THE BKCG BULLETIN

Fall 2015 Edition

BKCG
BURKHALTER KESSLER CLEMENT & GEORGE LLP

CAN THINGS THAT GO BUMP IN THE NIGHT LEAD TO LITIGATION NIGHTMARES?

A local Halloween tradition came to a close this year when the family behind an elaborate, self-operated haunted house in Long Beach pulled the plug after receiving notices from the city over a lack of permits. The Long Beach Haunted House on Myrtle Avenue began in the mid-1990s and has drawn thousands of visitors to its maze-like haunted house with meticulously-crafted props, strobe lights, and wobbling floors.

The organizers abandoned the attraction out of frustration with the city's vague citations to allegedly illegal extension cords and various other structural permitting requirements. Although nobody ever got hurt at the Long Beach Haunted House, it isn't hard to imagine that liability could arise from an injury at similar attractions.

Most of you aren't going to be operating a fake haunted house on your property this Halloween. But, some of you may be thinking, "my house is really haunted, could I be liable for that?" OK, you probably weren't wondering that, but you might still be interested to know that the answer to that question is "possibly." In a New York Supreme Court case famously known as the "Ghostbusters ruling", a homeowner named Helen Ackley reported to Reader's Digest and a local newspaper that several poltergeists occupied her home. However, when she sold her home in 1989, neither she nor her broker disclosed the poltergeists to the buyer.

The buyer sought rescission based upon fraudulent nondisclosure of the ghosts. Finding that the house was in fact haunted (itself, an incredible finding!), the court ruled that the seller was obligated to disclose the presence of the ghosts. Based on the Ghostbusters ruling, if you think you have some unwanted invisible guests in your home, you would be wise to disclose that "fact" when putting your house on the market.

Although no California court has held that you must disclose the presence of otherworldly spirits when selling your home, such a ruling is not inconceivable. Recognizing that "ill repute" or "bad will" may depress the value of property, California law requires a seller to disclose the fact that a house previously was the site of a multiple murder. Even if you are lucky enough not to live in a "murder home", and you were fortunate enough not to buy in a subdivision built on top of a Native American burial ground, you still have an obligation to disclose facts like the death (from AIDS or HIV) of an occupant within the last three years, as well as other, less-grisly facts like evidence of water intrusion, prior lawsuits against the developer, contractor or builder, and even the presence of obnoxious neighbors.

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VW DEALERS FACING BIG LOSSES, BUT HAVE STRONG CLAIMS FOR BREACH OF DEALER AGREEMENT

When VW admitted that it cheated Federal and state emission laws by installing sophisticated software to vary the emissions of its TDI engines in order to provide one set of parameters under testing, but a looser standard for daily driving, the public reaction was swift and damning. VW now faces consumer class action lawsuits as well as federal and state criminal charges.

Caught in the middle are VW's 650 U.S. dealers. They are franchisees that can only sell and service VW cars. As of September 2015, they are unable to sell or service TDI engines, which represents about 30% of their product line. Worse, those "frozen" products represented the most profitable part of their business. As a result, VW dealers are facing at least two significant forms of damages: a) lost profits, and b) the diminution in the value of their "blue sky" (goodwill). Both are expected to be substantial amounts.

That's the bad news. The good news is that VW's Dealer Agreement contains express language concerning ethical conduct. VW promised its dealers that it would "refrain from all conduct which might be harmful to the reputation of [VW] products or inconsistent with the public interest." It also promised its dealers that is would "avoid all discourteous, deceptive, misleading, unprofessional or unethical practices."

VW has publicly admitted to misconduct that proves liability under these contract provisions. But, whether VW will pay, and if so, how much, will likely require each dealer to file a lawsuit.

BKCG has been retained by a number of VW dealers to represent them in this crisis. Whether it will result in litigation remains to be seen.

Please contact Alton Burkhalter at (949) 975-7500 or aburkhalter@bkcglaw.com if you have questions about any issue discussed in this article.

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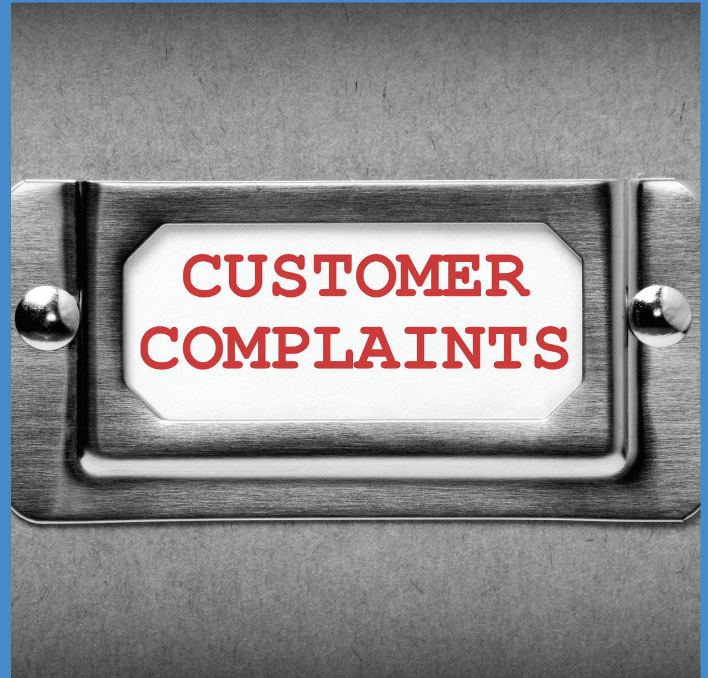
NEW COURT CASE DEMONSTRATES THE IMPORTANCE OF OFFERING A REASONABLE SETTLEMENT IF YOU RECEIVE A CONSUMER LEGAL REMEDIES ACT NOTICE LETTER

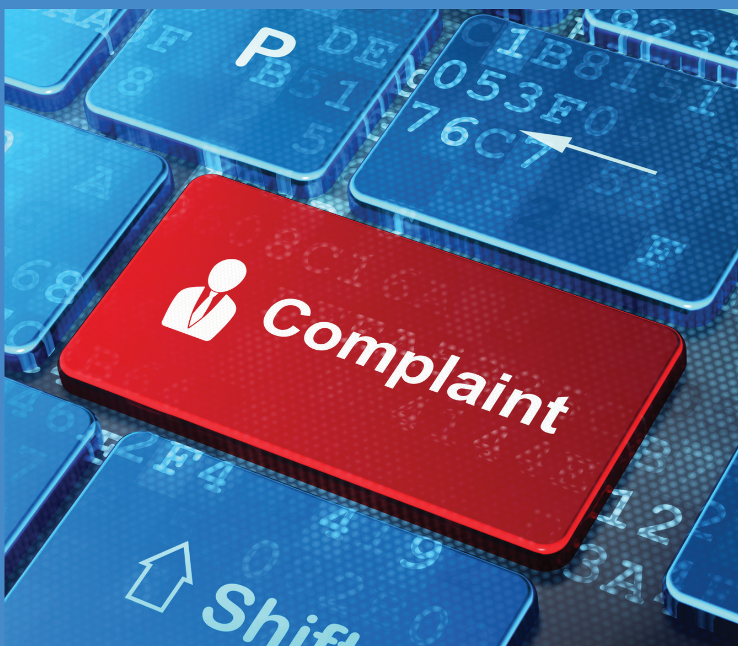


If you offer any type of product to consumers you likely have received, or unfortunately will receive, a demand letter from an attorney representing a disgruntled customer who is claiming some violation of California's Consumer Legal Remedies Act ("CLRA"). The CLRA was intended to offer protections to consumers who buy products that do not measure up to how they were advertised or described. It was also intended to allow businesses to avoid being sued for damages by allowing the business to "cure" an alleged violation of the CLRA by making an "appropriate correction, repair, replacement or other remedy." To that end, the CLRA requires that the consumer send written notice of the alleged CLRA violations to the business and allow the business 30 days to "cure" the alleged violations, in essence, making the consumer whole again. A consumer is not allowed to sue for damages under the CLRA until after the 30-day cure period expires.

In our practice, however, we have seen many examples of attorneys sending out boilerplate notice letters with no intention of allowing the business to cure the claims early on. This is because the CLRA allows a customer "prevailing" on their CLRA claim to recover the costs of using an attorney to pursue the claim. If the case settles early on, there is less opportunity for the attorney representing the customer to run up a huge bill. Therefore, the longer the case remains unsettled, the more work the attorney can claim was done on the case. When the case settles later on (and most cases do settle), the attorney demands reimbursement of exorbitant fees as part of the settlement. However, a recent court case, *Benson v. Southern California Auto Sales, Inc.* (Cal. Ct. App. 2015) 192 Cal.Rptr3d 67, is a hopeful step away from rewarding attorneys who use the CLRA in such a manner.

In the *Benson* case, a firm that specializes in bringing consumer cases against car dealerships, sent a CLRA Notice letter to a dealer claiming the dealer had violated the CLRA when it sold the firm's client a used car. The dealer responded in writing to the CLRA Notice letter within the 30-day "cure" period and offered to make its unhappy customer whole again by taking back the used car, refunding any payments the consumer had made on the car, and paying off any lien-holder. In addition, the dealer offered to pay $2,500 to the consumer to cover his attorney's fees. However, the consumer's lawyers filed the lawsuit before the cure period expired and refused to settle on the terms offered by the dealer. Later, the case settled and the consumer's lawyers argued they were entitled to $182,273 in attorney's fees and costs. The Court, however, disagreed and found the consumer's attorneys were not entitled to recover any fees because the dealer had offered "an appropriate correction, repair, replacement or other remedy" during the CLRA's 30-day cure period.

The consumer appealed the decision but lost the appeal too! Specifically, the Court of Appeals agreed that during the cure period the dealer "in effect offered to undo the entire transaction and pay Benson (really his lawyers) a reasonable sum for assembling a couple of largely boilerplate letters. Filing a complaint before the response period expired was Benson's (really his lawyers) decision. Instituting the lawsuit could have easily waited until after [the dealer] made its correction offer. The fact that the lawsuit was filed before Benson heard back from [the dealer] strongly suggests that the correction offer, unless it was truly extravagant, would have had no effect on Benson's (really his lawyers') plan to sue." The Court of Appeals concluded its opinion by noting "the [CLRA's] written notice requirement is intended to forestall litigation, by requiring the consumer and the merchant an attempt to fix the problem before resorting to the courts. ... The court did not abuse its discretion in deciding that the correction [the dealer] offered was appropriate. ... It is neither efficient nor economical to engage in protracted litigation and to run up attorney's fees when an appropriate correction has been offered at the very outset."



The *Benson* case highlights the importance of taking the initial CLRA demand letter seriously and timely responding to it by making a fair and reasonable settlement offer. If you receive such a letter, the best course of action is to immediately contact an attorney who can help determine a reasonable settlement offer and craft a response letter which irrefutably shows you offered to make the consumer whole. By doing this, you give yourself the opportunity to avoid paying exorbitant attorney's fees to the other side if the attorney for the consumer refuses the early reasonable settlement offer.

Please contact Ros Lockwood at (949) 975-7500 or rlockwood@bkcglaw.com if you have questions about any issue discussed in this article.

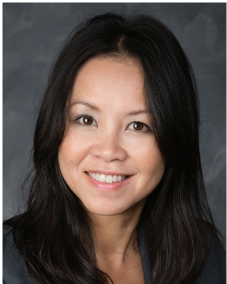
NEW ADDITION TO THE BKCG LAW TEAM

BKCG welcomes our newest litigation attorney, Camille M. Vasquez. Prior to joining the firm, Camille worked with Resources Global Professionals as a legal consultant, focusing on various employment-related projects for PIMCO, Latham & Watkins, Seyfarth Shaw and Tilly's. Prior to Resources Global Professionals, Camille worked at Gordon & Rees LLP as a lead associate on a wide range of labor and employment matters, franchise and business litigation cases.

Camille received her Juris Doctorate from Southwestern Law School. After graduating from law school, she clerked for Los Angeles Superior Court Judge Michael L. Stern, and was a recipient of the American Board of Trial Advocates Fellowship. She obtained her undergraduate degrees in Political Science and Communication from the University of Southern California.

Camille is currently assisting Daniel Kessler with an upcoming employment trial, as well as researching and drafting pleadings in a variety of civil litigation cases. Camille can be reached at cvasquez@bkcglaw.com or by phone at (949) 975-7500.

THE BKCG LAW TEAM DEPTH & KNOWLEDGE



Vietnamese American Bar Association of Southern California

Ms. Dwight is serving her third term on the Board of the Vietnamese American Bar Association of Southern California (VABASC). The VABASC is an association of Vietnamese American attorneys, judges, law professors, and law students, providing a network for its members and affiliates with practice settings ranging from solo practices to large firms, corporations, legal services organizations, non-profit organizations, law schools, and governmental agencies.

Amanda V. Dwight is a graduate of the UCLA School of Law where she was the recipient of two fellowships. At UCLA, Ms. Dwight served as the Chief Articles Editor of the Pacific Basin Law Journal and judicial extern for the Honorable Gary L. Taylor, U.S. District Court of California, Central District. Ms. Dwight also created a program to intake asylum seekers for the Center for Human Rights and Constitutional Law.

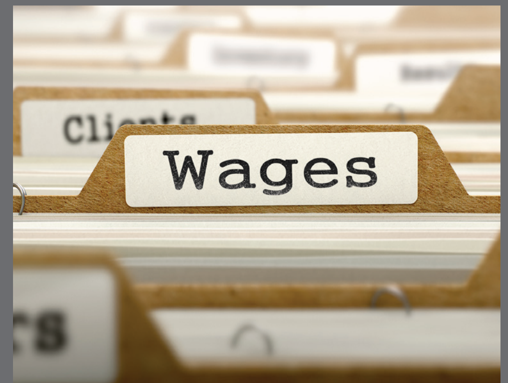
Ms. Dwight is a co-author of a leading treatise on trademark prosecution law, Trademark Registration Practice (Thomson-Reuters), a leading treatise on copyright prosecution law, Copyright Registration Practice (Thomson-Reuters), and the only practice guide in the U.S. concerning trademark examining procedures, Practitioner's Trademark Manual of Examining Procedure (Thomson-West). She has been a guest speaker and instructor at local and national organizations, including the national MAGIC Marketplace fashion tradeshow, regarding intellectual property matters.

Amanda is currently of counsel to BKCG and works on specialized cases involving intellectual property law service and consultation including trademark and copyright clearance, procurement, maintenance, and protection.

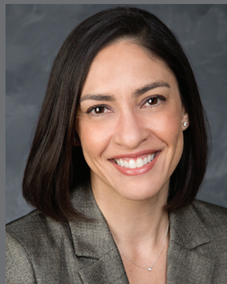
Amanda can be reached at adwight@bkcglaw.com or by phone at (949) 975-7500.

CALIFORNIA FAIR PAY ACT ADDRESSES LONGSTANDING GENDER WAGE GAP

Although California's existing Equal Pay Act ("EPA") originally enacted in 1949 was intended to address the wage gap between the sexes, in 2013, women still only earned a median of 84 cents for every dollar earned by men. The wage disparity is even greater for women of color. Senate Bill 358, entitled the "California Fair Pay Act", improves upon existing language in the EPA which enabled employers to utilize the broad "bona fide factor other than sex" defense to justify pay discrimination or disparity. Governor Jerry Brown already indicated that he would sign the bill which was recently passed by the legislature.



The provisions of the EPA previously allowed employers to explain away pay discrimination based upon irrelevant factors such as job location or title. The Fair Pay Act, however, requires equal pay for "substantially similar" employment, and allows employees to inquire about salary differences without fear of retaliation. The bill also prohibits an employer from prohibiting its employees from disclosing their own wages or discussing the wages of others. Employers do not have to disclose such information; though they cannot retaliate against an employee for asking.



Only time will tell whether the new bill will actually lessen the wage gap, or if it will simply increase the number of gender discrimination lawsuits in the court system. In either case, California employers should be prepared for the inevitable increase in salary-related inquiries they are likely to receive when the bill goes into effect on January 1, 2016.

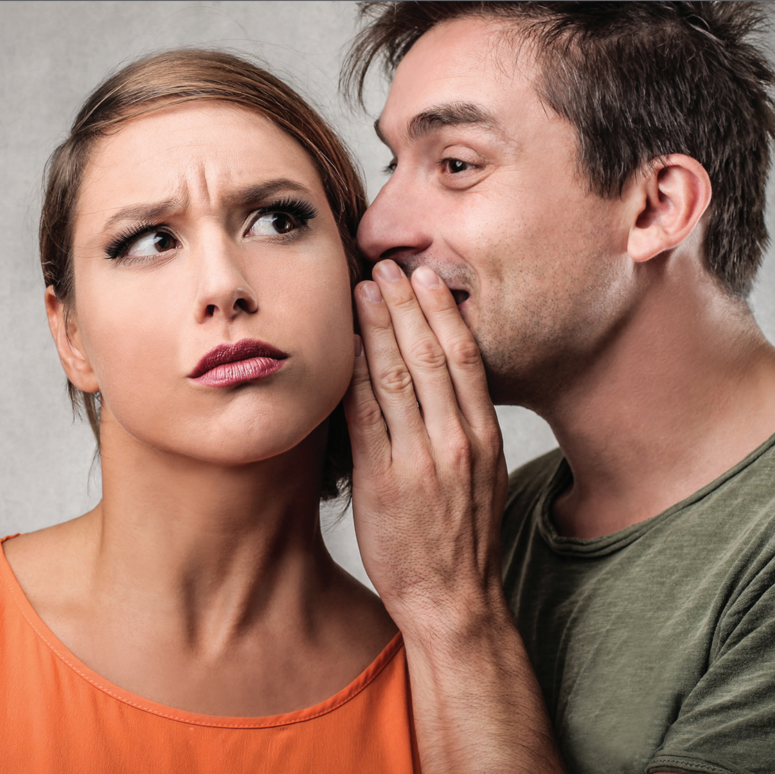
Please contact Amber M. Sanchez at (949) 975-7500 or asanchez@bkcglaw.com if you have questions about any issue discussed in this article, or any other related matter.

DEMYSTIFYING NON-DISCLOSURE, NON-SOLICITATION AND NON-COMPETITION AGREEMENTS

In my transactional practice, three of the things I am most frequently asked about are non-disclosure agreements and non-solicitation and non-competition agreements (or agreements that contain non-solicitation or non-competition provisions). Misinformation and incorrect beliefs seem very pervasive among BKCG clients about what is needed or appropriate for a particular business situation, what restrictions are okay to agree to or impose on others and what is even legally permitted. While an exhaustive review of these often overlapping topics is beyond the scope of this article, I will attempt below to shed light on a few of the more poorly understood significant issues surrounding these agreements in California.

First, general definitions of these terms.

A confidentiality agreement, commonly referred to as a **non-disclosure agreement** ("NDA"), is often the first step in any business negotiation and its main purpose is to protect one or more parties' valuable and proprietary trade secrets and ideas.



A **non-solicitation agreement** is a contractual attempt to prevent the recipient of a disclosing party's proprietary information, or someone who has been involved in a business relationship with a disclosing party, from benefiting from that proprietary information, typically by proscribing solicitation of the disclosing party's customers or employees, or both. A **non-competition agreement** is designed to prevent a person or company from either working, or transacting business, in a specified business or industry for a given period of time.

NDAs

The first common misconception about NDAs is that they are generic agreements that can be signed, or sent out to potential business partners for signature, with impunity and will adequately protect all of the disclosing party's important information. Actually, this analysis requires a step backwards, because many companies do not give adequate thought, up front, to the sufficiency of their own internal efforts to preserve the sanctity of their own confidential information and trade secrets. In other words, is the information that the disclosing party cares about even legally protectable in the first place?

This matters greatly because no NDA can retroactively protect a disclosing party's information that is already out in the pubic domain, for example because it has already been disclosed to a third party with no restrictions on its use or disclosure. So, even prior to signing an NDA, a business must first examine the reasonableness and adequacy of its own internal practices with regard to safeguarding the information and data it deems critical, using practices such as: password protecting or physically locking up critical files and documents; limiting access to sensitive information to key employees with a need to know; and having a standardized protocol for employees to follow before divulging proprietary information to any third parties, including vendors and suppliers, web designers etc. What many companies don't seem to realize is that once "the cat is out of the bag", no NDA can put the cat back in the bag!

A properly drafted NDA will include a definition of what "confidential information" is, whether the NDA is mutual or one way only, the recipient's permissible uses of confidential information and protocols for the return or destruction of confidential information when a business relationship or negotiations end. However, a key element that is frequently overlooked is the time limit set in the NDA for non-disclosure. NDAs will frequently specify that a recipient's non-disclosure obligations only survive for a limited period of time, often in the range of 1-5 years. However, a fixed period may be completely inappropriate for confidential information that has an indefinite lifespan. For example, information which is not patented or patentable, but derives its value from only being known by a small number of company insiders (the most commonly cited example of this is the formula for Coca-Cola). In such circumstances, confidentiality provisions should require non-disclosure for as long as the information in question remains confidential, which could be indefinitely. The NDA should state that, even after negotiations between the parties terminate, its non-disclosure obligations continue to apply. On the other hand, if the information in question will grow stale and lose its value after a certain amount of time or relates to fast-changing technology, a fixed time limit may be quite adequate. The critical conclusion to be drawn here is that an NDA is an important agreement that should not be signed or proffered for signature to a third party without some legal forethought.

Non-Solicitation Agreements

The key thing to know here is that, under California law, customer **non-solicitation provisions are unenforceable unless no more restrictive than necessary to protect legitimate trade secrets.** See *Thompson v. Impaxx, Inc.*, 113 Cal. App. 4th 1425, 7 Cal. Rptr.3d 427 (2003). What does this mean in practice? Well, it means that it is theoretically possible that the identities of a party's customers or suppliers can be legally protected, if their identities are not readily ascertainable and the disclosing party has taken reasonable steps to safeguard that information. However, unless the disclosing party operates in a specialized or narrow industry which has required a considerable amount of time, money and effort to develop a customer base that is not generally known, it may well prove very difficult to legally protect the identities of its customers.

(continued on page 5)

LEAVING YOUR ESTATE TO YOUR CHILDREN-WHAT ARE YOUR OPTIONS?

Most of us with children will ultimately leave our estates to them. If a sibling or friend upsets you greatly, you might remove them as a beneficiary. However, you are not likely to do the same with a child. If every parent disinherited a child who greatly upset them, no child would ever receive a nickel. That being said, there are many options you have in deciding how to leave your estate to your children.

Outright Distribution

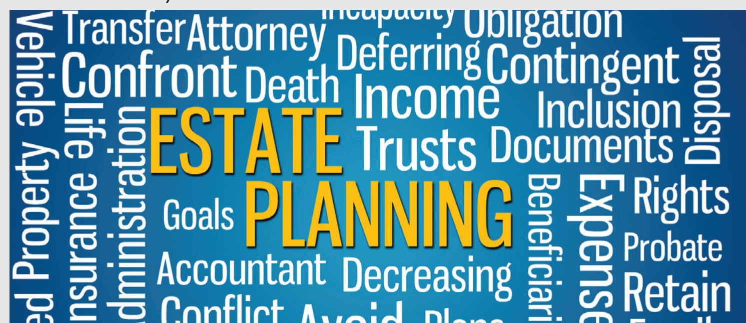
Most clients decide to leave their estate to their children outright, with no restrictions. In those cases, if the children are younger, you would generally provide that a child is to receive their inheritance at certain landmark ages. For instance, it may be a lump sum distribution at age 25, or gradual distributions at 30, 35 and 40. Giving an inheritance in stages provides a greater chance of your children doing well with their new found wealth due to maturity and hopefully, increased wisdom. While this is the simplest and most popular means of distributing an estate, there are other options that a client may want to consider.

Lifetime Trusts

If a client has a child who has one of the following circumstances present in their life, leaving the inheritance in trust may be an attractive option:

- Inability to manage money
- In a bad marriage
- Alcohol or drug abuse issues

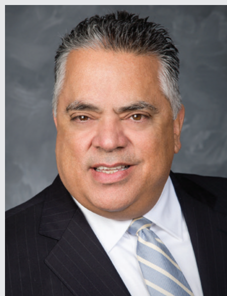
The concerns about distributing large sums of money to a beneficiary with one or more of the above characteristics is that the funds you leave to them could be wasted, lost in a divorce, lost in a lawsuit or used to facilitate a destructive lifestyle.



An alternative to outright distribution to a child would be to have the inheritance held in Trust for the child for his or her lifetime. The Trust could provide for regular monthly distributions to the child for their lifetime with the Trustee having the discretion to distribute additional funds, if needed, for the child's health, education, maintenance and support. This allows the child to receive steady monthly payments for life while preserving the principal. If structured correctly, a Trust for a child would be unavailable to a divorcing spouse and potential other creditors. Who will manage the Trust during the child's lifetime is often a difficult decision. It could be the child himself or herself, a family member or friend or a Bank or Trust Company.

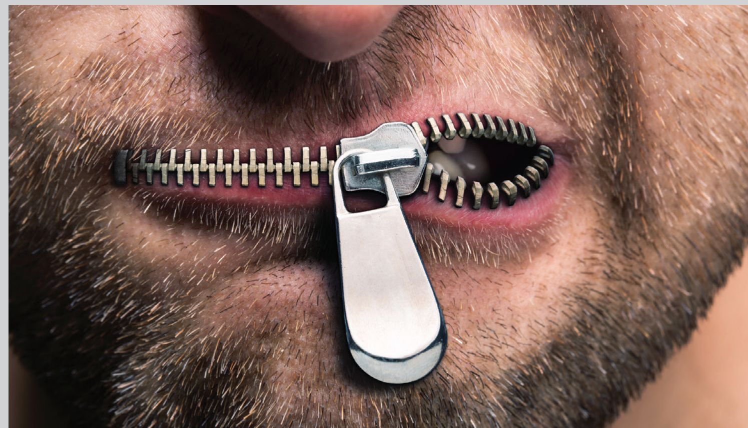
As you could imagine, there are a multitude of options as to the terms these trusts could have. Rather than monthly distributions, all distributions could be set up as discretionary. The Trust could match a child's income received from working. The Trust could authorize the Trustee to purchase a house for the child that the Trust would own. The child could be given the power to decide who receives his or her Trust when the child dies.

For a beneficiary who is disabled and is or may be receiving government assistance, a Discretionary Special Needs Trust may be advisable. Such a Trust would allow the disabled beneficiary to have a Trust fund for his or her benefit without disqualifying them from receiving public assistance.



We do not advocate setting up Lifetime Trusts for every child. In fact most clients will not create them. However, where a client has a genuine concern about a child's ability to manage, preserve and protect an inheritance, it may be worthy of consideration.

Please contact William George at (805) 373-1500 or at wgeorge@bkcglaw.com if you have questions about any issue discussed in this article.



Demystifying Non-Disclosure, Non-Solicitation and Non-Competition Agreements (continued from page 4)

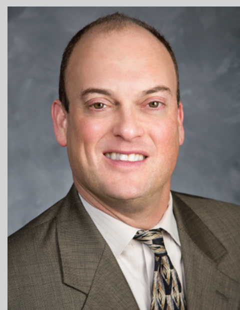
This issue arises frequently in the context of employers wanting to prevent employees from poaching their customers when they move on to another employer or to start their own businesses. However, employers who cannot substantiate their claim that the identities of their customers or prospects rise to the level of being trade secrets, or who cannot demonstrate that their employees also had access to other trade secret information (such as pricing, buyer habits, raw material costs, etc.), should not require their employees to agree to post-employment non-solicitation restrictions.

In other contexts (such as agreements with service providers and other third parties), any customer non-solicitation provisions should make clear that they are only intended to be enforced to the extent necessary to protect trade secrets. However, the argument that a customer's identity constitutes a valid and protectable trade secret and that a corresponding non-solicitation restriction is enforceable is one that is lost far more often than it is won in California, often with disastrous legal consequences for its proponents.

Put bluntly, in my experience, businesses tend to have a rather exaggerated idea of what a trade secret really is. Nevertheless, companies should still exercise great caution before agreeing to a non-solicitation restriction in an agreement drafted by a third party which is governed by the laws of, and with venue for dispute resolution in, states other than California. Non-solicitation restrictions are valid and enforceable in many other states and courts in those states may well enforce them as written, regardless of California law.

Non-Competition Agreement

Although California law is often grey on business issues, the law governing non-competition agreements is pretty black and white: they are only valid if reasonable in time (generally no longer than 5 years) and scope and imposed in the context of either the purchase and sale of the assets of a business or entity, or the bona fide purchase of equity in an entity. Any attempt to impose non-competition restrictions in California other than in these limited circumstances can constitute a violation of California's Unfair Competition Law, Business and Professions Code section 17200 et seq. and may result in a lawsuit. California courts also will not enforce non-competition restrictions imposed on California employees or businesses by out-of-state companies and purportedly governed by the laws of other states. However, as with non-solicitation restrictions under the same scenario, one should not assume that a court in, say, Georgia or Texas will refuse to enforce a restriction governed by the laws of that state.



Conclusion

These are complicated and often confusing areas of law that must be navigated with great caution.

Please contact Greg Clement at (949) 975-7500 or gclement@bkcglaw.com if you have questions about any issue discussed in this article, or any other aspect of business law.

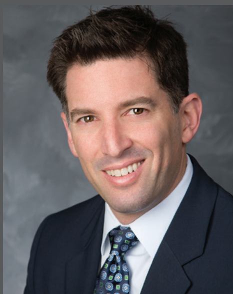
IF I HIRE A LAWYER TO REPRESENT ME IN A LAWSUIT, WILL THE OTHER SIDE PAY MY ATTORNEYS' FEES AFTER I PREVAIL?

Many people are surprised to learn that in most cases, the loser is not required to pay the winner's attorney's fees in a lawsuit. Rather, under the general rule, each side is responsible to pay its own attorney's fees, win or lose. This general rule often results in frustration amongst litigants who feel they were sued in a meritless lawsuit and must incur non-reimbursable legal fees to defend themselves, as well as those who believe they were wronged, but the legal fees they will incur to pursue legal redress may exceed the value of the case.

Certain exceptions exist to this general rule, the two most common of which occur when either a contract or statute afford the prevailing party reimbursement of its reasonable legal fees. For example, contracts may include a provision lawyers generally refer to as an "attorney's fees clause", which usually state that the prevailing party in any dispute arising out of the agreement will be awarded its reasonable attorney's fees. Although litigants frequently battle over whether the winner's fees were actually "reasonable," Courts often award the winner in cases involving a contract containing an attorney's fees clause reimbursement of most, if not all, of its attorney's fees at the conclusion of the lawsuit.

Certain statutes also entitle the prevailing side in a lawsuit to reimbursement of its attorney's fees. These statutes generally pertain to consumer or employment claims in which the aggrieved plaintiff may lack the wherewithal to pay for their own attorney's fees. For example, statutes that proscribe employment discrimination and consumer fraud entitle the winning side's lawyers to receive reimbursement of their reasonable attorney's fees from the losing defendant.

Before you enter into a contract, you should consult with an attorney to examine whether the inclusion of an attorney's fees provision is to your advantage, or whether your interests would be better served if the agreement omitted such a clause. In addition, if you have been sued or plan to file suit, you should certainly consult with an attorney to understand whether you have the ability through contract or by statute to recover your legal fees if you ultimately prevail.



Please contact Josh Waldman at (949) 975-7500 or at jwaldman@bkcglaw.com if you have questions about this article.

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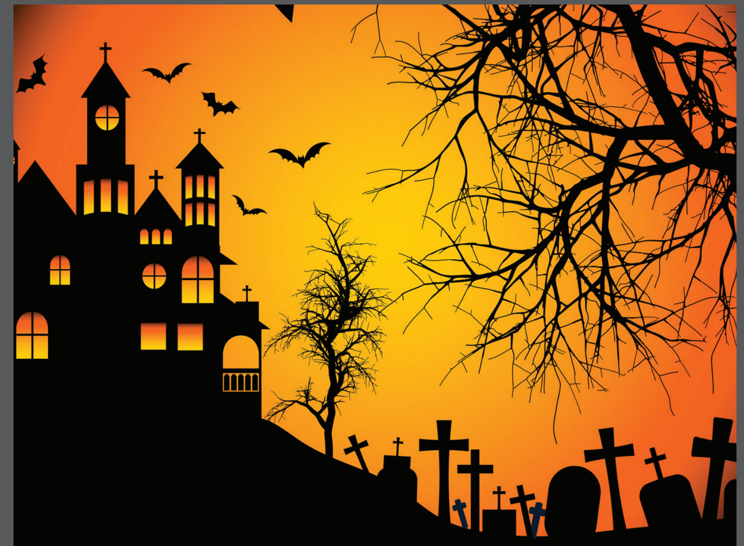
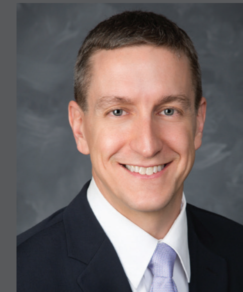


Earlier this summer, a New Jersey lawsuit received national exposure, and a terrifying nickname, the "Watcher Lawsuit." In this case, the buyers sued the sellers after receiving a series of letters written by an anonymous person who called himself the "Watcher", who claimed a right of ownership in the home and made threatening remarks about the family's young children.

The buyers alleged that the sellers had received similar letters from the "Watcher" but had failed to disclose this fact during escrow. The sellers have denied receiving such letters, and the case is currently being litigated. In conclusion, if you are selling your home, you should disclose all grisly facts so that they won't come back to haunt you. On the other hand, if you notice blood seeping from the walls in your newly purchased home (or perhaps something slightly less terrifying), feel free to call the attorneys at BKCG for legal advice. Just make sure to get out of the house first.



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