal matter for one of your programs, please feel free to contact Shelly Bivins, our Firm Administrator, to see how we can help.



The Firm is honored to announce that Tammy K. Larimore recently celebrated 30 years of service with the firm. Tammy is a

paralegal in the estate planning department of CECB. She has a bachelor's degree in education from Drury University. She is married to Larry Larimore and they reside in Republic, Missouri. They have two children, Aubrey, a recent graduate of MSU, and Collin, a 10th grader at Republic High School.



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