

AN “OFF THE SHELF” BUY-SELL PROVISION MAY NOT WORK FOR MANY MISSOURI BUSINESS OWNERS

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When a new business is formed by two or more owners, just like a new marriage, the participants often are so enamored with the new endeavor that little attention is given to the possibility that their union may one day come to an end.

Careful consideration must be given **early in a business relationship** to provide for an exit mechanism when owners no longer wish to participate in business with each other.

Buy-Sell Provision

A buy-sell provision is similar to a prenuptial agreement, in that it can establish mutually agreeable exit procedures that can be triggered in certain situations, such as when owners have reached a deadlock, when an owner retires, becomes disabled, gets divorced or dies, or when an owner is simply ready to exit the business. Buy-sell provisions can be simple (e.g., in the event one owner dies, the surviving owner can purchase the deceased owner's interests for \$100) or considerably more complex, consisting of pages of procedures.

Buy-sell provisions tend to have intriguing names, combining a geographical location with a risky activity, such as Texas Shootout or Russian Roulette. However, buy-sell provisions are not only the domain of John Wayne and James Bond—all business owners should have one in place.

A buy-sell provision should be tailored to meet the particular needs of a business and its owners.

Texas Shootout

A Texas Shootout is a classic type of buy-sell provision, where one owner sets a price at which the responding owner must elect to either purchase the initiating owner's interests or sell the responding owner's interests to the initiating owner at the set price.

A Texas Shootout is designed to keep owners honest when valuing their business; however, while a

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Texas Shootout is elegant in its simplicity, without careful planning, business owners in Missouri may find that an “off the shelf” Texas Shootout provision does not meet their needs.

The recent Missouri Court of Appeals decision in *Forbush v. Adams* provides a cautionary tale against using an off the shelf Texas Shootout provision.

Background on *Forbush v. Adams*

Forbush v. Adams, 460 S.W.3d 1 (Mo. App. E.D. 2014) In 2007, **Edwin Forbush** and a trust controlled by **Stephen S. Adams**, III, as the owners of 51% and 49% of Midtown Partners and Associates, Inc. (“Midtown”), respectively, acquired a Harley Davison dealership located in Vacaville, California.

Around the inception of Midtown, the two shareholders agreed to a Texas Shootout provision, which provided that either shareholder may make an offer to purchase the shares of the other “upon the terms and conditions” and at the price set forth in the offer.

Some buy-sell provisions will spell out the “terms and conditions” of an offer in great detail. The two shareholders in *Forbush* decided that such level of detail was unnecessary when they negotiated the terms of their Texas Shootout provision.

In 2013, Forbush elected to initiate the Texas Shootout Provision.

Forbush’s offer required the buyer to comply with the following “terms and conditions”:

1. repay loans advanced by the shareholders to Midtown
2. personally guarantee the seller’s guarantees of Midtown debt
3. offer a consulting agreement to the seller.

In response, Adams refused to agree to the terms and conditions, claiming that the offer added terms and conditions contrary to the Texas Shootout provision. Litigation ensued.

- **Forbush** contended that his offer was fully compliant with the Texas Shootout provision because there was no reason to restrict the meaning of “terms and conditions.”
- **Adams** claimed that the “terms and conditions” language related only to the purchase price and payment terms, and not peripheral matters, like repayment of loans advanced to Midtown and consulting agreements.

Missouri courts had not previously ruled on a similar matter.

Missouri Court of Appeals: *Forbush V. Adams*

The Missouri Court of Appeals reviewed the purpose of Texas Shootout provisions and concluded that **the purpose is generally to provide a fair method to value a company so that a company or a member’s ownership interest in such company can be discontinued.**

- According to the Court, the purpose **does not necessarily** include separating all of the owners’

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business "entanglements."

- In reviewing whether the "terms and conditions" language in the Midtown Texas Shootout provision encompassed more than price, the Court **observed that the owners dealt with personal guaranties** of Midtown debt in another provision in their agreement.
- The Court concluded that the reference to additional "terms and conditions" **only applied to payment terms** because the owners addressed specific other terms and conditions elsewhere in their agreement.

The *Forbush* decision is significant because it limits the efficacy of simple "off the shelf" Texas Shootout provisions in Missouri, especially for business owners that do not adequately negotiate and document the terms of their Texas Shootout provision. Many business owners, as a result, may be disappointed when they discover that their Texas Shootout provisions do not operate as intended.

Texas Shootout Conclusion for Missouri Entity Owners

Owners of a Missouri entity using a Texas Shootout provision should consider **specifically delineating in their operating or shareholders' agreement critical terms besides price** that the offer in the Texas Shootout provision may address.

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