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Limit your company's legal risk by negotiating form contracts

By Lee A. Dresie, Esq., Greenberg Glusker, Los Angeles, CA

Lee Dresie is a partner specializing in real estate litigation with the Los Angeles based firm of Greenberg Glusker Fields Claman & Machtinger, LLP. Greenberg Glusker is a member of Primerus, to which Rothman Gordon also belongs. Primerus is an international consortium of law firms. Through our membership in Primerus, Rothman Gordon lawyers are able to assist our clients throughout the country and around the world. For more information please visit the International Society of Primerus Law Firms.

Form contracts account for more than 80 percent of all agreements used to complete business transactions today. That percentage may be even higher when it comes to commercial real estate transactions like the ones companies sign to acquire corporate headquarters or satellite offices.

Unfortunately, many executives do not carefully review the specifics of a form contract before signing. Instead, they assume the form contract will be equitable to both parties. However, unless the form is an industry-neutral form such as one from the AIR Commercial Real Estate Association or Commercial Association of Realtors, terms in a standard form contract are generally designed to favor the party that presents it.

To limit a company's risk, it is vitally important to be able to recognize and negotiate unfavorable provisions out of form contracts. This may necessitate a call to in-house or outside counsel with expertise in the area.

By negotiating the form contract presented to him, a savvy building owner in Los Angeles was able to collect 15 years of rent from an outdoor sign company even though the law prevented the sign company from ever constructing a sign on the building.

The building owner had been approached by a well-known outdoor sign company about leasing the roof of his building for a large billboard. After reaching an agreement on the rent amount and term of the

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Rothman Gordon, P.C.
Attorneys At Law
310 Grant Street
Third Floor, Grant Building
Pittsburgh, PA 15219
(phone) 412.338.1100
(fax) 412.281.7304
www.rothmangordon.com

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lease, which totaled $750,000 over 15 years, the sign company presented the building owner with its "standard" form lease. The form lease provided that if the sign company could not obtain a building permit to erect the billboard, or if applicable building codes changed, the sign company could terminate the lease with no penalty of payment. The form lease thus placed all risk on the building owner.

The sign company was an expert in the field and familiar with the building permit process. The sign company was aware of a movement by the Los Angeles City Council to ban all new signs. Since the possible ban did not affect existing signs, the sign company wanted to get this deal done quickly so it could construct the billboard before any ban occurred. Once the ban went into effect, existing signs would become that much more valuable.

The building owner did not immediately agree to the sign company's form lease. Instead, the building owner (through his attorney) requested a different provision stating that the sign company had done all necessary investigation concerning city regulations and the availability of building permits. Because the sign company was anxious to acquire this site and complete construction of the billboard, the sign company agreed to replace its form provision with the building owner's provision.

Immediately after the parties signed the lease, the sign company's engineer re-measured the distance from the proposed sign location to the nearest competing sign. The sign company's preliminary measurements had been inaccurate. The sign company learned, after signing the lease, that the proposed sign location in the lease violated city codes providing minimum distances between billboard signs. The sign company therefore informed the building owner that the lease was terminated because the sign company could not construct its sign.

Believing that the sign company assumed the risk of any inability to construct its sign, the building owner filed suit in order to enforce the lease. The sign company vigorously protested, asserting that no court would require it to pay 15 years of rent for a location on which it could not construct a sign.

At trial, I argued (1) the sign company had knowingly assumed a foreseeable risk, and (2) the parties had re-allocated this risk to the sign company and away from the building owner.

The trial judge agreed with my position and ruled in favor of the building owner. The owner then recovered $750,000 for the entire 15-year term, despite the fact that no sign could ever be constructed. Additionally, the court awarded the building owner the attorney fees incurred enforcing the lease.

This example highlights the importance of carefully negotiating all contracts, especially those presented as the other party's "form contract." Such form contracts extend beyond real estate transactions, and could include executive employment contracts, lending transactions, and confidentiality or non-disclosure agreements.

You can be sure that the other party in a transaction will take the time and make the effort to carefully construct each provision in such an agreement to shift as much risk away from him or herself as possible. Unless you are willing to assume all of that risk, you should spend the same time and make the same effort to re-allocate the risk back to the other side.

To celebrate our birthday, help us get to 600 LinkedIn followers. Follow Rothman Gordon on LinkedIn. Snap the QR code or go to www.linkedin.com/company/rothman-gordon.

Mandatory electronic filing though the Unemployment Compensation Management System (UCMS) begins

Effective with the first quarter 2014 filing, employers will be required to electronically file quarterly UC tax and wage reports through UCMS.

If you have not already registered with UCMS to file electronically, the time to do so is now. To access UCMS, go to www.paucemployers.state.pa.us. The Department of Labor & Industry will not be mailing UC-2 and UC-2A forms to employers for any filing period that begins on or after January 1, 2014.

The following are several options that employers can use to electronically file their UC tax and wage data:

1. Online reporting (available only if the number of employees in your entity is 100 or less),
2. File upload through the employer portal or
3. File Transfer Protocol (FTP). If the number of employees exceeds 100, you must either file upload or FTP. For information on the file layouts and formats that are necessary for electronic reporting of UC tax and wage data by file upload or FTP, please review the UC-2010 handbook which can be found on the.

Employers who do not file their quarterly reports and/or amended reports electronically for filing periods that begin on or after January 1, 2014 may be assessed a penalty of 10% of quarterly contributions due at a minimum of $25 and a maximum of $250.

If you have questions, please contact the UC Employer Contact Center at 866-403-6163, Option 2 or, within the Harrisburg area at 717-787-7679, Option 2, weekdays from 8:00 a.m. until 4:30 p.m., Eastern Time. To ensure proper handling of your inquiry, please be prepared to provide the name of your business and your PA UC account number.

Source: PA Dept of Labor & Industry

Consumer protection law may carry severe penalties.

By Frank G. Salpietro, Esq.

On December 2, 2013, a three-judge panel of the Pennsylvania Superior Court issued an opinion that could have a far-reaching impact on businesses that sell or lease goods and services to consumers for personal, family or household purposes.

In the case of *Knight v. Springfield Hyundai*, reported at 2013 Pa. Super. 309, a consumer (Beverly Knight) appealed from a trial court's entry of a judgment against her on her claim that a car dealer made misrepresentations to her regarding a new vehicle. Among the reasons given by the trial judge for dismissing the claim was that the dealership could take advantage of a long-standing common law (that is, judge created) doctrine that prohibits a person from seeking damages for fraud when the "real" claim (in lawyer-speak, the "gist of the action") is based on a contract. The reason behind the doctrine is to prevent people who only have a breach of contract action from expanding the claim unnecessarily beyond the defined terms of the contract.

The Superior Court reversed the trial court's decision. In reaching its conclusion, the panel noted that the plaintiff brought her claim under a Pennsylvania law known as the Unfair Trade Practices and Consumer Protection Law (UTPCPL). This choice made all the difference.

The UTPCPL was enacted by the Pennsylvania Legislature to protect the public from unfair or deceptive business practices. It provides consumers with the right to sue for certain conduct by business owners which has a tendency to deceive consumers by causing confusion or misunderstanding. If the consumer can prove her case, the UTPCPL permits that consumer to recover her actual losses or $100 (whichever is greater), plus counsel fees and up to triple the damages awarded.

In the *Knight* case, the Superior Court held that when the Legislature passes a law like the UTPCPL,

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Rothman Gordon P.C.
310 Grant Street
Third Floor, Grant Building
Pittsburgh, PA 15219

it is intended to override judge-made doctrines like the "gist of the action" rule. Even though the plaintiff would have lost in a "typical" contract claim, because the Pennsylvania Legislature made it unlawful to advertise, make statements, or make assurances to consumers in a misleading way, it intended to provide additional protections to consumers that went beyond those provided by contract law, giving Ms. Knight, and consumers in similar situations, another avenue to pursue their claims. Therefore, a business which chooses to deal in consumer goods or services may give up the ability to raise otherwise valid and available common law defenses.

The "take away" from the *Knight* decision is that businesses selling their products and services to consumers for personal, family, or household uses must take care to avoid making either written or verbal statements that could be misconstrued by the consumer, and thus eventually lead to a consumer protection law claim that not only brings the potential of severe penalties in the form of triple damages and counsel fees (if proven), but also causes the business to lose strong contract defenses that would otherwise be available.

If you have questions or concerns about consumer contracts or your interaction with consumers, the lawyers at Rothman Gordon are available to help.

Frank Salpietro is the Chair of the Commercial and Business Litigation practice. He is a seasoned litigation and corporate/transactional practitioner representing regional, national and international clients, including individuals, family-owned enterprises, lending institutions and start-ups. Frank can be reached at (412) 338-1185 or FGSalpietro@rothmangordon.com.