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Is Backdating Ever Okay?

Legal Update

12.05.2017

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Although backdating can be either legitimate or improper, it is often misunderstood and associated with wrongdoing. Backdating encompasses a broad scope of conduct ranging from blatant fraud to the legitimate and common practice of executing a document after the event has already occurred. This article provides a brief overview of how to distinguish legitimate backdating from improper backdating.

To a layperson, backdating sounds like a bad thing. But it can be either right or wrong. Its legitimacy depends upon its purpose and effect. In some cases, backdating is pure fabrication. It is improper, of course, to date a document on one date, but the event occurred on a different, later date. Typically this type of backdating occurs when the beneficiary of the backdating can reap some sort of tax or other benefit if the event had occurred on the earlier date.

Examples of improper, fraudulent backdating:

- The backdating of a transaction from January of one year to December of the previous year in order to receive tax benefits from the earlier date.
- The backdating of invoices to make it appear that revenue occurred in an earlier period on a company's financial statements.
- The backdating of a deed to protect real estate from a creditor.

However, not all backdating involves fabrication. Backdating can also involve the practice of dating a document on the date the event occurred even if it is not signed until later. Here, the event occurs before the document evidencing it can be executed, and the document simply memorializes the earlier event. This is both a common and legitimate use of backdating.

Examples of legitimate memorialization:

- A lender loans a borrower some amount of money, which the parties agree will be memorialized with a promissory note. Thereafter, the promissory note is drafted and dated as of the date the loan was made, not the date that the note was drafted.

- During a board meeting, the directors verbally approve certain corporate actions. Later, the meeting minutes are drafted and executed reflecting the date of the meeting, not the date of the execution of the document.

Simply put, if a document is dated before the occurrence of an event, the backdating is fabricated and improper. On the other hand, if the document is executed after the event has occurred but accurately reflects the date of the event, the backdating is a proper memorialization. The line between these practices, however, is not always clear. For example, the date when the event itself occurs can be uncertain. Sometimes the law governing the event is ambiguous, and other times the facts surrounding the event are unclear.

Often a contract arises through a series of negotiations, and the exact time at which the agreement is reached may not be clear. Thus, when a contract is drafted that backdates to the date when the parties believe their agreement was reached, it may be unclear whether the backdating fabricates or memorializes. Likewise, backdating is a common practice in the conveyance of property, and here too the time of the transfer of ownership can be unclear. Determining the date of an event is further complicated by ambiguous records, limited recollections and the reliance on the recollections or statements of others. Moreover, at times fabricated backdating can be innocuous when no third party's rights are adversely affected and no law is violated, and other times backdating that memorializes can be problematic if it misleads a court to believe the document was executed on the date the event occurred.

Unfortunately, backdating is often inevitable. In order to mitigate your risks, you should always disclose your use of backdating by either identifying the date of execution or by utilizing "as of" dating. It is also important to have an attorney review the issue and provide guidance before you choose to backdate anything.

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