LEGAL EXPERTISE

Manchester-based firm focuses on bankruptcy and commercial litigation cases

For over 20 years, I have represented creditors and small businesses usually in complex commercial litigation cases, primarily in bankruptcy and federal courts. In 2022, Attorney Joshua Burnett and I created AMANN BURNETT, PLLC to focus on commercial litigation and bankruptcy cases. Our mission is to provide the highest caliber of legal representation, at reasonable rates with a holistic approach; we don't simply litigate, we serve as trusted advisors and never lose sight of our clients' best interests.

Some of the specific bankruptcy issues we handle regularly are Sub-Chapter V of chapter 11 (SBRA: Small Business Reorganization Act), business debt restructuring and wind-downs, chapter 11 and 13 plan formulation, objections and confirmation, cash collateral motions and budgets and reconciliations, valuation and evidentiary hearings, proofs of claim and defense, dischargeability actions, preference actions, motions for relief and bankruptcy ap-peals.

As a firm focused on business, we are well versed in handling commercial lease disputes, entity formation, operating agreements, asset purchase and sale agreements, secured transactions under the uniform commercial code (UCC), shareholder and derivative actions, and partnership and small business litigation.

Business often intersects with real estate, whether it involves land use/variances, zoning, leases, development, sales or real estate-related litigation, and the lawyers at AMANN BURNETT have substantial experience with these issues as well.

We love working with businesses and people. Above all, we are hardworking problem-solvers dedicated to obtaining the best results for you or your business. We are personable and accessible.

Striking the right balance between work and life is important. In my downtime, I sail, travel, cook, hike with my dog "Jack" and appreciate nature, music and art.

Attorney Burnett is an adjunct professor of law at the Massachusetts School of Law and is also an accomplished musician.

William J. Amann, Esq.

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LEGAL EXPERTISE

"Thumbs Up" Emoji Created a Binding Contract

A Canadian judge recently ruled that the popular "thumbs up" emoji may be used to form a contract between parties. The judge stated, "This appears to be the new reality in Canadian society, and courts will have to be ready to meet the new challenges that may arise from the use of emojis and the like."

Although the case — Southwest Thermal Ltd. v. Achter Land & Cattle Ltd. — does not establish precedent in U.S. courts, it does provide an interesting and perhaps controversial interpretation of this common means of communication and acceptance in today's world.

In this case, a grain buyer wanted to purchase flax from a farmer. The buyer texted the farmer a picture of a contract and asked the farmer to "please confirm flax contract" in the message. The farmer responded by text message and sent a thumbs up emoji, which he later said only indicated that he received the contract. The farmer said, "I did not have time to review the flax contract and merely wanted to indicate that I did receive his text message."

The seller/farmer did not want to honor the terms of the agreement after flax prices increased. In his ruling, the judge noted that the dictionary.com definition of the thumbs up emoji is "used to express assent, approval or encouragement in digital communications, especially in western cultures."

He added, "I'm not sure how authoritative that is, but this seems to comport with my understanding from my everyday use even as a late-comer to the world of technology."

The judge also noted that the parties had a lengthy history of doing business together and confirmation was often by text with responses of affirmation of "looks good," "ok" or "yup."

The judge ruled that there was a valid contract between the parties, which the seller/farmer breached by failing to deliver the flax. The buyer was awarded damages of $82,000 CAD, or approximately $61,000 USD.

The seller's attorney argued that allowing emojis such as the thumbs up, handshake or fist bump would "open up the flood gate" to cases requiring an interpretation of the meaning of an emoji. In response, the judge noted that the court could not change the commonly accepted use of the meaning of emojis in today's digital world.

The case points out the perils of today's technology on contracts, and is a reminder for businesses to pay attention to the commonly understood interpretation of digital communications.

For additional information on this, or any other labor and employment law matter, please contact one of the attorneys in the Portsmouth, NH, office of Jackson Lewis P.C.

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LEGAL EXPERTISE

Is your business in financial distress? There are options

Businesses facing financial distress with lenders, landlords or vendors have options other than closing their doors.

Two options for businesses to consider are forbearance agreements and the Subchapter V bankruptcy process, which is a streamlined, less expensive and more efficient bankruptcy process for smaller businesses.

Forbearance agreements

It is critical for financially distressed businesses to communicate with their lenders, landlords and vendors if an out-of-court restructuring is to take place.

One form of such a restructuring is a forbearance agreement. Forbearance agreements (FA) are agreements between a debtor (the business) and creditor (lender, landlord or vendor) that result after a debtor has defaulted on its payment terms with its creditor and the debtor has asked the creditor to forbear from exercising its collection or foreclosure rights.

Under an FA, the creditor agrees not to take collection action or to foreclose for a period of time in exchange for modified payments from the debtor, or other concessions if payments are suspended.

For a debtor, it is critical that an FA include, among others: attainable benchmarks including feasible payments, and a clear time frame of forbearance.

For a creditor, it is critical that an FA include, among others: statements that the lender has no obligation to lend additional money to the debtor or extend/renew the FA; and release language.

Both debtor and creditor will also want specific provisions within the FA regarding the defaults. While an FA is not a long-term solution, it can be designed to assist a debtor in stabilizing its finances, while also providing the creditor with certain benefits, thereby potentially saving the relationship between the debtor and creditor.

Subchapter V bankruptcy process

Chapter 11 of the Bankruptcy Code has historically been the manner through which struggling businesses have attempted to reorganize while retaining control of their assets and operations.

Chapter 11 provides invaluable tools for a business to restructure debt and do away with burdensome contracts, among other things, but chapter 11 also often involves slow and expensive processes that prohibit smaller businesses from utilizing chapter 11.

In February 2020, this problem was addressed with the enactment of the Small Business Reorganization Act (SBRA). SBRA amended the Bankruptcy Code to add Subchapter V, a streamlined chapter 11 process for smaller businesses. Subchapter V aims to make bankruptcy proceedings more expeditious and less costly by eliminating certain procedural hurdles, expediting time frames and eliminating certain fees, among others. For a debtor to be eligible to file a Subchapter V case, a debtor must be engaged in business and have secured and unsecured debt not exceeding a total of $7,500,000.

Why should a Subchapter V bankruptcy case be an attractive option for financially distressed smaller businesses? Subchapter V affords a debtor all the advantages of a traditional chapter 11 case — the ability to restructure and decrease debt, the ability to reject unfavorable leases and contracts, and, at the end of the process, a financially healthier debtor — but through a quicker and less expensive process.

In a Subchapter V case, the debtor must submit its plan of reorganization within 90 days of filing bankruptcy, thus ensuring a speedy process.

A trustee is appointed in each case, and the trustee's primary task is to facilitate a consensual plan of reorganization, thereby providing the debtor with an independent third party to assist in expediting the process. Fees owed to the federal government are eliminated.

As a result, Subchapter V has become a less expensive and more manageable process for smaller businesses, providing a restructuring opportunity that otherwise may have been too costly and too unpredictable.

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LEGAL EXPERTISE

Protect your business through divorce

A business may be a person's largest asset included in their marital estate at the time of a divorce. This business may also be the family's primary source of income, and necessary to continue after the divorce is finalized.

The value of the business and the income that it generates for a family will have significant impact on the issues of a final property settlement, child support and alimony. Both parties in a divorce proceeding should ensure the business can continue to operate and be profitable once the divorce is finalized.

For these reasons, it is important that the value of your business is safeguarded before, during and after your divorce. Below are two considerations to help protect this asset to continue to provide for you and your family.

1. Plan accordingly

If you own a business before getting married, a prenuptial agreement can set out the parties' future rights and responsibilities to the business in the event of a marriage breakdown. It may also set the terms of a property settlement and support payments if the marriage is ended. This may protect the value of the business and brings some certainty to the divorce process.

If no prenuptial agreement is in place at the time if the marriage, New Hampshire also recognizes post-nuptial agreements as enforceable. A post-nuptial agreement will allow the parties to negotiate a fair resolution to the distribution of marital assets should the marriage ultimately end.

Ultimately, a pre- or post-nuptial agreement can define the parameters of a fair market value (FMV) determination, which will reduce the time, expense and contentiousness of competing experts in your divorce.

2. Understand the value of your business

The court will look at the FMV of the business to establish what each parties' interest is in this asset. FMV of the business is determined through the expert testimony of a forensic accountant, who investigates the different aspects of the business and gives an opinion of the FMV based upon their training, experience and industry standards. Oftentimes, a party mistakes other financial metrics for the FMV.

Once the FMV is established or agreed upon, the challenge becomes how the non-owning party is compensated for their interest.

This could be through an offset of other marital assets owned by the parties or regular payments through the business to the other spouse.

In a worst-case scenario, the court could order that the business be sold and that the proceeds be divided between the parties.

If your family owns a business and are contemplating a divorce, it is important to consult with an experienced legal professional regarding all your options to protect and maintain your biggest financial asset.

David Tencza

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LEGAL EXPERTISE

Immigration pitfalls with the rise of working from home

We receive calls every week from employers asking us if it's acceptable for their foreign workers to change their workplace location to their home or a hybrid of in-office and at-home.

Seems simple enough — except employment eligibility status is governed by federal regulations involving foreign workers who are working in H-1B or E-3 status.

Employers are faced with outdated immigration regulations, while employees move forward with progressive work arrangements. There is no easy answer to find in the immigration regulations on hybrid employees and remote work locations.

Hiring a foreigner involves complying with Labor Condition Application rules from the Dept. of Labor (DOL) and paying the prevailing wage in the work location.

But the DOL has old definitions for "work site" dealing with brick-and-mortar locations and not cloud work sites. If the employee is moving from one site to another, and also working from home, then the geographic location and distance among these options must all be considered — which may require setting a new wage and filing amended immigration applications. New public disclosures may be required for the job and the salary.

The other factor that must be considered is supervision of the employee. Here it is easy for the employer to fall out of compliance with the DOL if the employee now works at a remote site and has other supervisors than the sponsoring employer.

Short-term placements can also put the employer in jeopardy unknowingly. All these new scenarios have exposed the antiquated immigration regulations surrounding employment of foreigners.

U.S. immigration laws are complex. New work arrangements are making them even more so.

Always consult immigration counsel before changing the work location of a given employee to be sure you remain in compliance and your employee remains in valid status.

John Wilson is President & Partner at GoffWilson, PA and focuses exclusively on global immigration in all industries — both inbound and outbound. You can reach him at jwilson@goffwilson.com.

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LEGAL EXPERTISE

Non-Compete Agreements Falling Out of Favor With the Federal Government

Courts in New Hampshire have long been critical of employers' use of "non-compete" agreements to restrict competition with former employees who depart to work for a competitor. Such agreements typically appear in employment contracts, shareholder agreements, or other contracts intended to define the parameters of the employment relationship. A non-compete clause is often incorporated into various "restrictive covenants" in such a contract, and is designed to prevent employees from seeking or accepting future employment within the same industry for a specified period of time and in specified geographic areas. While not illegal under New Hampshire law, such provisions must be narrowly drafted to protect legitimate business interests, and must pass a reasonableness test.

Earlier this year, the Federal Trade Commission (FTC) issued a new proposed rule purporting to further regulate non-compete agreements on the federal level. The FTC has a broad mandate to prevent unfair and deceptive trade practices in commerce. The proposed rule deems non-compete contracts to be an unfair method of competition, and would set a national standard regarding their legality. If adopted, and assuming it survives likely court challenges, the new FTC rule would effectively ban all non-compete agreements, except in limited circumstances. The new rule would also supersede all contrary state laws, rendering much of New Hampshire's less restrictive approach inapplicable.

In addition to prohibiting employers from entering into, enforcing, or attempting to enforce non-compete agreements, the proposed rule would also prohibit "de-facto" non-compete agreements. Any contractual provision that has a "de-facto" effect of prohibiting other employment could be deemed unfair competition in violation of the new FTC rule. For example, a contractual term that requires an employee to repay certain training costs if employment terminates within a specified time period may soon be deemed a "de-facto non-compete agreement" in violation of the new FTC rule. If the proposed rule goes into effect as written, employers will be required to rescind existing non-compete agreements and provide individualized notice to current and former workers who were previously covered by a non-compete agreement that the agreement is no longer in effect.

The FTC is not alone in its effort to curtail use of non-compete agreements on the federal level. In May, the General Counsel of the National Labor Relations Board (NLRB) issued an internal memorandum urging the Board to adopt the position that non-compete agreements in most circumstances amount to an unfair labor practice prohibited by the National Labor Relations Act (NLRA). While the NLRA is commonly regarded as the federal "union" law, its provisions apply to private employers, even if their employees are not unionized. While the memorandum does not have the force of law, the current NLRB has recently issued a number of employee-friendly decisions and could adopt the General Counsel's reasoning.

New Hampshire employers who use non-compete agreements should prepare for the potential scenario of a nationwide ban on most non-compete agreements in the near future. The FTC has indicated that it will likely vote on the proposed rule in April 2024, and, if approved, it would take effect 180 days later. In the meantime, employers should review their existing non-compete agreements to ensure that they comply with existing state law.

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As an attorney at Drummond Woodsum, Nicholas Blei devotes his practice to advising private and public entities on a full spectrum of employment matters, including collective bargaining negotiations, contract administration, and grievance and arbitration proceedings before state and federal administrative agencies.

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Public defenders provide legal advice on youth assessment process

BY MICHAELA TOWFIGHI

Before any charges are filed against a child in New Hampshire juvenile court, parents and children are asked the same question each time: Would you like to participate in the Child and Adolescent Needs and Strengths assessment?

The questionnaire allows youth to share more of their story — anything from family history with substance abuse to hobbies outside of school. And oftentimes, the detailed narrative the assessment provides can be the deciding factor in whether a child goes to court or is diverted away from the justice system.

Most families choose to participate. About a quarter decline. The assessment is a voluntary tool for the many sectors that touch the juvenile justice system to speak the same language and individualize plans for the children involved.

On July 1, a two-year, $100,000 contract approved by the Executive Council went into effect to provide legal counsel for youth in the juvenile justice assessment process.

The goal of these assessments and advice? Keep kids who don't need to be in court, out.

"If we can figure out what kids don't need to go there and shouldn't be there, then that's what we should be doing," says Pamela Jones, managing attorney at New Hampshire Public Defender's Nashua office.

Since introducing the universal assessment tool in October 2021, state data shows that 72 percent of the time, the assessment recommends a community referral for the child, instead of court involvement.

These community referrals include participation in community services, like the Boys & Girls Club or YMCA, mental health counseling, a diversion program or an at-home program through the Bureau of Children's Behavioral Health like FAST Forward.

These external options mean that children can access resources they need, without having to go through the court system.

Now, the New Hampshire Public Defender's attorneys can help explain how the assessment will be used as well as the varying outcomes of whether or not they participate.

The New Hampshire Public Defender solely provides legal counsel to youth clients,. However, both the parent and child have to consent to the assessment process. A report from the Department of Health and Human Services estimates that 100 children, ages 12-17, will be helped annually with this funding.

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