

Illinois Legal Update

Insights and Developments in the Law

Fall 2007

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Liability for Dog Bites

If you agree to take care of someone else's dog, you may give up any claim you have against the dog's owner if the dog injures you. By assuming control and care of the dog as a dog sitter or a dog walker, you give up the protection granted by the Illinois Animal Control Act because you are considered the dog's owner under the statute.

If you agree to watch someone else's dog, make sure you are able to keep the dog under control for the protection of others and yourself.

Before the Animal Control Act was passed, the law followed a "one-bite rule," which required a person who was injured by a dog bite to prove that the dog's owner knew or should have known that the dog had a tendency to injure people. In effect, the old rule made a dog owner liable only the second time that the dog bit someone, and thereafter.

The Animal Control Act was passed to give broader protection to the public and to provide an incentive to a dog owner to maintain control over his pet. Under the Act, you can be liable if your dog (or another animal, such as a ferret), without provocation, attacks or injures a person who is conducting himself peaceably in a place where he may lawfully be. The Act imposes such liability not only upon the actual dog owner, but also upon a person who keeps or harbors the dog, a person who has the dog in his care, a person who acts as the dog's custodian, or a person who permits the dog to remain on his premises.

One Illinois court found that a 10-year-old boy who agreed to take care of his neighbor's dog for five days placed himself in a position of control over the animal. While the dog was in the boy's care, they collided, causing injuries to the boy. Because the child had assumed responsibility for the dog, he was acting as the dog's legal owner and therefore had no right to recover damages from the dog's actual owner for his injuries.

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Doing Business on the Web— Clickwrap Agreements

Every day, more and more business transactions are conducted over the Internet. Many of these transactions begin with a “clickwrap agreement.” Clickwrap agreements are variations on “shrinkwrap” agreements (those printed terms and conditions usually found in the packaging for software). Clickwraps basically work the same way, but the user agrees to the terms by clicking a button on his computer, instead of by opening the package and using the product. While clickwrap agreements are still widely associated with software licensing, their use has spread to a wide range of business settings, such as advertising services, telecommunications, and banking, to name only a few.

Given that clickwraps have become ubiquitous, it is prudent for businesses to consider their advantages and to be informed as to the desirable characteristics that any clickwrap agreement should have. As compared with their paper predecessors, clickwraps are easier and quicker for a customer to accept, and more difficult for the customer to attempt to change. They provide a measure of control that is to the business’s advantage. Depending on the size of the business and its market, clickwraps can be the means by which countless relationships are formed and deals are struck, so it is vital for any business using them to get all of the details correct. To ensure enforceability and to head off later legal problems to the greatest extent possible, companies should seek and use the advice of legal counsel as they create clickwraps tailored to particular businesses.

Once a business decides to use a clickwrap agreement, there are certain traits that should be considered:

- Put the steps in the right order. Before a customer is expected to pay for the product or service, or is allowed to receive it, he should be given the chance to review the entire clickwrap agreement and the option to accept or reject all of its terms and conditions.
- Identify the user. If the party who comes to a company’s clickwrap represents another company, it is especially impor-

tant to get identifying information that will show that the user is authorized to bind his company to the agreement. To this end, the clickwrap should have places for the user’s name, the company’s name, the user’s title, and both e-mail and physical addresses. Of course, aside from its value for such verification purposes, the identifying information can be useful in other ways.

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Tax Consequences of Selling Collectibles

Collectibles such as gold and silver coins, works of art, antiques, and stamps have seen significant appreciation in value lately. As the buying and selling of collectibles picks up, it is important to be familiar with the tax consequences of such transactions.

If collectibles are sold at a profit, the price increase is treated as a capital gain for income tax purposes. For a holding period of more than one year, the gains are long-term. The downside for sellers is that long-term gains on collectibles are taxed at 28%, not the 5% or 15% rate likely to be used for gains from the sale of other forms of property. To establish the basis, which is the cost of an item for tax purposes, owners of collectibles should keep records of the price paid for the items, as well as records of any expenses related to the items, such as insurance or storage costs. The expenses may be added to the basis, thus decreasing the taxable capital gain when the property is sold.

Someone who inherits valuable collectibles will receive a “step-up” in basis to market value at the time of the inheritance, rather than using a basis determined by the earlier cost of acquiring the property. The new, higher basis means a reduced tax when the property is eventually sold. Inherited collectibles should be appraised right away, so as to establish the value to be used for the stepped-up basis.

Clickwrap Agreements

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- Do not make the user hunt. The clickwrap should be readily apparent to a user, and the “install” or “download” button should appear only after the clickwrap is set out in its entirety. In the same vein, a checkbox indicating that the user has agreed to the terms of the clickwrap makes good sense. The idea is to prevent anyone from claiming in a later dispute that there were parts of the agreement that he could not have easily seen, and to which he did not give his assent. As for any terms that are weighted in favor of the business, making them hard to find is an especially bad idea. On the contrary, these terms should stand out, maybe even with their own “I agree” checkbox.
- Drop the legalese. As is true for any contract, a clickwrap should use clear, plain English. It is well settled in law that a court will construe ambiguous terms against whoever wrote them, that is, the business whose clickwrap is being deciphered.
- Make the clickwrap control. If there are any other dealings with the user, whether oral or written, that conceivably could be said to constitute a separate agreement, they all should explicitly defer to the clickwrap agreement. Likewise, the clickwrap itself should have lan-

guage indicating that its terms override any conflicting terms in other agreements relating to the transaction.

- Keep the final word for your business. What if a user navigates successfully and accepts the clickwrap agreement, but your business determines for some reason that it wants no business relationship with that user? The business should provide itself with an escape hatch, with language in the agreement to the effect that the business must confirm the agreement before it becomes enforceable, or that the business can cancel the agreement at will.

Clickwrap agreements have gained acceptance as valid, enforceable contracts, albeit in an unconventional format. This point is illustrated by a recent federal court decision. In a breach-of-contract dispute between two software companies concerning the use of licensed software, the court hardly paused at the question of whether a clickwrap agreement constituted a valid contract. In answering “yes,” the court also relied on an extensive list of prior court decisions that had reached the same conclusion. The clickwrap agreement has become a permanent part of the legal landscape for businesses and individuals alike.

Arbitration? Better Tell Them First

Arbitration (a private process by which people settle disputes outside of court) has become increasingly popular with big business, which sees it as a way to avoid being made to answer at the courthouse. Indeed, it is hard to find any large company that does not force its customers to arbitrate disputes. However, a recent decision by a court in Illinois might signal a shift in this trend.

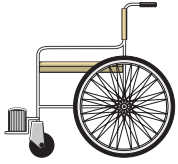
The case involved a dispute between a satellite TV company and a subscriber. The subscriber sued,

claiming that the company’s late fees violated state law. The company tried to force the subscriber to arbitration, but the court refused to send her because it found the arbitration agreement to be procedurally unconscionable. It noted that the customer did not receive a copy of the agreement until after she had signed up for the service and paid for the equipment, and that the agreement was contained in minuscule type in a long pam-

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Resolution of legal issues depends upon many factors, including variations of facts and interpretations of Illinois law. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.

Nursing Home Regulation



As the population ages and people live longer, nursing homes and the care they provide will become even more important to thousands of Illinois citizens. Fortunately, the quality of care provided by nursing homes is subject to the requirements of both federal law and the state Nursing Home Care Act, which is enforced by the Illinois Department of Public Health (on the web at www.idph.state.il.us).

The Nursing Home Care Act regulates almost every aspect of nursing home operations. It specifies that (as much as possible) residents of nursing homes retain the same rights as they had before entering the nursing home. These include the rights to manage their affairs, to privacy, to receive visitors, and to worship as they please.

The Act governs the quality of the care provided to nursing home residents and establishes minimum standards that nursing homes must meet with respect to everything from the handling of the resident's funds, to the screening of staff, to the provision of medical care. All nursing homes in the state are required to be licensed, and, in order to keep their licenses, the nursing homes must follow the provisions of the Act and be ready to have their operations inspected by the Department of Public Health for compliance.

As the nursing home "watch-dog" agency, the Department of Public Health ensures compliance through a combination of thorough regular inspections (done at least once every six to 15 months) and

inspections in response to complaints received throughout the year. In either case, inspections are conducted without notice to the nursing home, and the schedules of inspections are changed annually to make sure that a deficient nursing home does not have a chance to "clean up its act" before the inspector comes.

Also, if a nursing home has a history of problems and deficiencies, it will probably be inspected by the Department of Public Health more frequently than would a nursing home with a good record of compliance.

If the Department of Public Health finds some deficiency (whether during a regular inspection or in response to a complaint),

it requires the nursing home to come up with a plan to correct the problem. It can fine the nursing home for serious violations of state law, in an amount up to \$10,000 per violation, and can further recommend fines for violations of federal law. Additionally, it may take other kinds of enforcement actions, such as forcing the nursing home to curtail admissions or appointing a qualified temporary manager, or it may suspend or even revoke the nursing home's license to operate.

Although the number of regulations governing nursing homes is high, they are intended to promote the important goal of ensuring that nursing homes are safe and healthy places for the residents to live.

Dog Bites

Continued from page one.

It does not matter how long you assume care and control over someone else's dog, or even whether you care for the dog as a favor or for payment. An Illinois court denied recovery to an employee who was injured while walking her boss's dogs one day as a favor. Because the dogs were in her custody and control at the time that she was injured, the court considered her to be the dogs' owner and did not allow her to pursue her lawsuit against her employer.

The moral of the story is, if you agree to watch someone else's dog, make sure you are able to keep the dog under control for the protection of others and yourself.

Arbitration

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phlet included in her first bill. The court may also have been influenced by the fact that the subscriber had no bargaining power, i.e., it was a "take-it-or-leave-it" deal.

Because the only way for the consumer to avoid the arbitration provision was to cancel her service (which would have meant losing the amount she had spent on equipment and incurring a deactivation fee), the court accepted the argument that she had no meaningful option in deciding whether or not to agree to arbitrate her claims. The court went on to find that this lack of a meaningful choice meant that the agreement was so unfair that it could not be enforced.