Title: CHAPTER 2
BANKING, COMMERCIAL, & CONTRACT LAW
Item: Book Chapter
Date: 2008
Publication: 2008 Kansas Annual Survey, Volume XIX
Publisher: Kansas Bar Association
ISBN: 1-890452-20-3

KANSAS BAR ASSOCIATION

CHAPTER 2
BANKING, COMMERCIAL & CONTRACT LAW

David E. Pierce

I. INTRODUCTION

During the April 2007 to April 2008 reporting period there have been several cases addressing general common law principles regarding banking, commercial, and contract law. There are no significant legislative developments in these areas to report since the 2007 survey, which addressed all developments during the 2007 legislative session.

II. COURT DECISIONS

A. Banking Law

1. Fiduciary Obligations of Bank to Non-Customer; Tortious Interference

When can an inquiry by a non-customer of a bank, regarding the application of loan funds by the bank's customer, give rise to fiduciary obligations to the non-customer? In *Linden Place, LLC v. Stanley Bank*, 38 Kan. App. 2d 504, 167 P.3d 374 (2007), the court of appeals reversed the trial court's grant of summary judgment in favor of Bank on the plaintiff's fiduciary duty claim. The court held the existence of a fiduciary relationship was an issue of fact that iwas not appropriate for summary judgment. Linden Place owned lots which it sold to Williams Building & Development Corporation on credit. Williams was a customer of Stanley Bank. Williams agreed with Linden Place to construct houses on the lots. To facilitate a construction loan by Stanley Bank to Williams, Linden Place agreed to subordinate its lien for payment of the lots to Stanley Bank's construction loan.

The alleged fiduciary relationship arose when Scott Harder, a representative of Linden Place, discovered that Williams was not using all the Stanley Bank construction funds to construct houses on the Linden Place lots. In October, Harder contacted Walt Dotson, Stanley Bank's representative, and informed him of his concerns regarding Williams. The pertinent facts recited by the court are:

> Dotson told Harder he would investigate the matter and report back shortly.
>
> Two days later Harder contacted Dotson again, and Dotson assured Harder that he had looked into the matter and was handling it. He told Harder not to be alarmed about the situation and that expenditures would be monitored carefully in the future.
>
> Shortly thereafter Harder learned of additional improper expenditures by Williams. He contacted Dotson to alert him to the ongoing misuse of loan proceeds. Harder also contacted Joe Jackson, the president of Stanley Bank. ... Jackson ... thanked Harder for bringing the matter to his attention and assured Harder that he would look into the matter and report back shortly. When Harder called Jackson again the next day, Jackson advised that he had no further comment on the matter and was not represented by counsel.

Characterizing these facts as giving rise to "an extraordinary close question" the court of appeals noted: "It is certainly possible that out of such discussions a fiduciary relationship could arise, albeit for a short period of time. ..." For this reason, the court held that summary judgment was improper. Judge Marquardt dissented, stating that these facts could not support a fiduciary relationship, particularly when dealing with "a third party that had no relationship with the Bank."

The court also affirmed the trial court's grant of summary judgment in favor of Bank on Linden Place's tortious interference claim. The court first listed the basic elements of a tortious interference claim as: "(1) [T]he existence of a contract between [Linden Place] and Williams, (2) Stanley Bank's knowledge of it, (3) the Bank's intentional procurement of its breach, (4) the absence of justification, and (5) resulting damages." Linden Place alleged that Bank induced Williams to breach its contract with Linden Place by failing to monitor the use of loan proceeds disbursed to Williams pursuant to its loan with Bank. Rejecting this argument, the court noted that nothing in Williams' contract with Linden Place addressed the use of loan proceeds; and there was no showing of any intentional or malicious conduct by the Bank.

2. *Bank's Actions Resulted in Loss of "Check-Kiting" Insurance Coverage*

Exchange State Bank of St. Paul, Kansas purchased a "check kiting fraud indemnifiction policy" from Kansas Bankers Surety Company to protect it from the classic check-kiting scheme where a depositor uses checks written on Bank A to deposit in Bank B, and then writes checks on Bank B on the uncollected funds from its Bank A check. By the time the checks are processed and it is determined there are no funds to cover a deposited check, one of the Banks is left with the loss.

Exchange State Bank established a practice of allowing Cash Grain of Weir, Inc. to incur overdrafts on its account, which the Bank would track and then notify Cash Grain that it needed to make a deposit to cover the overdrafts. Bank would charge an overdraft fee, and Cash Grain would make the necessary deposits. This continued for four years. By July 2004, the overdraft amounts exceeded $400,000. On August 9 and 10, 2004, Cash Grain deposited with Exchange State Bank $523,000 in checks drawn on Cash Grain's account with Labette Bank. In a few days, $1,031,000 in checks drawn by Cash Grain on its Labette Bank account were returned to Exchange State Bank for insufficient funds. Exchange State Bank sought to recover this loss under its insurance policy with Kansas Bankers Surety, to the extent of the $250,000 policy limits.

Kansas Bankers argued that it had no liability under its policy because of an express exclusion from coverage "for any loss which is the result of *willful extension of credit by the Insured* through the payment of checks drawn on uncollected funds." (Emphasis added) The Kansas Court of Appeals, in *Exchange State Bank v. Kansas Bankers Surety Co.*, __ Kan. App. 2d __, 177 P.3d 1284 (2008), held that Bank's conscious acts of paying checks against uncollected funds over a period of months, charging overdraft fees, manually processing payment of overdrafts, and contacting Cash Grain to make additional deposits, constituted the "willful extension of credit" as contemplated by the exclusion. Therefore, Exchange State Bank had no coverage for the losses it sustained due to Cash Grain's check kiting scheme.

The court relied on Professor Clark's observations in his treatise where he noted: "Making a conscious decision to allow a hard overdraft in a checking account should qualify as an unsecured 'loan,' even if the depositor has not signed a formal overdraft credit agreement." The court did a good job of distinguishing the Cash Grain situation from situations in which a bank, as a general policy, allows for expedited funds availability to comply with the federal Expedited Funds Availability Act and Regulation CC addressing the same topic. Although these routine banking practices will result in "the payment of checks drawn on uncollected funds," they would not be the sort of activities that could be classified as the "willful extension of credit." The court of appeals addressed this issue because the trial court, in denying coverage under the policy, took a much broader view that would make any payment on uncollected funds something that could potentially be encompassed by the exclusion. The court noted that view would render the policy meaningless. The "willful extension of credit" language in the exclusion properly defines the line between the routine payment of checks on uncollected funds and those situations where Bank has consciously taken on additional credit risks.

3. *Bank Allowed to Proceed Against Accounting Firm for Negligent Audit*

First State Bank provided funds to the Law Enforcement Equipment Company ("LEECO") through a revolving line of credit based, in part, on audit reports and financial statements prepared by Daniel and Associates, an accounting firm. When LEECO defaulted on its loan, Bank sued Daniel and Associates for negligent preparation of the audit reports and financial statements for its client, LEECO, which Bank relied on to extend credit.

In *First State Bank v. Daniel & Assocs.*, 519 F. Supp. 2d 1157 (D. Kan. 2007), the federal district court denied Daniel and Associates' motion for summary judgment, noting that the Kansas Supreme Court would most likely apply the Restatement (Second) of Torts § 552 to this situation. Section 552 allows a third party non-client to bring a claim against an accountant for negligence under a negligent misrepresentation theory. In a prior decision, the federal court had held that the statutory protection provided by K.S.A. 1-402 would not apply in this case because Daniel and Associates was not registered with the Kansas Board of Accountancy.

B. Commercial Law

1. *Waiver of Right to Accelerate Loan Following Late Payment*

CTP, LLC entered into a promissory note with Foundation Property Investments, to fund the purchase of a truck stop. Monthly payments on the note were made on time during the first four months but were late during the following nine months, including the payment on June 1, 2005. When the July 1, 2005, payment did not arrive on July 1, Foundation, by letter dated July 8, gave notice that the note was in default and that Foundation was "exercising its option to declare all of the unpaid principal and interest immediately due and payable." The trial court rejected CTP's waiver defense and granted Foundation summary judgment for the full amount owed, including accrued interest, attorney fees, and costs. The Kansas Court of Appeals, in *Foundation Property Investments, v. CTP, LLC*, 37 Kan. App. 2d 890, 159 P.3d 1042 (2007), *rev. granted* (Nov. 7, 2007), reversed the trial court and held that Foundation's acceptance of late payments for a nine-month period constituted a waiver of its rights under the acceleration clause. Observing that the note at issue did not contain an anti-waiver provision, Foundation's

course of performance in accepting late payments without objection limited its ability to declare an acceleration.

Under these circumstances, Foundation would need to give CTP advance notice that it would no longer accept late payments. The acceleration clause could be used by Foundation prospectively, so long as CTP were put on notice that Foundation expected future payments to be made in a timely manner.

The court also stated the basic rules for interpreting promissory notes and mortgages: They are contracts, and they will be governed by "ordinary rules of construction applicable to contracts. ..." "Like other contract rights ... an acceleration clause may be waived." "Waiver" in this context is "the intentional relinquishment of a known right. ..." The intention to waive a right can be inferred from conduct. In Kansas, such implied waiver can be controlled by use of an "anti-waiver" clause such as: "Any waiver of any payment hereunder or under the instrument securing this note at any time, shall not, at any other time, be taken to be a waiver of the terms of this note or the instrument securing it." The note at issue in *Foundation* did not contain an anti-waiver clause.

Although not raised in this case, an alternative basis for the holding in CTP's favor could be a breach of the covenant of good faith in the *enforcement* of the contract. For example, Restatement (Second) of Contracts § 205 provides: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Cases frequently focus on good faith to define a party's discretion in the performance of imprecise contractual provisions. However, it is equally applicable when a party is seeking to enforce their contract. A case that illustrates this principle is *Baker v. Ratzlaff*, 1 Kan. App. 2d 285, 564 P.2d 153 (1977), which dealt with the structurally similar situation where the seller had a right to terminate a supply contract if payment was not made upon delivery. The seller had accepted payment after delivery but, without prior notice, exercised its contractual termination right for a subsequent failure to pay upon delivery. In that case, the seller was held to be the breaching party when it relied on the termination clause following a payment made after delivery. Such action breached its obligation to enforce the contract in good faith.

The court also addressed CTP's argument that Iowa law should be applied to the note because it was signed in Iowa. The court rejected that argument, noting the contractual transaction in which the note was delivered was entered into in Kansas and that the management services agreement, which was part of the transaction, contained a choice of law provision designating Kansas law as the governing law. The issue was of limited significance because the court held that Kansas, like Iowa, would recognize a waiver of the acceleration clause.

2. *Unconscionability Claim Against Towing Company Not Preempted*

The Kansas Attorney General brought claims against a towing company for alleged violations of the Kansas Consumer Protection Act ("KCPA"). The district court held the KCPA claims were preempted by an express preemption clause in the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 14501(c)(1). In *State ex rel. Kline v. Transmasters Towing*, 38 Kan. App. 2d 537, 168 P.3d 60, *rev. denied* (Dec. 18, 2007), the court held the activities at issue came within an express exception to the preemption clause.

The ICCTA preempts state regulation "related to a price, route, or service of any motor carrier. ..." However, excepted from preemption is state regulation of matters "relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle." In this case the alleged unconscionable acts related to towing of vehicles without the prior consent of the owners. The court held that the KCPA's unconscionable acts or practices provisions were matters "relating to" price and therefore not preempted.

3. *Due Diligence and the Sale of a Business*

The federal court's opinion in *Ascend Media Professional Services, LLC v. Eaton Hall Corp.*, 531 F. Supp. 2d 1288 (D. Kan. 2008), provided insight regarding the sale of a business, the associated due diligence process, and problems that can occur when the sale price is based on revenue projections by the seller. Scott Goldman, through various Eaton Hall entities, built up a successful trade show business which Ascend Media agreed to purchase for $3.3 million. The purchase price was based, in part, on a multiple of projected income from the 2006 show. The numbers were derived from a 2006 show budget prepared by Goldman which projected $1.27 million in revenue; the actual revenue was about $1.02 million, or about a 19% shortfall. Ascend Media contended that this inflated the purchase price by $1.8 million.

Although the court found that the facts might support Eaton Hall's good faith estimate of 2006 show income, good faith is an issue of fact that cannot be resolved at summary judgment. However, the other issues raised were resolved in Eaton Hall's favor as a matter of law. The facts regarding the disclosures, representations, and actions of Eaton Hall all supported the conclusion that it acted in accordance with the purchase and sale agreement. In the process of arriving at this conclusion, the court worked its way through the contract terms, disclosures made as part of the due diligence process, and an evaluation of the accuracy of Eaton Hall's disclosures and representations.

C. Contract Law

1. *"Contract Clause" of Constitution Not a Limit on Condemnation*

In 1947, Richard and Virginia Wilks conveyed property to a school district in the form of a fee simple determinable for so long as the property was used for "school purposes." In 2005, the school district commenced condemnation proceedings to acquire the possibility of reverter held by the Wilks' successor in interest, Young Partners. Although the special limitation on the grant had been satisfied since 1947, the school district was seeking to protect its investment in the property by seeking condemnation, as expressly authorized by K.S.A. 72-8212a.

In *Young Partners v. U.S.D. No. 214*, 284 Kan. 397, 160 P.3d 830 (2007), the Supreme Court held that Article I, § 2 of the United States Constitution, the "Contract Clause," which provides that "No State shall ... pass any ... Law impairing the Obligation of Contracts," does not limit the state's sovereign power of eminent domain. The trial court held that K.S.A. 72-8212a was unconstitutional because it allowed a 1982 statute to negate the contractual relationship created by the 1947 conveyance. Rejecting the trial court's holding and analysis, the Supreme Court noted that it has long been held "that the states' power of eminent domain is one of the 'essential attribute[s] of sovereignty' that is not subject to the limitations of the Contract Clause."

Therefore, the inherent power of eminent domain held by the state of Kansas was properly delegated by the legislature, through K.S.A. 72-8212a, to the school district as a public entity authorized to exercise these powers reserved to the state. "In the case of a public contract where the state (or some government agent) is one of the contracting parties," the Contract Clause will not limit the public entity's ability to exercise rights, such as eminent domain, that fall within the state's inherent reserved powers.

2. *Real Estate Broker was "Procuring Cause" Under Contract*

The court of appeals, in *Antrim, Piper, Wenger, Inc. v. Lowe*, 37 Kan. App. 2d 932, 159 P.3d 215 (2007), upheld summary judgment for a real estate broker under a nonexclusive right to sell agreement. The purchaser of the property saw the listing on the broker's website, contacted the listing agent, who then directed the purchaser to contact the owners to find his way to the property. The purchaser met with the owners and entered into a contract to purchase the land for $1,500,000 with the understanding that the sale would be structured as a "1031 exchange" so the sellers could defer capital gains taxes on the sale.

The contract was signed, and a $75,000 down payment was made the same day, May 19, 2004. The exchange property was obtained, and the transaction closed on April 12, 2005. The sellers refused to pay the 5% commission, claiming: (1) the agent had not done anything to complete the sale, and it was a nonexclusive listing; (2) the contract closed after the 90-day period following the August 22, 2004, termination of the listing agreement; and (3) no commission was due in the event the property was exchanged instead of being sold in a cash sale. Rejecting each of these arguments, the court first held that although the owners did the work in preparing the contract, obtaining the purchaser's signature, and closing the transaction, this was all done with a "buyer procured by a real estate agent hired by the owner." The court noted that "the key undisputed fact remained that [owners] knew that [the purchasers] had been sent to them through the efforts of [the broker's] salesperson. Moreover, without [broker's] website listing, [the purchaser] would not have learned of the ranch." Therefore, the agent was the "procuring cause" of the sale and was entitled to receive its commission.

Regarding the termination date of the listing agreement, the Court held that the critical date was the date the sales contract was entered into (May 19, 2004), not the date it was ultimately closed (April 12, 2005). The court held that the contract contemplated that if the property were sold in an exchange transaction, a commission would still be due, but it might not be possible to deduct it from cash sales proceeds because cash might not be involved.

3. *Contractual Rights to Terminate and Cure Under Trademark Contract*

The Coleman Co. entered into a contract with Fleetwood Folding Trailers, Inc. ("FFT"), authorizing FFT to use the Coleman trademark on trailers manufactured by FFT. When FFT failed to comply with various provisions of the contract, Coleman followed the contractual termination procedure which required:

> (1) FFT must fail to perform or fulfill any term or obligation of the agreement; (2) Coleman must provide "written notice" to FFT of those defaults; and (3) after receipt of written notice, such default continues for 30 days.

Following written notice, and FFT's failure to cure within 30 days, Coleman declared the contract terminated.

The trial court found that Coleman would have to establish a "material breach" of the contract before it could terminate the agreement. The court of appeals, in *Fleetwood Folding Trailers v. Coleman Co.*, 38 Kan. App. 2d 30, 161 P.3d 786 (2007), *rev. granted* (Nov. 7, 2007), held the trial court erred when it implied that a "material" breach was required by the termination clause. The termination right applied to FFT's failure to perform "*any* term or obligation" of the contract. "The parties' inclusion of 'any' suggests that the provision breached may be one or more of the provisions

in the agreement, not that the provision breached must be material to the agreement." *Fleetwood,* at __.

Regarding the contractual opportunity to "cure," the court held that under any definition of the term, FFT failed to take the necessary action to remedy its noncompliance with the contract. FFT argued for an interpretation that it had 30 days to cease violating the agreement; Coleman argued that FFT would have 30 days following notice "to remedy any existing breaches and return the parties to their predefault conditions within the 30-day period." The clause stated Coleman could terminate when FFT "fails to perform or fulfill any term or obligation ... in the time and manner provided, and if such default shall continue for thirty (30) days after written notice thereof." The court rejected FFT's interpretation stating: "The 30 days were not intended to give breaching parties an extended time period to commit new breaches." *Id.* at __.

4. *Freedom of Contract or Abuse of Contract? Contract Disclaimers*

Katzenmeier v. Oppenlander, __ Kan. App. 2d __, 178 P.3d 66 (2008), is another of a mounting line of unsuccessful cases attacking contract disclaimers in standard form real estate sales contracts. The process, and the design of the process, are pretty basic: First, have the property owners fill out a detailed statement revealing everything they know about the property they are selling. Second, deliver the disclosure statement to the prospective buyer so the buyer can read it to determine the status of the property; and, often, to determine whether there is anything that warrants further inspection. Third, real estate agents instruct the buyer to obtain an inspection, if buyer wants one. Fourth, buyer is instructed to sign documents that say buyer is not relying on anything in the disclosure statement. Fifth, buyer purchases the property and discovers a major defect, which the sellers most likely knew about but didn't reveal in the disclosure statement. The legal result, in Kansas, is pretty clear: buyer loses.

Katzenmeier was a suit alleging intentional and negligent misrepresentation. Summary judgment was granted to the buyer because, under the express terms of the contract, the buyer could not have reasonably relied on the allegedly false representations made by the seller.

It appears the only way to combat the effect of such disclaimers is to refuse to agree to them — which requires adequate counseling and is unlikely to come from the buyer's real estate agent — the agent will tell buyer to get an inspection. As with any contract regarding a major financial transaction, the only way parties can adequately protect themselves is through competent legal counsel. Counsel can begin by turning the seller's disclosure into affirmative representations that will survive the closing and provide the buyer with the power to rescind, damages, or attorney fees, etc., in the event a representation proves to be inaccurate. In the long term, this will not be a happy state of affairs for the real estate industry when the sale of residential real estate departs from the simple cookie-cutter form of transaction and begins to resemble the more heavily-lawyered commercial real estate deal. I predict this will continue to be the trend until disclaimers in form contracts are revised to remedy the imbalance now created in favor of the seller and everyone else involved in the transaction, except the buyer.

5. *Contract Formation, "Meeting of the Minds," and a "Reasonable Time"*

Navair, Inc., for almost 30 years, was the exclusive distributor in Canada for IFR Americas, Inc. Navair would procure buyers of IFR's products which IFR would sell at a discount to Navair. In October of 2002, IFR gave Navair notice that IFR would not renew the distributorship contract, which would expire on October 31, 2002. In *Navair, Inc. v. IFR Americas, Inc.*, __ F.3d __, 2008 WL 697381 (10th Cir., 2008), the court considered the precise date on which the contract would end as to a particular sale that Navair was concluding with the Canadian government when it received IFR's non-renewal notice.

The trial court granted IFR summary judgment concluding: "IFR was willing to protect Navair's price quotations until January 31, 2003" but not beyond that date. Navair contended that the parties had agreed Navair would have a "reasonable time" to conclude the transaction with the Canadian government which was not concluded until after January 31, 2003. The court of appeals reversed the trial court, holding that an issue of material fact existed regarding how long "IFR was willing to protect Navair's price quotations."

In the process of arriving at its decision, the court explored some of the foundations of contract law. First, IFR argued that without a specific termination date, any agreement to extend as to the Canadian government sale lacked an "essential term" and was therefore unenforceable. The court rejected this argument, noting that under such circumstances courts will readily imply a term: the extension will be for a "reasonable time." Citing Kansas case law, the court noted: "a 'basic principle of contract construction is that where a contract does not specify the time of performance or for the occurrence of a necessary event, a reasonable time will be implied.'" This meant the trial court, on remand, would have to ascertain what would be a reasonable time under all the circumstances.

IFR's second argument was that since it understood the extension would end on January 31, and Navair did not, there was no "meeting of the minds" and therefore no mutual assent essential for the formation of a contract. This argument, which the court also rejected, allowed it to discuss why the frequently stated requirement of "meeting of the minds" really does not require any such thing. It did that by distinguishing

between the *objective* and *subjective* theories of contract. The court noted: "Contracts are not formed by comparing mental states [subjective theory]; they are formed by what the parties *communicate* [objective theory]." The court made the point with the following quotation from the 4th edition of Williston on Contracts:

> In the formation of contracts ... it was long ago settled that secret, subjective intent is immaterial, so that mutual assent is to be judged only by overt acts and words rather than by the hidden, subjective or secret intention of the parties. During the first half of the nineteenth century, however, there were many expressions which seemed to indicate a contrary rule. Chief among these was the familiar statement, still invoked by many courts today, that a contract requires a "meeting of the minds" of the parties. However, the fundamental basis of contract in the common law is reliance on an outward act (that is, a promise), as may be seen by the early development of the law of consideration as compared with that of mutual assent.

1 Richard A. Lord, Williston on Contracts § 4:1 (4th ed. updated 2007).

The court also relied on the analysis of the Kansas Court of Appeals in *Southwest & Assocs. v. Steven Enterprises,* where the phrase "meeting of the minds" was used, but then was immediately limited to its modern objective context:

> In order to find that Southwest and Steven Enterprises entered into an enforceable contract, Southwest is required to show a meeting of the minds as to all essential terms. In determining intent to form a contract, the test is objective rather than subjective, meaning that the relevant inquiry is the manifestation of a party's intention, rather than the actual or real intention. Put another way, the inquiry will focus not on the question of whether the subjective minds of the parties have met, but on whether their outward expression of assent is sufficient to form a contract.

The court used these observations to conclude: "[E]ven if IFR understood that the extension would lapse on January 31, 2003, that understanding is irrelevant because there is no evidence that this understanding was communicated to Navair when the two parties agreed to an extension of the December Agreement."

The Restatement (Second) of Contracts fully supports the objective analysis, except in one situation: "misunderstanding." Restatement (Second) of Contracts § 20 contains what I like to call the "Rule Against Perpetuities of Contract Law" and provides, in part: "There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and (a) neither party knows or has reason to know the meaning attached by the other. ..." This is a restatement of the holding in the *Raffles v. Wichelhaus* case regarding the two ships named Peerless which sailed from Bombay; one in October, the other in December. Although this would seem like a big hole in the objective theory of contracts, as a practical matter it is usually subsumed by interpretive rules, such as those found at Restatement (Second) of Contracts § 201, where at least one party is deemed to have known, or should have known, of the meaning attached by the other.

6. *Evergreen Clause Extended Contract; Economic Loss Doctrine*

Rabb Sales, Inc. entered into a contract giving it the right to distribute the products of Domino Amjet. In *Raab Sales, Inc. v. Domino Amjet, Inc.*, 530 F. Supp. 2d 1192 (D. Kan. 2008), Domino filed a motion to dismiss in response to Raab's complaint asserting breach of contract, negligent misrepresentation, and unjust enrichment. One of Domino's defenses to the contract claim was that Domino terminated the contract in November 2006. However, the contract contained what is commonly referred to as an "evergreen clause" which would automatically extend the contract for an additional year (November 1 to October 31) "in the absence of three months' prior written notice by either party." Under this provision the notice of termination would apparently have been due before August 1. Therefore, the contract was extended through October 31, 2007 unless some other event terminated it, and assuming that the proper termination notice was given to prevent the contract from extending beyond October 31, 2007. The court denied Domino's motion to dismiss Raab's contract claim.

The court granted Domino's motion to dismiss Raab's negligent misrepresentation claim after finding it barred by the "economic loss doctrine" recognized by Illinois law. The court found that Illinois law applied to the dispute because of an express choice of law provision. Under the economic loss doctrine, "a plaintiff may not recover solely economic damages in a tort action." Such "economic losses due to defeated expectations of a commercial bargain" are matters of contract, not tort.

The Kansas Court of Appeals has applied the economic loss doctrine in several cases. *Prendiville v. Contemporary Homes, Inc.*, 32 Kan. App. 2d 435, 83 P.3d 1257, *rev. denied* (2004), collected the relevant Kansas case law and described the purpose of the rule as follows: "The doctrine is designed to prevent a party from asserting a tort remedy in circumstances governed by the law of contracts." The doctrine recognizes that a contract can provide a sort of immunity from tort liability when the asserted wrong would otherwise be a potential breach of contract. The doctrine, however, is still being defined in Kansas. *See generally*, Kevin Breer & Justin

D. Pulikkan, *The Economic Loss Rule in Kansas and its Impact on Construction Cases*, 74 J. Kan. B. Ass'n 30 (2005).

7. Causes of Action Arising Out of Competition by Unfaithful Employees

It requires careful planning when an employee decides he or she no longer wants to work for the "boss" but instead wants to compete with the boss as an independent entrepreneur. The legal problems that can arise when employees commence a competing business, while still employed by their soon-to-be competitor, are reviewed by the court in *Resource Center for Independent Living, Inc. v. Ability Resources, Inc.*, 534 F. Supp. 2d 1204 (D. Kan. 2008). Although the opinion concerns the defendants' motion to dismiss the plaintiff's claims, it provides a nice summary of the varied claims that can arise against a group of allegedly unfaithful employees.

As alleged in the complaint, former employees of Resource, while still employed by Resource, began setting up their competing business under the Ability Resources name. Plaintiff alleges its employees: gained access to files on Resource computers and other property to assist Ability in competing with Resource; made representations to Resource customers that suggested there was a relationship between Resource and Ability; and generally set into motion a plan to depart from Resource and take with them Resource business and good will.

The plaintiff's claims included: (1) violation of the Lanaham (Trademark) Act for use of the Resource name in violation of federal law protecting a service mark; (2) violation of the Computer Fraud and Abuse Act, a federal law designed to protect confidential and proprietary information maintained in an electronic format; (3) breach of the duty of loyalty that employees owe their employer in this situation; (4) tortious interference with Resource's business relationships with its clients; (5) conversion of Resource's equipment, including confidential and proprietary information; and (6) a civil conspiracy that resulted when the employees took action to execute their plan to ultimately compete with their employer. All of the plaintiff's claims survived defendants' motion to dismiss.