BURKE, WARREN, MACKAY & SERRITELLA, P.C.

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EMPLOYMENT LAW

TO COMPETE OR NOT TO COMPETE

Appellate court ruling could mean changes for employers and non-compete restrictions

Aaron Stanton

Non-competition restrictions in employment agreements may be difficult to enforce after a recent Illinois Appellate Court ruling. The court ruled that post-employment non-competition restrictions for new employees are not enforceable if the employment relationship ends within two years. To enforce non-compete agreements with new employees, employers must now offer a form of consideration, such as a signing bonus, other than simply the promise of future employment.

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SECURITIES LAW

PRIVATE COMPANIES GET PUBLIC PLATFORM:

Closely-Held Firms Cleared for Wide-Scale Investor Advertising

Craig McCrohon

This summer, the Federal Securities and Exchange Commission (SEC) adopted and issued new rules permitting privately-held companies to raise capital through "general advertising." With this new rule, firms can now widely circulate offering materials to more than simply friends, family and business contacts. At the same time, closely-

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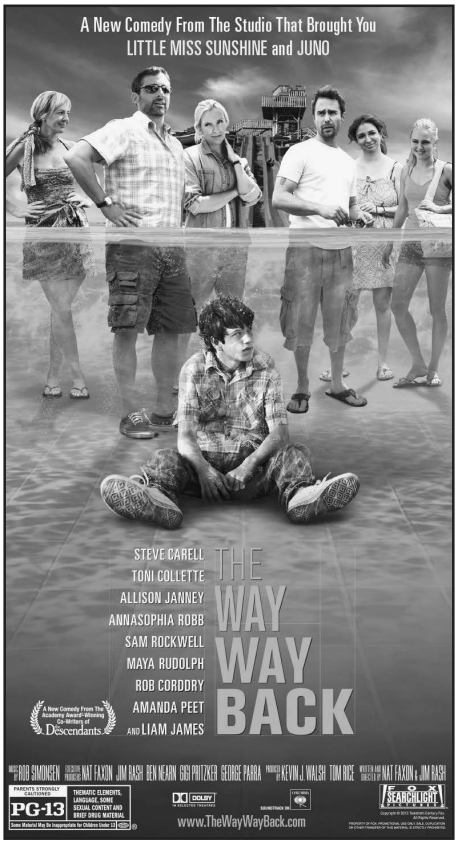
CLIENT FOCUS

Critical Acclaim For *The Way Way Back*



On July 5th Chicago's own OddLot Entertainment successfully released the film *THE WAY WAY BACK*. The film stars Steve Carell, AnnaSophia Robb and Sam Rockwell, and has been receiving rave reviews, with the Los Angeles Times describing it as "one of the summer's pure pleasures." This critically acclaimed film centers around a 14-year-old boy's search for his place in the world which he finds with the help of a special place called Water Wizz water park.

This is not the first success for OddLot Entertainment. The company has a number of other successful productions, including the movie *Drive* with Ryan Gosling as well as *Million Dollar Quartet*, which was released through its sister company Relevant Theatricals. It is presently working on the release of the expected fall blockbuster, *Enders Game*, starring Harrison Ford.

Congratulations to Oddlot Entertainment from the firm's Karen K. MacKay, Martin P. Ryan and Patrick J. Bruks.

INSIDE THIS ISSUE:

LITIGATION

A Case for Arbitration: How to make arbitration the right tool for business disputes

Fred Mendelsohn

A recent case involving this writer illustrates how arbitration can be the faster and more affordable alternative to the courtroom. The case was essentially a wrongful termination against a supplier, the most significant claim being that the terminated distributorship was actually a franchise under state law. If the franchise claim held up, the plaintiff could have been entitled to remedies beyond those in the underlying Distribution Agreement, plus additional damages and attorneys' fees. The initial $7 million+ sought was whittled down to roughly $2 million by the time of hearing. After a week-long arbitration trial and briefing, a three-member panel of arbitrators issued an award for the supplier (our client) — denying the distributor any relief and awarding the supplier roughly $500,000 for amounts due it for goods and loans. Here is why the arbitration process worked well in this case:

A Three Member Arbitration Panel: Perhaps because arbitrators do not have to follow courtroom rules of evidence, and are able to admit evidence that would never fly in court, critics complain that arbitrators seem to do merely what they believe is just, instead of simply following the law after reviewing all important facts. On the other hand, by requiring a "majority rule" decision, a three-member arbitration panel significantly reduces the risk of a no-win "compromise decision." In our case, the three-member panel was required (by the underlying contract's arbitration provision) to have knowledge of the relevant industry. This experienced panel maintained a strong governance of the process by limiting the admission of evidence that the supplier considered seriously out of bounds. The lesson: require more than one arbitrator, experienced in your industry, to hear your dispute, and put that in your contract.

A Reasoned Award: Arbitrators are not always required to issue written opinions or to otherwise explain their decisions, and awards sometimes seem to emanate from a "black box." An arbitration award can be virtually impossible to successfully challenge in court, leaving little recourse from a poorly reasoned or otherwise incorrect decision.

In our example, the three-member panel agreed to provide the parties with a reasoned award — akin to a written judicial opinion, providing the parties with a clear-cut rationale for the finding, making an attack on appeal unlikely. The lesson: do what you can to obtain a reasoned award. While the arbitration rules may require a reasoned award, or the arbitration panel may prefer or agree to provide one, providing for a reasoned award in your contract's arbitration provision is the surest way to secure one.

Privacy: Proponents of arbitration often cite privacy as a significant benefit to arbitration. Our case involved a great number of what the supplier believed were exaggerated, unsubstantiated claims, most of which were refuted by multiple testifying witnesses. The terminated distributor had no real case, recklessly sued the supplier and lost — and the supplier preferred that the misrepresentations stayed private. In a small industry, word can travel fast, but not always accurately or completely; everyone hears the accusations at the beginning of the case, but few see the story through to its end. The lesson: privacy in dispute resolution has its advantages, and can be valuable — certainly worth your share of the cost of the arbitration panel and the process.

Costs and Speed: Arbitration's critics say that it is not quite as inexpensive and speedy as its supporters claim, especially considering costs of arbitrators attending a week-long hearing, conducting all pre-hearing matters, considering legal briefs and ruling on motions. Nonetheless arbitration still comes in as a relative bargain — cutting out almost all pre-trial discovery, particularly depositions, and proceeding through a trial with live witnesses, can save arbitrating parties as much as $100,000 in

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BWM&S

MacKay presents at Illinois CPA Society's 2013 Taxation on Real Estate Conference

On June 4, 2013, as a panelist at the Illinois CPA Society's 2013 Taxation on Real Estate Conference, Karen MacKay spoke to the attendees with regard to the estate, gift, and generation-skipping transfer tax aspects of transfers of real estate and strategies to minimize estate tax. Ms. MacKay can be reached at kmackay@burkelaw.com or 312/840-7009.

Karen MacKay

The Firm Grows Again

Firm welcomes partner to real estate practice

Burke, Warren, MacKay & Serritella is pleased to announce that Thomas J. Boyle has joined the firm as a partner in the Real Estate practice. Mr. Boyle has concentrated his practice in the real estate tax field for the past 17 years, representing commercial, industrial, and residential property owners in challenging property tax assessments on both a local and a national level. Before joining the firm, Mr. Boyle was a partner in the Real Estate practice at Neal, Gerber & Eisenberg in Chicago.

Thomas J. Boyle

Mr. Boyle's practice highlights include serving as Class Counsel in the case *Khaldoun Fakhoury v. Maria Pappas, Cook County Treasurer and Ex Officio County Collector*, which represents the first successful real estate tax-related class action in the State of Illinois in 40 years. The judgment, on behalf of more than 23,000 Cook County taxpayers was affirmed by the Appellate Court and Supreme Court of the State of Illinois, exceeded $14,000,000. Mr. Boyle was also a trial attorney representing Chicago real estate owners in a landmark case relating to the legality of certain city property tax levies. The court entered a tax refund judgment in favor of the city property owners of approximately $50,000,000. The judgment is believed to be the largest property tax refund judgment in Illinois.

Mr. Boyle received his B.S. from John Carroll University and his J.D. degree from Chicago-Kent College of Law. He is a member of the Chicago Bar Association and the Real Estate Investment Association. Mr. Boyle can be reached at 312/840-7042 or tboyle@burkelaw.com.

New associate joins religious & not-for-profit and litigation practices

Burke, Warren, MacKay & Serritella recently welcomed Joan E. Ahn as an associate in both the Religious and Not-For-Profit Organizations and Litigation practices.

Prior to joining the firm, Ms. Ahn worked at a boutique law firm in Chicago, specializing in civil rights litigation. Ms. Ahn worked as a member of trial teams that won defense verdicts in multiple jury trials in federal court. She also obtained dismissal of claims through motion practice at both the pleading and summary judgment stages.

Joan E. Ahn

Ms. Ahn earned her B.A. in English and mathematics from Amherst College in 2004. She earned her J.D. from the University of Chicago Law School in 2010. While attending law school, Ms. Ahn served as a judicial intern for the Honorable Elaine E. Bucklo in the Northern District of Illinois, and was a member of the Chicago Journal of International Law. Ms. Ahn may be contacted at 312/840-7131 or jahn@burkelaw.com.

Firm welcomes litigation associate

The firm recently welcomed Julie M. Wiorkowski as an associate in the Litigation practice. Ms. Wiorkowski has focused her practice on business litigation representing a wide range of institutional clients in complex commercial disputes. She previously practiced at a litigation boutique in Chicago.

Julie M. Wiorkowski

Ms. Wiorkowski earned her B.A. in Human Development from The University of Chicago. While at The University of Chicago, Ms. Wiorkowski was a four-year member of the Women's Varsity Softball team. Ms. Wiorkowski earned her J.D. *cum laude*, from the University of Notre Dame in 2010.

Ms. Wiorkowski can be contacted at 312/840-7107 or jwiorkowski@burkelaw.com.

POOLING INVESTMENTS

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held firms can issue stock or bonds under the private placement exemption — which exempts closely-held firms from expending time and capital by publicly offering securities.

New Rule – Advertising of Private Placements Permitted

These new rules now permit closely-held companies to generally advertise their search for new shareholders, while also qualifying for the coveted "private placement" exemption from registration. Without the private placement exemption, a firm would have to spend hundreds of thousands of dollars to comply with the extensive SEC filing and approval requirements of an initial public offering, requirements more appropriately applied to a firm with thousands of employees and a value approaching half a billion dollars.

For decades, smaller firms have contorted their offering documents to qualify for the private placement exemption. Among the most important prerequisites for that critical exemption was a condition not to generally advertise the securities offering. If the federal government, or a court, found that a firm was not strictly selling stock to friends, or at least friends of friends, investors could immediately demand the return of their money, with interest.

The Future of Fundraising

Companies may now distribute prospectuses for investors to many, many potential buyers. Smaller firms may canvass large numbers of potential purchasers without jeopardizing the streamlined and much less expensive "private offering" exemption. Companies may now approach customers, affinity groups, employees and neighbors as part of investor recruitment efforts. Offering documents and procedures will become more streamlined, since firms no longer need to work around many of the prior rules and procedures restricting "general advertising and solicitation." Now, it does not matter.

The Way We Were

In the past, to avoid this compliance calamity, firms could only offer securities through issuance of quiet, tightly controlled, offering documents. The prior law imposed a myriad of rules governing public offerings on private firms promoting their offerings on internet, radio, newsletters or other "non-private" media. The precautions recommended by courts and regulators had become unwieldy. Recordkeeping, long disclaimers, and almost secretive distribution of documents were required to prudently avoid violating securities laws. Mistakes could prove financially fatal.

Now, companies can have their investment cake and advertise it, too.

What This Means

Just as new rules several years ago permitted drug companies to advertise medications on television, this new rule will open the doors to an entirely new set of mass media investment promotions. Privately-held firms will be able to advertise on television (unlikely), or send thousands of spam emails promoting the latest way to get rich (likely). Other possible avenues for aggressive promotions include web sites, newsletters, speeches at Holiday Inns, infomercials, and colorful booths at fairs.

For more traditional companies, the new fundraising freedom will lead to a restrained, but less cumbersome, campaign of mailings and public presentations. Companies can now deliver investment booklets, much like a job seeker mass mailing resumes.

Stranger-Danger, the Investor

Most sophisticated private companies appreciate that the greater the number of investors, the greater the headaches in managing the firm. Attracting too many investors can result in "stranger danger" owners. Such anonymous investors can include, in the worst case, a wolf in investor's clothing, poised to file a nuisance suit simply to extract "buy-off" money from a company wishing to avoid the inconvenience of defending a claim. Such anonymous investor lawsuits are often based on minor non-compliance with the securities laws, or failure to accurately predict financial troubles. Even if a suit has no ultimate merit, numerous hostile investors can extract significant sums from innocent companies.

The result: most private firms will cautiously deploy restrained "advertising" programs for new investors. Nevertheless, the benefits of having cleared the old compliance minefield will enable firms to streamline initial offering documents and accelerate fundraising.

The Fine Print – Conditions to Qualify for Advertising

To qualify for this new world of investment promotion, firms must undertake the following:

- All purchasers must be accredited investors. An accredited investor includes, among others, persons with incomes over $200,000 per year, married couples with incomes over $300,000 per year, or persons with a net worth exceeding $1 million (excluding one's home).
- The issuer must document that it tried to verify that the potential purchasers were "accredited." This new exemption now requires "trust, but verify" (the old rule: "trust, and don't bother to verify"). The SEC provides specific examples of methods for such verification. These include: review of the purchaser's

tax returns for the prior two years; purchaser self-certification regarding income levels; bank statements; brokerage statements; certificates of deposit; third-party appraisals; or a credit report. The list is not exhaustive. Securities issuers should require additional reliable evidence of investor wealth in the case of offerings to many inexperienced investors, or in situations where company information is limited and difficult to find.

If the Rule Fits, Wear It

Firms should determine whether the new exemption for broadly-distributed investment materials is appropriate. Companies should assess the following before jumping into the world of mass-marketed investments:

- Firms that will aggressively advertise fundraising will likely be those that can benefit from smaller checks and a higher profile. These include stores, consumer product makers, retail services, or websites that require a high profile. Also, some passive investment opportunities such as real estate or other similar single asset investments might use more aggressive promotional methods.
- Will the company need future funding from its shareholder base? The new exemption is more likely to be "one and done." Large numbers of shareholders with smaller amounts invested are less likely to return should the company need more funds. Firms that raised the same amount of money from a handful of deep pockets will have more chances to return to these investors should the need for more cash arise.
- Simple, low-risk businesses are easy to explain; complicated, risky businesses are vulnerable to misunderstanding. A larger pool of investors will require frequent updates about the business. A volatile R&D-driven business model makes for a difficult story to sell to multitudes of investors. Better to stick with a small number of stoic deep-pocketed owners.
- Venture capitalists are afraid of crowds. If a firm intends to raise institutional money, a large investor base will deter venture capital money. Venture capitalists hate the uncertainty and distraction of large numbers of unruly investors who might complain (in court) if the venture capitalist gets too much of the future return.
- Just as beer can be a bad combination with liquor, the new mass-market exemption does not mix well with other securities exemptions. In fact, some exemptions will be explicitly prohibited once the company uses the new general advertising exemption.

Next Stop: Crowd Sourcing

This new rule has been issued in connection with a set of rules that permits more companies to seek investment from more persons. The SEC plans to release more crowd-funding rules that will expand the fundraising. This new "general advertising" alternative is a dramatic first step.

Craig McCrohon is a Corporate and Securities attorney at Burke, Warren in Chicago. He specializes in stock offerings, venture capital and acquisitions, as well as bank regulatory counseling. You may contact him at cmccrohon@burkelaw.com or 312 840-7006.

Firm's Jonathan Michael makes radio debut

The firm's Jonathan Michael recently made his radio debut on WBBM Newsradio 780 & 105.9FM in Chicago. Mr. Michael was featured on a show called "At Issue," hosted by WBBM's political reporter, Craig Dellimore. Mr. Michael's discussion focused on issues relating to estate planning for people who are aging. The discussion also featured key people from the Illinois Department of Aging and AARP. The broadcast is available at http://chicago.cbslocal/show/at-issue/

Jonathan Michael

Michael featured in *Chicago Tribune* Primetime section

Mr. Michael was also recently quoted in the Primetime section of the Chicago Tribune. In the article "Creating Durable Powers of Attorney Gives Peace of Mind," Mr. Michael gave his advice on powers of attorney in Illinois, including a recommendation for both married and non-married people to have powers of attorney in place, especially for property. Not having powers of attorney in place can result in expensive court proceedings and may result in the incapacitated person not being represented by the individual he or she would prefer to make decisions on his or her behalf.

Mr. Michael frequently speaks on issues relating to estate planning, business succession planning, asset protection planning, and the transfer and taxation of collections and collectibles. For more information on any of these topics, Mr. Michael can be reached at jmichael@burkelaw.com or 312/840-7049.

TO COMPETE

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In the case *Fifield v. Premier Dealership Services*, the court ruled that in order to enforce post-employment non-competition restrictions in employment agreements, an employer must employ an employee for at least two years **or** offer other adequate consideration to the employee, such as a signing bonus in exchange for the employee's agreement not to compete with the employer, post-employment. *Fifield v. Premier Dealership Services, 2013 IL App (1st) 120327.*

The employee in the *Fifield* case, who worked in the automobile insurance and finance industry, executed an employment agreement that precluded him from competing with the employer for two years after termination. This restriction, however, did not apply if the employee was terminated "without cause during the first year of employment." The employee resigned three months after executing the employment agreement and went to work for a competitor.

The Illinois Appellate Court held that the non-compete restriction was invalid because it lacked "adequate consideration," stating that where the only consideration given to the employee is the promise of future at-will employment, "there must be at least two years or more of continued employment to constitute adequate consideration."

The *Fifield* decision presents two questions that all employers must address.

- How can an employer best ensure that non-competition provisions in employment agreements with new employees can and will be enforced?
- For current employees with non-compete agreements who have been employed for less than two years, what can the employer do to protect itself?

The answer to both of these questions is that **the employer must offer the employee "adequate consideration" in exchange for the non-compete restriction.** Although there is scant Illinois law on what constitutes "adequate consideration" for enforcement of a non-compete provision, it is clear that the consideration for the non-compete must be **more than the salary and benefits that the employee will receive or currently receives** for his or her employment. Therefore, after *Fifield*, an employer now must offer something in addition to regular salary and benefits — that is, something that the employee is not entitled to or would not normally receive simply for his or her employment. Courts outside of Illinois have held that additional adequate consideration includes: a signing bonus, stock options, a year-end bonus, managerial or other specialized training that could lead to career advancement, unconditional severance benefits at the end of employment, or a raise or promotion (for current employees).

Having determined what additional consideration will be offered, an employer must then determine what amount is adequate. Although there is no precise formula to ascertain what amount is adequate under the law, courts look at the amount of consideration on a case-by-case basis, based on the employee's salary, education, experience, and industry custom and practice. For example, courts have found that signing bonuses of $500.00 and $2,000.00 in consideration for a non-compete in an employment agreement were sufficient additional consideration to make non-compete restrictions enforceable.

In addition to consideration, to create an enforceable non-compete provision, an employer must show that: (1) it has "a legitimate business interest" in need of protection by the non-compete, which requires that: (a) the employer has "near permanent customer relationships" and/or (b) the employee has access to the employer's confidential information; and (2) the restrictions are reasonable in geographic and temporal scope — for example, the employee cannot compete for one year and within five miles of employer.

To better protect your confidential information, customers, and human capital with post-employment restrictions, please contact Aaron Stanton at 312/840-7078 or astanton@burkelaw.com.

A PRO BONO SUCCESS STORY

Ellen Brace

Ellen Brace, an associate in the firm's Litigation group, recently represented an Iraqi veteran, who had been injured in combat, in connection with his civil asset forfeiture case in Cook County. In this case, the State's Attorney attempted to forfeit the client's vehicle to the State based on drugs that were allegedly found inside the vehicle.

During the trial, Ms. Brace successfully obtained an order from the judge for the vehicle to be released to the client. In a separate hearing, Ms. Brace was able to have towing and storage fees reduced for the client so that he was able to pay the fine and reclaim his car from the impound lot.

Winning this case and helping the client recover his vehicle was especially important because the client needs the vehicle to get to and from his daily treatment for his injuries sustained while serving in Iraq.

Ms. Brace was supervised by Dan Klapman, a partner in the firm's Litigation group, during this case. She can be reached at 312/840-7029 or ebrace@burkelaw.com.

Bruks' Contract Circle™

A Universal Process for Analyzing any Contract Using *Ten and Only Ten Basic Questions*

Over the course of his career, the Firm's Patrick Bruks has developed an innovative and groundbreaking process for analyzing any contract by asking and answering *Ten and Only Ten Basic Questions*.

Patrick Bruks

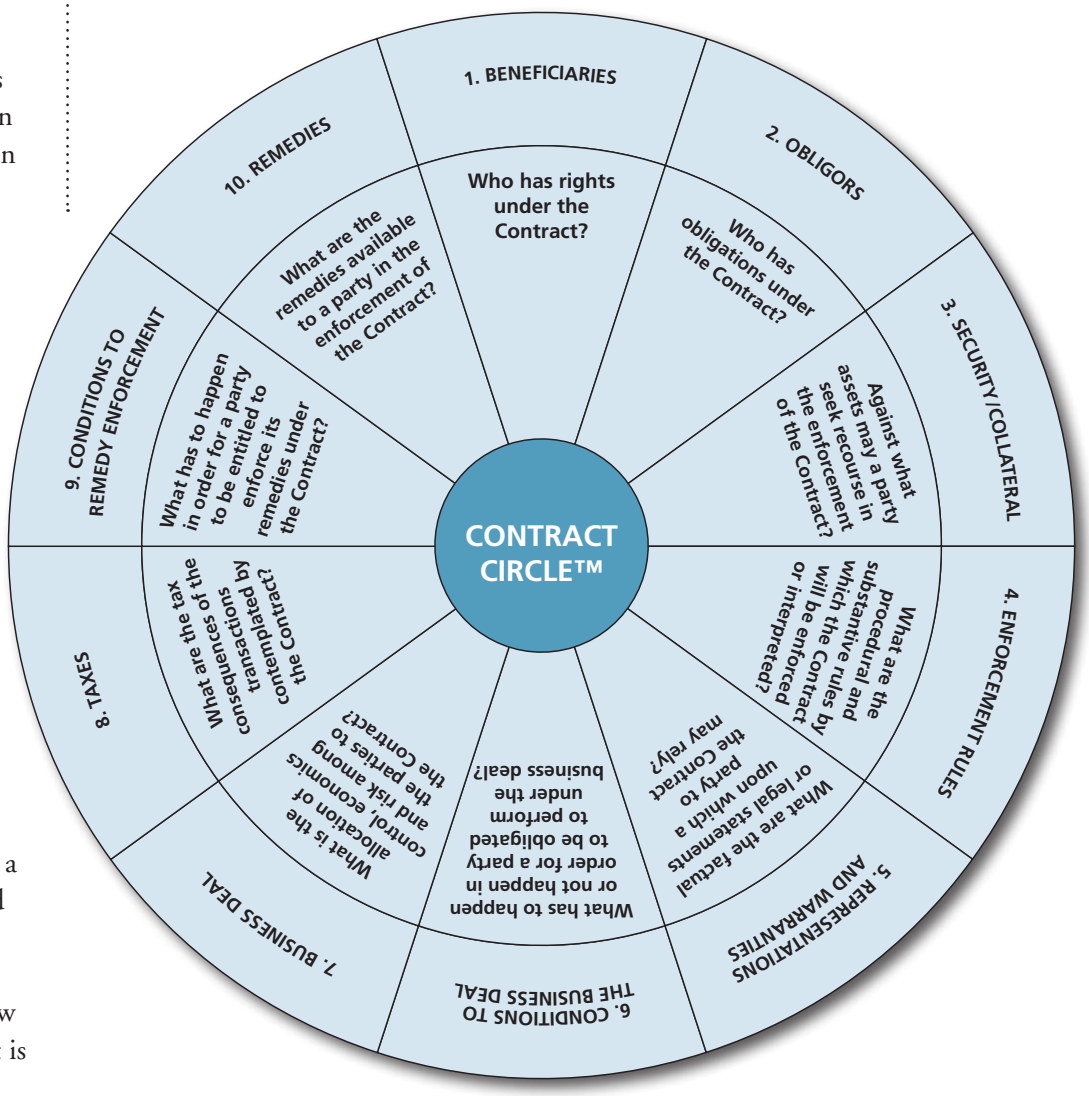
This process has been successfully applied to all types of transactions from a simple handshake deal to a 100 page agreement drafted by a team of attorneys. Both lawyers and business people have used Pat's process to gain a significant competitive advantage in analyzing and negotiating contracts.

Given that there are hundreds, if not thousands, of different types of contracts, the idea that all contracts answer *Ten and Only Ten Basic Questions* may at first seem somewhat counterintuitive. However, the validity of this idea has been tested, re-tested, proven and re-proven in all kinds of transactions and agreements over the last decade including mergers, acquisitions, joint ventures, financings, leases, licenses, non-compete and employment agreements, partnership agreements, operating agreements, settlement agreements, and supply agreements.

Since 2007, Pat has been teaching a Mergers and Acquisitions class based on his *Ten Basic Questions* at DePaul University's College of Law. His students constantly comment on how Pat's process for analyzing a contract is simple, practical, and extremely easy to apply. They quickly learn and use the *Ten Basic Questions* to analyze a fact pattern, negotiate a term sheet, and draft the corresponding definitive agreement. In connection with his class, Pat has authored the book: *Mergers and Acquisitions: A Universal Process for Analyzing any M&A Contract Using Ten and Only Ten Basic Questions.*

Both lawyers and business people have used Pat's process to gain a significant competitive advantage in analyzing and negotiating contracts.

If you would like further information on Pat's process for analyzing any contract using *Ten and Only Ten Basic Questions* or would like a copy of his book, please contact him at pbruks@burkelaw.com.



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trial expenses.

Further, a good arbitration panel disposes of a case quickly. In our case example, the claim was filed, arbitrators selected, all pre-trial matters finished and an award issued in less than 18 months. In court, the life of the case would likely have stretched to five years or longer. Lesson: Even though its compressed schedule imposes significant costs and attorneys' fees, the process of arbitration can still be more expedient and less expensive than a courtroom procedure.

No Discovery; No Big Deal: Arbitration's critics suggest that it limits or fails to enforce parties' valuable rights to (1) command and subpoena documents from third parties, (2) subpoena witnesses, and (3) preserve trial testimony through evidence depositions. But arbitration's relaxed rules of evidence allow ample opportunity for each side to present its full case. Parties to an arbitration agreement can agree to limit or expand each other's discovery rights (e.g., a limited number of depositions). In our example, neither party was prejudiced by such restraints and the matter moved forward quickly. Again, the lesson is that a well-managed arbitration makes good business sense.

Arbitration is often the better option for resolving disputes, if you avail yourself of its more advantageous features — a three-member panel experienced in your industry, a reasoned award, and seasoned arbitrators who can manage and effectively control the process to deliver a verdict in relatively short order.

To discuss arbitration issues and/or this article, contact Fred Mendelsohn at 312/840-7004 or fmendelsohn@burkelaw.com.

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