October 2014

Monroe McDonough Goldschmidt & Molla
Attorneys at Law

SOUTHERN ARIZONA'S REAL ESTATE LAW FIRM

MONROE McDONOUGH GOLDSCHMIDT & MOLLA

Welcome to the MMGM Newsletter

LAST ISSUE OF THE MMGM NEWSLETTER

MICHAEL J. MONROE'S RETIREMENT

HOW TO CONTACT ALL THE ATTORNEYS AS OF NOVEMBER 1, 2014
(SEE LAST PAGE)

IT'S TIME!

By Michael J. Monroe, Esq.

Practicing law over the past 47 years has been a very gratifying experience and I have enjoyed it immensely. I have witnessed enormous change in how law is practiced by attorneys and in the evolution of so many laws affecting us all. Like everything in life there have been many, many highs and also some low points. That is to be expected.

I started when attorneys could literally shake hands on a deal". Today, under most circumstances, that might be a breach of an attorney's duty to his/her client. Everything has to be reduced to writing. I have seen people become more strident and litigious. But, I have also seen the advent of alternative dispute resolution with mediation and arbitration to resolve disputes more quickly and more economically. Lots and lots of changes! One of the most impacting changes in the legal field has been the advent of attorney advertising. It has begun the transition of the legal profession being viewed as a business as much as, or more than, a profession. It has been most interesting to be part of that evolution.

But, the time has arrived for me to become a spectator rather than a litigator or counsellor. I have made the decision to retire. I have enjoyed the vast majority of clients I have worked with and for, and I appreciate every referral sent my way. It has been a great experience being able to help so many people in such a variety of ways. I hope that you will appreciate that the other attorneys in our firm are continuing their practice. I hope you will feel comfortable allowing them to continue with your legal work. They are all fantastic attorneys. I have enjoyed working with each and every one of them.

Now, it's time for me to seek new challenges. I hope that I find the new adventures to be as enjoyable as has been the practice of law. Again, I thank each and every one of you for your business, your patience, your referrals and, most of all, your trust and confidence. I will miss you all. Thank you for the great memories I will take with me into retirement.

Stay in touch with me on non-legal matters:

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DOING BUSINESS IN OTHER STATES: When is it Necessary to Register? *By Heidi Rib Brent, Esq.*

So you have a business going strong in one state and have some business in other states, how do you know if you have to register in the other states with their corporation commissions or similar agencies? And what does it matter if you don't? These can be very crucial issues for growing a business.

Only the federal government can regulate interstate commerce. Therefore, the issue begins with what is interstate commerce that only the federal government can regulate versus what is intrastate commerce – doing business within a state – which each state can define, regulate and tax. The difficulty is that states define "doing business" differently, have different standards and exceptions and some have heavy penalties for failure to register to do business in that state. Thus, it is a matter that needs to be evaluated on a state-by-state basis and is very fact specific. There is no easy answer. However, the general rule is that a business must register within a state if it has regular, repeated or continuous business contracts within that state or business of a local nature. Typically, if a business has offices, employees or actively targets advertising within a state, it will constitute intrastate commerce and the business will need to register.

Arizona's statute on foreign corporations (which means corporations formed in other states or countries), A.R.S. Section 10-1501 states: "A foreign corporation shall not transact business in this state until it is granted authority to transact business in this state as provided in this chapter from the commission." However, the statute continues to delineate activities that do not constitute transacting business within the state, including, but not limited to: "(1) Maintaining, defending or settling any proceeding. (2) Holding meetings of the board of directors or shareholders or carrying on other activities concerning internal corporate affairs. (3) Maintaining bank accounts. (4) Maintaining offices or agencies for the transfer, exchange and registration of the corporation's own securities or maintaining trustees or depositaries with respect to those securities. (5) Selling through independent contractors. (6) Soliciting or obtaining orders, whether by mail or through employees or agents or otherwise, if the orders require acceptance outside this state before they become contracts. (7) Creating or acquiring indebtedness, mortgages and other security interests in real or personal property. (8) Securing or collecting debts or enforcing mortgages and security interests in property securing the same. (9) Owning, without more, real or personal property. (10) Conducting an isolated transaction that is completed within thirty days and that is not one in the course of repeated transactions of a like nature. (11) Transacting business in interstate commerce. (12) Being a limited partner of a limited partnership or a member of a limited liability company."

Arizona's list is pretty broad! A similar list applies to limited liability companies in Arizona. A.R.S. 29-809. Given this list, examples of what would be intrastate commerce, requiring registration in Arizona, include owning rental property, selling goods or services through local employees, having a local warehouse and engaging in a transaction that is not completed within thirty days.

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However, some states (i.e. New York, Ohio, D.C.) have very few of the listed exceptions, and Alabama has none of the exceptions, which means that more businesses would have to register in those states.

One important factor in the evaluation whether a company is doing business in a state is how much income is the company making from the state's constituents. The more money earned within a state, the more the state wants to tax it! Thus, states will look very carefully at the number and extent of the contracts involving state residents.

So in this era of Ecommerce, with most businesses having websites, how do you apply these criteria? The analysis includes evaluation whether the website is passive, meaning informational only; active, in that it accepts orders; or interactive, in that it allows for the exchange of information. The more active or interactive a website, the more likely states will view the company as doing business within its borders, especially if a business uses technological tools to target customers in a geographic area within the state.

A business, having determined that it may be considered as doing business within a particular state, then needs to register within that state. It has basically two options: (1) it can register as a foreign corporation or limited liability company or (2) register as a new corporation or limited liability company within that state. A major benefit of registration as a foreign entity is simpler overall accounting and tax filings. However, a serious benefit of creating a new entity, usually as a subsidiary of the parent entity, is limitation of liability. If there is an incident giving rise to serious liability within one state, if the business entities are truly maintained separately, the liability can be limited to that one state entity and not impact the business in other states.

And if a company does business in a state and fails to register, so what? The most universal penalty is that the company cannot bring or defend a lawsuit in that state until or unless it becomes registered to do business there. During the period of registration, the company may miss important deadlines, including being in default or missing the statute of limitations. Other penalties that states may impose include shutting the business down within that state, convictions of misdemeanors by the company, its officers, directors or members, heavy fines and penalties, and hefty back taxes.

A company involved in this analysis should seek legal counsel to evaluate each state where it does business. If multiple-state registration is advisable, there are corporations that assist with filing in each state, acting as statutory agent and keeping the business advised of important changes to laws in each state.

TRUSTEE'S DUTY TO DISCLOSE ATTORNEY-CLIENT COMMUNICATIONS CONFIRMED. *By D. Rob Burris, Esq.*

Recently, the Arizona Court of Appeals confirmed Arizona's adoption of the Fiduciary Exception to the Attorney-Client Privilege by holding that a trustee must disclose to the trust beneficiary and successor trustee what would otherwise be privileged communications between the trustee and legal counsel. *Hammerman v. Northern Trust Co.,* 1 CA-CV 13-0260, 6/3/14.

In *Hammerman,* the Northern Trust Company served as trustee of a survivor's trust under which the plaintiff was the sole beneficiary. The plaintiff, as beneficiary, eventually removed Northern Trust as trustee and thereafter asked Northern Trust to provide all files related to the trust. Northern Trust transferred the majority of its files but withheld a number of communications between Northern Trust and legal counsel claiming that such communications were protected under the attorney-client privilege. The plaintiff was eventually forced to petition the court for an order forcing Northern Trust to disclose all communications related to the trust.
Under Arizona Revised Statute §12-2234(A), "an attorney shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment." The attorney-client privilege generally extends to "any communication" between the attorney and client.

However, there are exceptions to the general rule. Many jurisdictions outside Arizona have adopted the fiduciary exception which requires a trustee to comply with a beneficiary's request to produce all legal advice that the trustee has obtained on matters concerning the administration of the trust. Those jurisdictions who have adopted the fiduciary exception have done so under the belief that it is crucial for beneficiaries to know of the affairs and mechanics of the trust management in order to hold the trustee to the proper standards of care and honesty.

Under the fiduciary exception, a trustee has an obligation to disclose all attorney-client communications that occur in its fiduciary capacity on matters related to the administration of the trust. The Arizona Appellate Court therefore held that "a component of a trustee's duty under A.R.S. §14-10813(A) is a duty to disclose 'legal consultations and advice obtained in the trustee's fiduciary capacity concerning decisions or actions to be taken in the course of administering the trust.' Restatement (Third) of Trusts § 82 cmt. f. The attorney-client privilege does not permit a trustee to withhold 'material facts' from a beneficiary simply because the trustee has communicated those facts to an attorney."

However, like many things in the law, the exception is not without an exception. In this case, the fiduciary exception does not apply when a trustee seeks legal advice in a personal capacity on matters not related to the administration of the trust. Therefore, the attorney-client privilege does protect communications where the trustee has sought legal counsel on whether or not the trustee has breached its duties owed to the trust and/or beneficiaries. This is true even if the trustee used trust funds to pay for the legal counsel.

WHAT THE HECK IS AN EXCULPATORY CLAUSE?

By Michael J. Monroe, Esq.

Like a good attorney, the place to start on a subject likes this is with Black's Law Dictionary. It defines such a clause as a provision which releases one of the parties from liability for his or her wrongful acts.

Why do we worry about such clauses? The answer to that question is because such provisions most often appear in leases and contracts and trusts. Such a provision is intended to protect a party from liability primarily arising from the party's wrong doing or negligence. For instance, a common use is to protect a trustee from liability where the trustee has certain power which he or she attempts to execute but does so negligently. The exculpatory language is intended to protect the trustee, even if negligent, so long as the trustee acted in good faith.

In a commercial lease matter this firm handled, the lease provided that the landlord had the right, at any time, to make changes and alterations or improvements to the building including the right to change the entrances, exits, traffic lanes, parking layout and boundaries and to remodel or change the architectural design of the exterior. It provided that the tenant had no right to make any claim against the landlord for any reason as a result of any such action. The landlord proceeded to commence major renovations which, due to the manner in which the work was performed, caused substantial interference with the business of the tenant.

The starting point in analyzing such a claim is to know that exculpatory clauses are valid in Arizona. However, such clauses are disfavored by the courts. An exculpatory clause or waiver of rights is strictly interpreted against the party (here the landlord) relying upon such a provision.

In our case, the language was rather general as opposed to being specific as to exactly what the landlord could do. We took the position that due to the generality of the language the clause was ambiguous. Our position was that if there is an ambiguity due to the language being so broad that it should be resolved against the party relying on the provision (here the landlord). Although the tenant had an attorney represent him at the time he entered into the lease we argued the language was way too broad, not a separately negotiated provision and was tucked inside a larger paragraph whose title did not indicate the waiver. In other words it did not 'jump out' so, as a consequence, the provision was not 'brought home' to the tenant. The language was not highlighted or otherwise emphasized in the text in any way. We also argued that the language was not specifically discussed during the lease negotiations.

The fact is, some Arizona cases have indicated that the waiver must include the actual word "negligence" if that is what the relying party is being immunized from. In our situations there was no mention of a waiver of negligence and to the contrary, the language was very general indicating the landlord was purportedly exonerated from "any claims".

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WHAT THE HECK IS AN EXCULPATORY CLAUSE?

By Michael J. Monroe, Esq.

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We recognized the case was not an absolute 'winner' for the tenant. There were, as well, other issues existing between the parties. After two days in court our client prevailed overall in the case. There was no specific finding as to how the court viewed our defense to the exculpatory language.

The main lesson here is that when utilizing exculpatory language the party who wishes to rely upon such language should be as specific as possible. It would even be better to have the parties initial the provision so there is no question that at the time the contract was negotiated the waiver was brought to the attention of the other party. Naturally, it is even better if the parties discuss the provision so that the other party cannot deny the provision was brought to his or her attention and the party agreed to it with a full understanding of the consequences of the waiver. Also, bolding the language and perhaps even using a larger font for the exculpatory language is even better.

For real estate agents and brokers you can look at Article 6h lines 224 – 230 of the Arizona Association of Realtor's® Residential Resale Real Estate purchase Contract for an example of an exculpatory clause. It states:

" BUYER ACKNOWLEDGMENT: BUYER RECOGNIZES, ACKNOWLEDGES, AND AGREES THAT BROKER(S) ARE NOT QUALLIFIED, NOR LICENSED, TO CONDUCT DUE DILIGENCE WITH RESPECT TO THE PREMISES OR THE SURROUNDING AREA. BUYER IS INSTRUCTED TO CONSULT WITH QUALIFIED LICENSED PROFESSIONALS TO ASSIST IN BUYER'S DUE DILIGENCE EFFORTS. BECAUSE CONDUCTING DUE DILIGENCE WITH RESPECT TO THE PREMISES AND THE SURROUNDING AREA IS BEYOND THE SCLOPE OF THE BROKER'S EXPERTISE AND LICENSING, BUYER EXPRESSLY RELEASES AND HOLDS HARMLESS BROKER(S) FROM LIABILITY FOR ANY DEFECTS OR CONDITIONS THAT COULD HAVE BEEN DISCOVERED BY INSPECTION OR INVESTIGATION. (BUYER'S INITIALS REQUIRED) BUYER_____ BUYER _____ "

You can measure the above exculpatory language from the Arizona Association of REALTORS'® contract and see that the wording is precise, limited in nature, in bold print and requires the buyer(s) to initial that the buyer(s) has read and presumably understands the language.

Now you are an expert in the use of exculpatory clauses!!

AMENDING GOVERNING DOCUMENTS

By Carolyn B. Goldschmidt, Esq.

As any community association volunteer or member knows, the governing documents guide the operations of the Association and clarify the duties and responsibilities of members and the board of directors. Many communities have documents that were written in the 1970s and 1980s, which are outdated and don't reflect current practices or pertinent laws. Some boards believe that their HOA's governing documents need to be revised simply because of their vintage.

When do an HOA's governing documents need to be amended?

Most of the changes to the Arizona Condominium Act and Planned Communities Act affect the Bylaws (which contain the guidelines for administration of the Association) rather than the Declaration of CC&Rs. The Condominium Act became effective in 1986 and the Planned Communities Act in 1994; therefore, if your Bylaws and CC&Rs pre-date the pertinent Act, your documents are probably inconsistent with current law.

Some other reasons that your community's governing documents might need to be revised are:

1. The documents no longer reflect or support the physical and cultural realities of the community and are missing needed provisions.

2. There are multiple amendments in separate documents requiring cumbersome reference to multiple different documents;

3. The documents do not comply with secondary mortgage market lending requirements;

4. The CC&Rs has outdated provisions that could cause allegations of discrimination; like: (a) a provision giving the Association the right of first refusal or other restraints on the sale or leasing of property; (b) The CC&Rs wrongfully discriminates on the basis of age in violation of Fair Housing Act; (c) The documents do not give adequate authority and detail to allow the board to address existing or anticipated problems; (d) The documents are difficult to work with: contain omissions, ambiguities or inconsistencies, or are poorly organized.

Reasons Not to Amend.

1. The amendment process can be costly and time consuming;

2. Owners may not be convinced that a change is necessary and resist the efforts of the board;

3. If lender approval is required, it will take effort and further expense;

4. Proposed changes may be controversial and cause division in the community.

5. If the governing documents are usable and understandable by the directors and members. Oftentimes, associations with professional management have the guidance to work with older documents in conjunction with current statutes and best practices, and amendments are not required.

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AMENDING GOVERNING DOCUMENTS

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What are the Current Hot Amendments?

In the past couple of years, the CC&Rs amendment that I have been asked most frequently to prepare is one to allow the board to enter into an exclusive contract with a trash services vendor on behalf of all the association members. I also have amended condominium governing documents many times to add needed language to allow the board to borrow money to address deferred maintenance or needed repairs. And, leasing restrictions and rules pertaining to rentals also are a common amendment. Some HOAs have amended their insurance provisions to shift the burden of obtaining insurance from the HOA to the individual owners or to address insurance deductibles and losses that are considered a high risk.

The Process.

The board may summarily decide that the governing documents are outdated and lacking and start the amendment process. Otherwise, the board (with the help of the HOA's attorney) may undertake review of the documents to decide whether there appears to be a need for an amendment and identifies the major issues that need to be addressed by an amendment. A decision will be made on whether amendment and restatement is warranted, which is replacement of one or more of the documents with an updated version. The board may assemble a documents committee for the review and possible revision process. The board also needs to review the amendment procedure, which generally is in each of the documents.

In the CC&Rs, there may be a "duration" or "term" clause, which could result in a delay in the amendment process. This provision states, for example, that the CC&Rs shall remain in effect for 20 years, after which time, the document shall automatically renew for periods of 10 years each, unless terminated or amended by a majority of the lot owners. The Arizona Court of Appeal in the case of *Scholten v. Blackhawk Partners* interpreted a similar clause to mean that the amendment would not become effective until the transition from the first term to the second (i.e., after 20 years or at the 10-year renewal. It is very important to know what the amendment requirements require so that a window of opportunity does not close.

Here is the suggested procedure after the board's preliminary analysis and decision-making:

1. The Association's attorney prepares the proposed amendment or restatement of the document addressing the issues identified by the board and recommended by the attorney. In general, it is most cost effective to let the attorney prepare the first draft rather than a committee or the board. This will take less time than requiring the attorney to read through a draft prepared by others.

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AMENDING GOVERNING DOCUMENTS

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2. The board reviews and comments on the attorney's draft. It is often most productive for the board to meet with the attorney to review the revised documents. It is my experience that such meetings give rise to important policy discussions and refinement of the revised governing documents.

3. The documents are put in final form and mailed to the owners with a ballot and an explanatory cover letter.

A long enough voting period should be set so that board members and manager have time to cajole members into returning their votes. It is helpful if the owners are informed as soon as possible of the anticipated project and its scope so that they are aware of their needed involvement. It is very important to follow the amendment procedures exactly as written. For example some CC&Rs required the signed and notarized consent of at a specified percentage of owners attached to and recorded with the amendment.

If the amendment process is successful, amendments to CC&Rs need to be recorded at the County Recorder's office. Bylaws are not required to be filed or recorded at any outside agency. Articles of Incorporation need to be filed with the Arizona Corporation Commission and published for three consecutive issues of a newspaper of general circulation in the proper county.

The worse mistake I have seen boards make is to undertake extensive amendment of the governing documents without an attorney's review. Some boards removed whatever they did not understand and wound up omitting important provisions. Other boards used improper procedure for the amendments, creating confusion about which governing documents were in force and applied to a particular situation.

It often helps the approval process to have a town hall meeting of the members to allow questions from the members and suggestions for the revised documents. In any event, amending governing documents requires a reasonable strategy and adequate communication with the members.

MARK YOUR CALENDAR— October Events

1-31—Nightfall at Old Tucson

10-12—Patagonia Fall Festival

15—Fine Dining & Dancing

16-19—Tucson Fashion Week

17-19—Tombstone Helldorado Days

17-19—SAHBA Home & Garden Show

17-19—Phantom of the Opera Ballet

18—Bisbee 1000 Great Stair Climb

18-19—Cruzar la Cara de la Luna

22—Meteor Mania at Kitt Peak

24-26—Halloween at Reid Park Zoo

24—Doggie Costume Contest

24-26—Halloween Howl at Colossal Cave

24-26—Tchaikovsky Violin Concert

25—Jazz Under the Stars

25—Tucson Firefighters Chili Cook-Off

25—Feast With the Dearly Departed

10/31-11/02—Tucson Celtic Festival & Scottish Highland Games

Nov 1—Political Satire Fine Art Opening

SHOTGUN OFFER

By Karl MacOmber, Esq.

In Gries v. Plaza Del Rio Management Corp. and Harper, the Arizona Court of Appeals upheld a ruling by the trial court which had suspended and then dismissed an action for dissolution of a close corporation. During the course of the litigation, one shareholder offered to purchase the shares of the other partner. The parties agreement contained a "shotgun" provision, which provided that in the event one shareholder offers to buy the interest of another shareholder, the offering shareholder must be prepared to sell his shares for the same price he offered to buy the other's shares. Such a provision is designed to short-circuit a dispute that renders the business unmanageable. It is also designed to require the parties to make reasonable offers to purchase/sell because if one shareholder offers to buy the other's shares at a price far below market value, the offeror can be forced to sell his shares for that price. Similarly, a shareholder who insists upon an inflated price for his shares can be forced to purchase the others' shares at the same inflated price. Gries brought suit to dissolve the corporation and during the course of the litigation offered to buy Harper's shares for $1.5 million. Harper argued that the shotgun provision was inapplicable due to the fact that Gries had filed suit to dissolve the corporation, or, in the alternative, that her emotional attachment to the business would force her to match the inflated $1.5 million offer. The trial court dismissed the lawsuit, saying the shotgun offer mooted the litigation and leaving it to the parties to decide who would pay the $1.5 million. The Court of Appeals affirmed that ruling.

An Important Message from the Partners (Effective November 1, 2014):

As Monroe, McDonough, Goldschmidt & Molla approaches the end of its lease in its current office and combined with the retirement of both Mike Monroe after 47 years as an attorney and Negatu Molla after 40 years as an attorney, the remaining attorneys have agreed to reorganize into three separate specialized law firms, each in their own new office location. Thereafter MMGM will cease doing business. This transition is both amicable and exciting, and will occur on November 1, 2014.

Monroe, McDonough, Brent & Morales, PLLC will open its office at 2500 N. Tucson Blvd., Suite 140, Tucson, Arizona, 85716. Contact Number 520-292-2500. While Mike Monroe will retire, he has agreed to allow his name to appear in the new firm. Attorneys Larry McDonough, Heidi Rib Brent and Anne Morales, together with their staff, will continue their practice of real estate law, probate and estate planning, business law and litigation related to those areas.

Goldschmidt Shupe, PLLC will open its office at 6700 N. Oracle Road, Suite 240, Tucson, Arizona, 85704. Contact Number 520-265-4462. Attorneys Carolyn Goldschmidt and Mike Shupe, together with their staff, will continue their practice in all areas of homeowners association law, assessment collection and related litigation, as well as general real estate law.

Burris & MacOmber, PLLC will open its office at 2478 E. River Road, Tucson, Arizona, 85718. Contact Number 520-308-3138. Attorneys Rob Burris, Richard Burris and Karl MacOmber, together with their staff, will continue their law practice focused on business and real estate litigation and transactional matters, international law, estate planning and personal injury.

Even though they will separate their respective legal practices, all of our lawyers who are continuing their law practices look forward to continuing to provide clients with highly effective and competent counsel and representation. All the attorneys will carry on working with and cooperating with one another in overlapping areas of the law.

Thank you to all MMGM clients for the opportunity to serve each and every one of you. **Please feel free to call us at any time if you have any further questions or if we can be of service to you in your future legal needs.**