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M&P In Brief

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Lessons About Email from Recent Kentucky Court Cases

For any office worker, it's almost hard to remember the days before email. According to various histories of the Internet, the "@" symbol was first used in computer message sending protocols in the early 1970s. However, it was not until the mid-1990s that email usage began to reach the masses as Microsoft released its Windows 95 and Office suite of products and computers increasingly appeared on office desks. Over time, email has evolved into a communication mechanism that is almost universally available in the developed world, is interoperable between computer systems, is relatively inexpensive, and has reached a usage level where one expects a business contact to have an email address.

As one might expect, a communication system with email's characteristics has now become a part of the disputes that reach the court system for resolution. Over the past year, Kentucky courts have increasingly issued decisions in cases that mention email. What lessons can a business person learn from those court decisions?

1. Email Is Considered By The Courts To Be A Routine Part Of Business.

When I first started using email, I began to wonder how judges would consider emails. Would they demand extraordinary proof before admitting them as evidence? Would a case be decided differently because the information at issue came from an email instead of from a paper document or verbal testimony?

The tenor of the recent Kentucky cases is clear—judges treat email the same way you and I do—a well-recognized and commonly used method of communication. Whenever the word "email" is used, there is no special connotation.

There is one major exception to this—disputes over the extent to which persons in a lawsuit must locate, preserve and provide to the other side copies of their emails. The federal courts are constantly issuing decisions about who should pay to find emails in archive or other storage and the consequences of failing to preserve or produce email communications once a lawsuit is filed. If your business is regularly involved in litigation, you are probably well aware of this trend. If your business has not been sued recently, congratulations. But you need to know that pre-trial procedures in an era of emails are very different from lawsuits in a world of letters and paper files. You need to consult your attorney about what your business needs to do about email records in advance of a lawsuit and, no matter what, as soon as a lawsuit has been filed.

2. Do You Know What Your Employees Are Sending Out Via Email? Poor Employees Are Also Poor Email Users.

On September 21, 2007, the Court of Appeals decided the case of *Cole v. City Council Of The City Of Florence, Kentucky*, No. 2006-CA-2108. The lawsuit arose from a random screening of email messages by the City of Florence police department to determine "whether improper messages were being sent over the system." The police department identified five police officers who were sending what it considered to be inappropriate emails. The audit uncovered messages ranging from "K-Mart sucks" to various vulgar insults about co-workers. The officers were asked to explain those messages the department considered inappropriate, and all but one of the officers wrote letters acknowledging their wrongdoing and expressing contrition. The recalcitrant officer, Officer Cole, received a one-day suspension while the other officers received reprimands. The suspended officer then elected to appeal the discipline to the Florence City Council. Officer Cole not only received a hearing before the City Council, but at the end of the hearing the

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Equine Liens: Not just a Security Interest Anymore

The most popular times to buy and sell horses at public auction are the summer and fall seasons. This time of year always generates great interest in the Thoroughbred business. During the Keeneland sales, many banks, particularly those in central Kentucky, lend money to prospective purchasers. From July 2007 to November 2007 over 10,000 horses were catalogued to sell at Keeneland. It is not uncommon for 10 to 25% percent of the yearlings sold at Keeneland's September sale to be pledged as collateral.

Once a horse is purchased, it may be moved immediately to a local farm for breeding purposes. It could also be kept in Kentucky for boarding until the sales are complete. Regardless of the amount of time the horse remains stabled in Kentucky, there may be enough time for another lien to attach to the horse. This is something of which all lenders and secured creditors should be aware.

There are three major categories of equine liens: (1) Uniform Commercial Code (UCC) Article 9 security interests and agricultural liens; (2) statutory liens, including agister's liens, veterinarian liens and stallion service liens (which may be included as agricultural liens depending on the specific set of circumstances); and (3) common law and equitable liens, which are the least common of the three.

Revised Article 9 expanded the scope of the UCC to include certain kinds of liens, which were previously outside its scope. Specifically, KRS 355.9-102(1)(e) provides a new term defining "agricultural lien" as an interest, other than a security interest, "in farm products: (1) Which secures payment or performance of an obligation for: (a) Goods or services furnished in connection with a debtor's farming operation . . ." An agricultural lien is a non-possessory lien, which specifically classifies horses and equine interests as farm products, irrespective of whether the debtor is engaged in farming operations and without regard to how the horse or equine interest is put to use. KRS 355.9-101, Official Comment 4(a) and KRS 355.9-102 (ah)(5).

The Kentucky legislature has created a variety of equine statutory liens to secure payment for individuals who provide value to, or preserve the value of, a debtor's horses. For example, KRS 376.400 - 376.410 provide that the "agister's lien" applies to charges for "keeping, caring for, feeding and grazing" a horse. Here, the debtor's horse has received a benefit from the agister, or the boarding farm, which has provided the goods or services. In this instance, the debtor is usually not required to grant a security interest to the boarding farm. Requirements covering a veterinarian's lien are found under KRS 376.470 - KRS 376.475, and stallion service liens are found under KRS 376.420. Those statutory liens are now included within the scope of Revised Article 9, as the definition of a secured party now includes a person who holds an agricultural lien. KRS 355.9-102(1)(e).

Equitable or common law liens typically survive only during the period in which the lienholder retains possession of the horse. Typically, a common law lien may attach to a broodmare because of an unpaid stallion service fee in favor of the stallion owner. However, owners are now routinely required to grant a security interest in the mare to the stallion farm pursuant to a stallion service contract. Priority issues with prior perfected secured parties on the mare become complicated because, customarily, a stallion farm will not release a stallion service certificate (which is a pre-requisite to obtaining The Jockey Club Registration Papers) to the owner before payment is made for the stallion season.

The rules of priority for agricultural liens are the same as the priority rules for security interests: the first to file or to perfect wins under KRS 355.9-322(1)(a). A perfected agricultural lien on equine collateral can have priority over a "conflicting security interest in or on the same collateral if the statute creating the agricultural lien so provides." KRS 355.9-322(7).

As a general rule, an agricultural lien should be perfected by filing a financing statement with the Kentucky Secretary of State. This is because agricultural liens are, by definition, non-possessory liens, at least insofar as their effectiveness cannot be dependent on possession. KRS 355.9-310(1). However, the custom and practice in the industry is that an agister in possession of a debtor's horse will not even-handedly release the horse to a creditor or the debtor without paying the board bill. The holder of a statutory agister's lien, whether or not it has been perfected under KRS 355.9-322, may always argue perfection by possession pursuant to KRS 355.9-313.

The choice of law regarding the perfection and priority of agricultural liens is covered under KRS 355.9-302. The statute provides that the local law of the jurisdiction in which the horse is located governs priority, perfection or the effect of non-perfection. Note that the choice of law regarding the perfection and priority of security interests is applied separately pursuant to KRS 355.9-301. Though the law states that a financing statement should be filed in the jurisdiction where the debtor is located, it appears to be the custom and practice of the industry to also file in the jurisdiction where the horse is located. This is because, more often than not, the equine collateral is located in a different jurisdiction than the debtor. Also consider that horses routinely move from location to location, especially if the horses pledged as collateral are race horses. In light of Kentucky's recently enacted Thoroughbred Breeders' Incentive Fund under 810 KAR 1:070, more mares and foals are quickly moving from Kentucky upon breeding or upon weaning the foal. Therefore, it is imperative that all lienholders, especially secured creditors, remain cognizant of the location of its mobile collateral.

The Kentucky statutes creating the liens for agisters, veterinarians and stallion service providers do not provide for the liens to extend beyond 1 year without taking some action to enforce the liens. However, a financing statement filed under Article 9 is effective for five years

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Lessons About Email

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Council voted to dismiss him from service for misconduct. In a lawsuit challenging the dismissal, the Court of Appeals affirmed the dismissal.

Perhaps the most illuminating part of the opinion is the following quote from Officer Cole when asked about his view of his emails: "I guess I didn't understand what was appropriate, inappropriate, embarrassing, obscene."

Are your employees receiving training about how to appropriately use email? Does your company take any steps to understand what your employees are sending or receiving in their emails? This case illustrates that you may be surprised at what is really going on and what your employees actually believe is appropriate. Quite simply, poor employees are also poor email users—with their faults now documented in writing.

3. Just Because It Comes From Your Attorney Doesn't Mean It Won't Appear In Litigation.

The case of *United Propane Gas, Inc. v. Federated Mutual Insurance Co.*, No. 2005 CA-001101, arose from a propane gas explosion. The propane gas supplier's insurance company, Federated, settled a personal injury lawsuit over the explosion for $2.5 million and cancelled the policy. The premium for replacement insurance from a new insurer increased by $1.6 million (allegedly because of the settlement/claims history), and the propane gas company sued Federated and sued the law firm hired by Federated to provide the defense in the litigation, claiming malpractice.

The Court of Appeals ruled for the insurance company on the basis that it had legally sufficient grounds to settle the case. The court also ruled in favor of the law firm hired by the insurance company to defend the propane gas supplier. Among the evidence cited by the Court was an email from a second attorney hired by the propane gas supplier to monitor the lawsuit. It is unclear from the Court's opinion to whom the email was sent. In the email, the attorney expressed concerns about certain omissions by the propane gas supplier and the risk of an award of punitive damages. It seems likely that the attorney who sent the email did not expect at the time it was written that it would become a key piece of evidence used in a case brought against his own client years later.

Generally, attorney communications of this nature would be confidential (and often communicated orally). However, in a world of email, the communication can be produced in a written form and years after the fact. This case highlights the importance of remembering that emails (even those to and from an attorney) may become used in unexpected ways. Thus, care in deciding when to send an email and what it should say is always essential.

4. Being Careful Pays Off. Don't Send An Email When You're Angry.

The Court of Appeals opinion in *Vorobiev v. Hersh*, No. 2005-CA-002522, is proof that being careful pays off.

In that case, some students at the University of Kentucky School of Music were angry over the judging of a piano competition. The winner was a pupil of Dr. Alan Hersh, so Dr. Hersh received a copy of an email from a student expressing the dissatisfaction. In response, Dr. Hersh sent his own email to his supervisor and other university personnel. In his email, Dr. Hersh made several comments about another faculty member, Dr. Vorobiev, and her husband. The Vorobievs were angry at the content of Dr. Hersh's email, and they sued Dr. Hersh for defamation.

The Court of Appeals ruled in favor of Dr. Hersh finding that the "careful language" used by Dr. Hersh in his email was not defamatory. But perhaps the most important lesson from the case is to ask whether Dr. Hersh should have even sent the email. There was no formal investigation that Dr. Hersh had to defend, and the triggering email came from a student not a member of the University. Perhaps Dr. Hersh should have ignored the email (or just spoken to the student) and prevented a lawsuit that certainly had to be distracting even though he ultimately won. The lesson—never compose or send an email when you're angry. The satisfaction of the "here's yours" feeling when you hit the "send" key will always be outweighed by the fallout from the email.

M. Thurman Senn

Equine Liens

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from the date of filing. KRS 355.9-515.

Auctions are not the only venue uncovering liens under Article 9 and KRS Chapter 376. Our experience is that many private purchasers in the industry fail to perform their due diligence by conducting a lien search prior to buying a horse. A secured party may require that all or a portion of the proceeds be paid to the lienholder in order for it to release the lien prior to closing the transaction. Without a search, both the private purchaser and the lender may face costly litigation as a result of buying a horse that is collateral without an appropriate release.

At public auctions in Kentucky, however, a bona fide purchaser of a horse buys the horse or equine interest free and clear of any liens or security interests pursuant to KRS 355.9-320(6). Nevertheless, the lender does have some protection as the lien or security interest attaches to the proceeds of the sale as authorized under KRS 355.9-315(1)(b).

In summary, always consider whether or not the boarding farm, the veterinarians or the stallion season have been paid. Whether the borrower purchases a horse by private or public sale, all lienholders, especially secured creditors, should conduct a thorough examination of the complete value of its equine collateral, not simply its appraised value. Lienholders must remain cognizant of the location of their collateral and become familiar with the totality of equine transactions in general.

Emily H. Cowles

Security Interests and ATVs: Part III

How to perfect a security interest in all terrain vehicles (ATVs), and other off road vehicles, has been a subject of debate for two years among lenders, county clerks, and the Kentucky Transportation Cabinet. Some lenders have insisted on perfecting their security interest through filing liens on state titles issued for the ATVs.

The Attorney General has now entered the debate, finding in an informal opinion that the Cabinet does not have the statutory authority to issue titles for ATVs. The opinion, issued for Donald Blevins, Fayette County Clerk, also finds the Cabinet cannot allow the clerks to decide whether to title an ATV.

At the insistence of secured parties wanting to perfect their security interests in ATVs through the title lien system, some county clerks began issuing state Certificates of Title for ATVs. Last year, the Cabinet took contradictory positions, first notifying the clerks that they did not have the authority to title ATVs, and subsequently telling the clerks they could make their own decision on the issue while the Cabinet studied its authority.

The issue is important to secured creditors because a bankruptcy court has found that a title lien, properly filed, on an improperly issued title does not perfect a security interest. The court found, we think correctly, that the only proper means to perfect a security interest in ATVs is through a UCC financing statement filed with the Secretary of State. The process is as simple as the title lien procedure, and at $5 per electronic filing, less expensive.

Perfection through the UCC system is effective for five years (two years less than the effective period for a title lien). It would be unusual for ATV collateral to be financed for more than five years; however, the financing statement may be continued for another five years through an amendment of continuation and another $5.00 filing fee.

If the ATV is consumer goods, perfection occurs automatically, without filing a financing statement, upon attachment of the security interest. Security interests in ATVs that, because of their use, are classified as equipment can only be perfected by filing a financing statement.

If there is any doubt about the use of the ATV, filing a financing statement is always recommended. The collateral may be described in typical motor vehicle fashion by make, model and vehicle identification number, or included in a larger group of collateral using the generic description of "equipment."

Secured parties who attempted to perfect security interests in ATVs through title liens retain perfected status, without taking additional action, if the units are consumer goods. If the ATV collateral requires a financing statement for perfection, a secured party that attempted to perfect with a title lien can still file a financing statement. Purchase money status may be lost because of the late filing; however, unless another secured party perfected on equipment, a late filing should fix the perfection problem.

John T. McGarvey

Firm News

M&P Is Pleased To Announce . . .

- Thomas W. Volk and Clyde H. Foshee, Jr., formerly of the National City Law Department, are joining M&P as of counsel. Tom practices in the areas of commercial lending and workouts. Clyde practices in the areas of payment systems, checks, credit cards and letters of credit.
- Timothy A. Schenk has joined the firm as an associate attorney. Tim is a 2007 graduate of the University of Kentucky College of Law where he was a member of the *Kentucky Law Journal* and Trial Advocacy Board. He obtained his bachelor's degree from the University of Kentucky in business administration. Tim intends to focus his practice on commercial litigation and bankruptcy. Tim is located in M&P's Louisville office and can be reached at 502-560-6731 or *tas@morganandpottinger.com*.
- John McGarvey has been appointed as a member of the Public Policy Committee for Greater Louisville, Inc.
- Emily Cowles has been named a senior associate.
- Jim Scroghan has been admitted to practice in Tennessee.
- Camille Rorer has become a member of the Board of Directors for the House of Ruth.

In Other News . . .

- On June 19, 2007, at the University of Kentucky College of Law's 34th Annual Midwest/Midsouth Estate Planning Institute, John Majors gave a presentation on creditors' rights in probate and non-probate estates.
- On August 28, 2007, John McGarvey gave a presentation for the Texas Bankers Association entitled "Default, Remedies and Enforcement under Revised Article 9".
- On September 11, 2007, Margie Loeser presented on mediation, arbitration and mechanic's liens at a seminar for the Kentucky Ready-Mixed Concrete Association and held by Kentucky's Small Business Development Centers.
- On September 13, 2007, John McGarvey gave a presentation for BankersOnline Learning Connect entitled "Common Mistakes in UCC Filing".
- Shon Leverett, a senior associate of M&P, has also become a member of M&P Collections, LLC.
- If you would like to receive future editions of M&P In Brief electronically, please e-mail us at *newsletter@morganandpottinger.com*.