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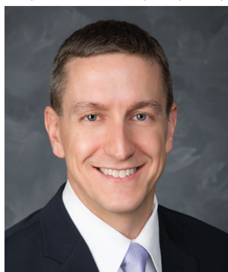
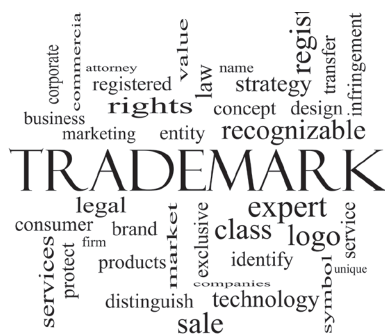
BKCG
BURKHALTER KESSLER CLEMENT & GEORGE LLP

Can a Landlord Be Liable for Trademark Infringement Committed by Its Tenant?

Shopping center owners would seem to have enough to worry about without having to wonder what its tenants are up to. In the hands of overly zealous Plaintiffs' lawyers, however, the law always manages to create new problems for property owners to deal with. One recent, disturbing trend we have observed involves attempts to hold property owners and landlords liable for intellectual property violations perpetrated not by the owner itself, but by its tenants.



Federal and state law recognizes that liability for intellectual property infringement (trademarks, copyrights, and the like) can extend beyond those who actually manufacture or sell infringing materials to those who assist others in such infringing conduct. In Inwood Laboratories v. Ives Laboratories 456 U.S. 884 (1982), the U.S. Supreme Court stated that a person can be liable for contributory trademark infringement if the person intentionally induces another to infringe a trademark or continues to supply a product knowing the recipient is using the product to engage in trademark infringement. Subsequently, a federal court in another district applied the Inwood Laboratories holding to hold the owner and operator of a flea market liable for the sale, by a flea market vendor, of counterfeit Hard Rock Café merchandise. In Hard Rock Café Licensing Corp. v. Concession Services, Inc. (7th Cir. 1992) 955 F.2d 1143, a federal court of appeal held that the property owner could be liable if it was "willfully blind" to the sale of counterfeit merchandise, even if it did not induce the sale or supply the product.



The Ninth Circuit Court of Appeal, which includes California, applied the Inwood Laboratories and Hard Rock Café cases to property owners in a case called Fonovisa, Inc. v. Cherry Auction, Inc. (9th Cir. 1996) 76 F.3d 259. Cherry Auction operated a swap meet in Fresno, California, where many of its vendors sold counterfeit recordings in violation of Fonovisa's trademarks and copyrights. The Fresno County Sheriff's Department raided the swap meet and seized more than 38,000 illegal recordings. A year later, the Sheriff put Cherry Auction on notice that illegal recordings were still being sold at the swap meet, and Cherry Auction apparently did not stop those vendors from continuing their illegal sales. The Ninth Circuit ruled that Fonovisa had stated a valid claim against the Cherry Auction.

The facts in Fonovisa are unique, and the property owner in that case really seemed to turn a blind eye to the rampant unlawful activity that was taking place on its property. Under normal circumstances, without strong evidence that the landlord knew of its tenant's illegal activity, we believe that an owner cannot be held liable for unlawful sales by its tenants. If you are a landlord and you learn of such illegal conduct on your premises, however, you must investigate and take steps to protect yourself.

The Fonovisa case is significant to shopping center operators and owners in California. Under Fonovisa, a property owner or landlord can be responsible for the torts of those it permits on its premises "knowing or having reason to know that the other is acting or will act tortiously."

Please contact Michael Oberbeck at (949)975-7500 or at moberbeck@bkcglaw.com if you have questions about this article or any other related matter.

HO HO HO-rrendous Potential Liability for Company Holiday Parties

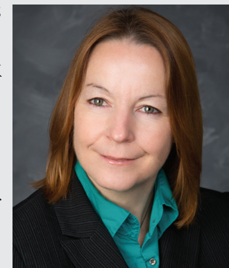
This holiday season, a number of businesses are likely hosting parties to "thank" their employees for their hard work the past year. If your company plans to do this, it is worth remembering that in a relaxed, party environment, especially when alcohol is being served or is available to people, better judgment often gives way to impulse and poor choices.

This is a significant concern for California's employers especially in light of a recent case, Purton v. Marriott International, Inc. (2013) 218 Cal.App.4th 499, which demonstrates how broadly courts are construing an employer's potential liability for its employees' reckless and dangerous holiday choices.

In Purton, the Marriott Hotel Corp. hosted a holiday party to "thank" its employees. Alcohol was available to the employees attending the party, but each employee was allowed only two drink tickets which could be redeemed for beer and wine. Presumably, this measure was intended to prevent employees from becoming dangerously intoxicated.

One Marriott employee, a bartender named Michael Landri, attended the event. Landri did not work the day of the holiday party and, in fact, another Marriott employee acted as the bartender during the party.

Landri drank alcohol prior to the party. During the party, he filled a flask he brought from home with whiskey surreptitiously provided by Marriott's other bartender.



Rather than using his two drink tickets and drinking the beer and wine provided by Marriott, Landri drank whiskey during the party and also shared shots of hard alcohol with a member of Marriott's upper management.

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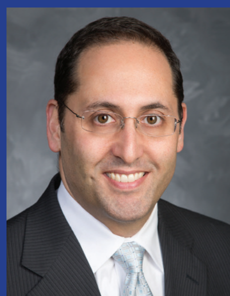
New Change in California Harassment Laws Could Lead to Litigation Abuse

Anyone who has worked at a company in California with 50 or more employees has probably participated in a formal training session regarding sexual harassment in the workplace. That is because for nearly ten years, California has required such employers to provide "sexual harassment training and education" to all supervisory employees once every two years. While preventing unlawful harassment in the workplace is really the law everywhere in the United States, only a handful of states actually mandate this type of training. Well, effective January 2015, California has taken this a step further.

In September of this year, Governor Brown signed into law A.B. 2053 which amended California's employee harassment training statute (Government Code section 12950.1). The existing law requires employers with 50 or more employees to provide supervisory employees with training and education including "information and practical guidance regarding the federal and state statutory provisions concerning the prohibition against and the prevention and correction of sexual harassment and the remedies available to victims of sexual harassment in employment. The training and education shall also include practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation, and shall be presented by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination, and retaliation." Thus, the training required by existing law has always focused on preventing conduct that is actually illegal, such as unlawful retaliation, or harassment and discrimination against an employee based on their protected class (race, gender, religion, national origin, sexuality, etc.).

The recent amendment adds something totally new. Now, employers must also include "prevention of abusive conduct" as a part of the harassment training and education. While it is certainly good business to train supervisors on ways not to be abusive of employees, the new requirements raise grave concerns as to whether this training statute can be used – or abused—to improperly expand the scope of employment discrimination laws well beyond the type of discrimination-related conduct that the law recognizes to be impermissible.

The amendment defines "abusive conduct" as "conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests. Abusive conduct may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance."



Again, best practices support counseling supervisors on this behavior. But the troubling part is the final sentence that states: "A single act shall not constitute abusive conduct, unless especially severe and egregious." That sentence is odd because there is no law that makes abusive conduct (without discrimination or retaliation) unlawful—whether it is a single act or a series of acts. There is no evidence in the legislative record that the amendment was intended to create a new basis for employment cases, but In California, there is no shortage of employment plaintiff lawyers willing to push the envelope.

For now, if your company is required to have harassment prevention training, be sure your trainer is compliant with these changes, and be vigilant to police against workplace bullying—of any kind.

Please contact Dan Kessler at (949) 975-7500 or at dkessler@bkcglaw.com if you have questions about this article or any other employment litigation matter.

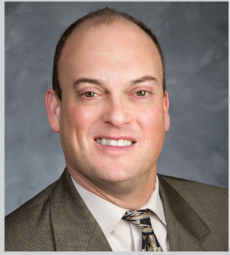
Congratulations to Trantronics, Inc. as the Orange County Business

On November 19, 2014, the Orange County Business Journal held its Fifteenth Annual Family Owned Business Awards honoring the best of Orange County's family-owned businesses. The Orange County Business Journal presents the Award to local family-owned businesses who distinguish themselves for both their business accomplishments and contributions to the local community.

Five separate businesses were honored at the event including "Longevity" and "Up and Coming" honorees, as well as honorees from small, medium, and large businesses. BKCG was honored to support its long-time client, Trantronics, Inc., at this year's event. More than that, BKCG was delighted when the award for the Medium Business Honoree was presented to Trantronics, Inc. by BKCG's own, Gregory M. Clement, Esq.

Trantronics, Inc. was founded in 1997 by the husband and wife team of Tom Tran and June Tran.

Commercial Real Estate Brokers Who Act as Dual Agents in a Transaction Will Now Need to Disclose That Fact to Their Clients



Unbeknownst to many prospective tenants and purchasers of commercial real property, up till now, commercial real estate salespersons and brokers in California have been able to operate freely without ever having had to disclose the fact that they were representing the landlord/seller at the same time they were representing the prospective tenant/buyer in a commercial real estate transaction.

Well, as of January 1, 2015 this situation will change as the result of Senate Bill 1171, signed by Governor Brown this past August, thanks primarily to the efforts of Jason Hughes, president of Hughes Marino, a San Diego-based commercial real estate firm with offices in Orange County that exclusively represents tenants. Partly in recognition for its critical role in getting this new law passed, Hughes Marino recently received the Orange County Business Journal's 2014 Family-Owned Business award in the small business category.

Jason Hughes explained that the reason he asked State Senator Ben Hueso to sponsor this new law was that he recognized a need for greater transparency in the commercial real estate industry: "It astounded me that commercial real estate salespersons and brokers were not required to provide written disclosure to their clients about any conflicts of interests they may have – or who the brokers were actually representing," Hughes explained. "In residential real estate, agents are required by law to provide such disclosure immediately prior to engaging with a client. However, brokers for commercial transactions had no such requirement. What resulted was a tremendous amount of conflicted representation, which almost always adversely affected companies who were buying or leasing commercial space."

The new law, codified as California Civil Code Section 2079.13, requires a written disclosure of one of the following three statements: (1) Agent represents only the landlord/seller; (2) Agent represents only the tenant/buyer; or (3) Dual Agency: agent represents both the landlord/seller and the tenant/buyer. The new law also places restrictions on certain confidential information that a dual agent may disclose in a transaction without the written consent of the disclosing party. For example, dual agents will be specifically barred from telling the tenant that the landlord would accept less, and from telling the landlord that the tenant would pay more.

The new law, together with a recent California State Court of Appeal ruling (Horiike v. Coldwell Banker (2014) 225 Cal.App.4th 427), also makes clear that commercial real estate professionals working for the same corporate broker are, in fact, dual agents if the listing office corporate broker is the same as the selling agent's corporate broker. Consequently, if two salespersons or brokers working under the same corporate broker's license are working on the opposite sides of the same transaction (as frequently occurs with the large national brokerage companies who represent both landlords and commercial tenants), each will now be required to disclose their "dual agency" role and will be subject to the confidentiality requirements described above. One anticipated possible outcome of this law is that commercial brokerage firms may begin to morph into exclusively representing either landlords or tenants, but not both, as most currently do. Whether this occurs or not remains to be seen, but one salutary result of the new law seems inevitable:

"What this bill does is put teeth into a new protection for companies who lease and purchase space," says Hughes. "Now, tenants will go into their real estate negotiations with their eyes wide open. No longer will they 'think' their broker is looking out for their best interests when, in fact, he or she might be in a hugely conflicted position."

BKCG firmly believes that the greater transparency this new law will bring to the commercial real estate marketplace is a very positive thing and we commend Hughes Marino for its foresight, commitment and perseverance in making this happen.

Please contact Gregory Clement at (949) 975-7500 or at gclement@bkcglaw.com if you have questions about this article or any other commercial real estate law matter.

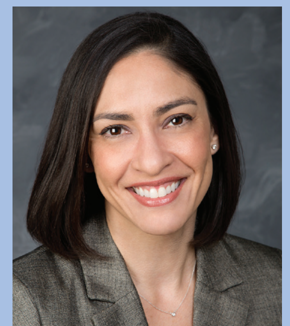
Journal's Medium Family-Owned Business Honoree

After leaving war-torn Vietnam as refugees, the Trans built their business from the ground up with the help of other family members and their community. Trantronics, Inc. successfully maintains its electronics manufacturing and assembly business in Orange County, serving many Fortune 500 customers, despite operating through our most recent economic recession in a highly competitive industry with many low cost overseas competitors.

In addition to building a successful company, the Trans and their employees have greatly contributed to their community by active involvement in their multi-lingual church in Santa Ana, helping to develop many programs which address the needs of its Vietnamese-speaking congregants.

As a further testament to Trantronics, Inc.'s well-respected reputation, when its entire business literally burned to the ground in 2011, even Trantronics, Inc.'s competitors allowed it to complete jobs in their own facilities. Trantronics, Inc. was finally able to resume its business at its new location in Irvine in 2014.

Once again, BKCG would like to recognize all of the family-owned businesses that contribute to the prosperity and well-being of Orange County, and to congratulate Trantronics, Inc. for their accomplishments this year, and for the years to come.



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

Watch Out for These 12 Common Contracting Mistakes

Many of the clients BKCG represents have an admirable "do-it-yourself" mentality, which has helped them become extremely successful in their businesses and investments. Unfortunately, doing it yourself is not always the most prudent decision when presented with a contract involving a significant business or investment decision.

BKCG often handles cases in which one or more parties to a contract have signed the agreement without carefully considering the language or consulting with an attorney. In providing contractual advice to our clients, BKCG's first priority is to minimize the risk of costly litigation over a contract. All too often we are retained in connection with a contractual dispute once a lawsuit has already been filed in instances where litigation could have been avoided had the parties paid careful attention to what they were actually agreeing to.

With that in mind, the following is a list of common contracting mistakes the BKCG attorneys have seen throughout our respective careers that you should keep in mind before negotiating or entering into a contract:

1) Failing to Get the Agreement in Writing.
This is an obvious one, but this issue still comes up all the time. As discussed in further detail below, many contracts are not required to be in writing. However, failing to get your agreement in writing puts you at risk of becoming embroiled in a "he said, she said" dispute down the road if the other party breaches or makes a demand that was never part of your original deal.

Even if you might have every reason to trust the person you are negotiating with, you might not know that person's investors, partners, shareholders, heirs, potential assignees, etc. In this respect, getting your agreement in writing can help protect you from people whom you might not even know.

A good rule of thumb is to avoid doing business with people who prefer to do things on a handshake deal alone or tell you that they do not want the deal in writing. Often times, these people are insisting on a verbal deal because they intend to disavow their obligations in the future and do not want a written record of these obligations.

2) Assuming that Your Verbal Agreement Isn't Every Bit as Enforceable as a Written Agreement.
With the exception of certain kinds of contracts that fall under what is known as "The Statute of Frauds," a verbal agreement can be enforceable to the same extent a written agreement is.

Because of the risk of a "he said, she said" dispute explained above, you should be very careful in your verbal negotiations while working out the terms of an anticipated deal so that you are not actually verbally assenting to the deal before you execute the written agreement. Subject to certain exceptions, you are still bound by a contract that you verbally agree to.

Oral contracts can have very expensive consequences if you are not careful. For a recent example drawn from popular culture, a talent scout claiming that the former producer of the pop star singer Lady Gaga breached an oral agreement with her recently was awarded a $7.3 million judgment by a jury in the District of New Jersey federal court over a dispute regarding an oral agreement.

To this point, in addition to making sure that you get your agreement in writing, it is always a good idea to leave a "paper trail" of the fact that you are still negotiating, and have not come to a formal agreement. Consider sending throughout your negotiations e-mails akin to: "Pursuant to our conversation today, my understanding of our pending negotiations regarding deal points X, Y, and Z are as follows ________________." This serves the dual purpose of 1) establishing that you have not finalized your agreement yet; and 2) making it more difficult for parties who later seek to escape their obligations under the deal to claim that they were unaware of those deal points, or were fraudulently induced to enter into the contract because of the representations made during the negotiations.

3) Failing to Get the Entire Agreement in Writing.
It is also important to make sure that your entire agreement is reduced to writing so that no part of your deal is left out of the written contract. As explained below, most written contracts (at least the well-drafted ones) include a provision called an "integration clause," which is designed to prevent parties to a contract from later claiming that the written language of the contract does not reflect the parties' agreement. A typical integration clause will substantially convey the following:

This agreement, and any addendums and exhibits hereto, constitutes the entire agreement of the parties regarding the subject matter of the agreement, and supersedes all prior or contemporaneous agreements, negotiations, or understandings with respect thereto. This agreement may only be modified in writing with the executed signature of all parties hereto. (continued on page 6)

Managing Your Investment Advisor

Since the "tech wreck" of the early 2000's, Alton Burkhalter and Joshua Waldman have been litigating cases against investment firms and investment advisors. Many cases they evaluate were losers, often because the investor wanted to speculate and take huge investment risks, and then became shocked when his big gamble failed. Other cases were compromised because the investor blindly signed documents put before them by their investment advisor, and those forms essentially gave the broker carte blanche to engage in imprudent investment schemes.

The best cases have been those where the investor clearly communicated her investment objectives and risk tolerance, and only signed documents that were consistent with those stated limits. They also opened their monthly statements and notified the investment firm of concerns, such as questionable trades or unexpected losses. In those cases, the arbitrators have punished the investment firms and the advisor because they failed to follow the client's written instructions concerning risk tolerance and investment objectives.

With the stock market at all-time highs and interest rates at historic lows, most investors are enjoying very strong unrealized gains in their portfolio. However, what goes up can (and often does) go down. Whether or not you are truly ready for, and if not, then whether you are protected from these portfolio losses significantly depends on the representations you have made to your investment firm by way of your new account forms and your most recent updates to them.

Is Your True Risk Tolerance Correctly Noted?

The first thing you need to do is obtain in writing from your investment firm what they have on file for you as your "risk tolerance". While the terms vary from firm to firm, risk tolerance is usually stated in terms such as "conservative," "moderate," "aggressive" and "speculative."

If you have stated that your risk tolerance is "speculative", you have essentially given your broker a license to gamble on your behalf. Should he lose, well, too bad for you. However, if you have stated that your risk tolerance is "conservative" and your broker invested your funds in penny stocks that lost most of their value, you have a much better case.

The key here is to understand what your investment firm means by each definition. And, don't sign up for more risk than you can tolerate. Be sure to update your risk tolerance so that it correctly reflects your current situation. Get a copy signed by both you and your investment firm and keep it for future reference.

Are Your Investment Objectives Correctly Stated?

Next, you need to know what your investment firm says you have indicated for your "investment objectives". They are usually framed in terms such as "capital preservation", "income" or "growth". These terms also have special meaning to your investment firm, so ask them to give a definition of what each category means.

For example, if your investment objective is "income", then investing your funds in non-dividend paying stocks is probably not appropriate. As with your stated risk tolerance, be sure to update your investment objective in writing so that it correctly reflects your current situation and obtain a copy of the updated form signed by the investment firm.

Are You Monitoring Your Account?

You should be getting monthly account statements. When you do, open them and look them over. If you don't understand them, ask someone who does understand them to review them with you. If you do this with your broker, please periodically confirm what he says with a third party, such as your CPA.

If you see anything that looks like unauthorized investing, unexpected losses, or unexplained fees or expenses beyond your expectations, notify your broker and his supervisor. Take careful notes and document your communications. And, don't hesitate to call or email us for advice. The best situations for our clients are those in which a problem is caught early and "nipped in the bud".

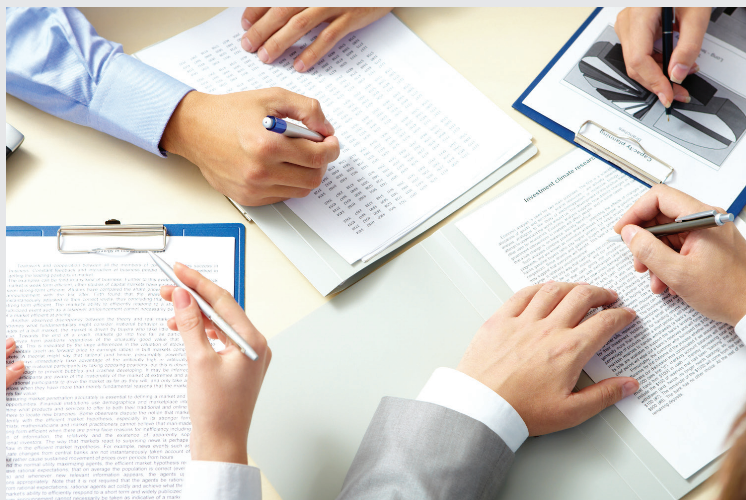
We hope you never need us to evaluate a potential case against your investment advisor. But, by taking these steps now, you can ensure that your documentation supports your claim.

Alton Burkhalter and Josh Waldman frequently litigate investment loss cases before FINRA.

Please contact Alton Burkhalter at (949) 975-7500 or at aburkhalter@bkcglaw.com if you have questions about this article or any other financial law related matter.

Watch Out for These 12 Common Contracting Mistakes (cont. from page 4)

Under the "parol evidence rule," evidence of oral or written agreements outside of the written contract itself cannot be used to alter or modify a written contract that is "fully integrated." An "integration clause" is presumptive (but not conclusive) evidence that an agreement is "fully integrated," i.e., that the parties intended their written contract to be the final expression of their entire agreement. As a practical matter, this means that a party claiming that the contract language does not reflect the parties' true deal ordinarily has an uphill battle in litigation regarding the contract.



For this reason, it is important to insist that each and every material aspect of your deal is included in the written contract itself, or you will have a difficult time claiming that it was part of your deal later. Again, avoid doing business with anyone who makes promises to you regarding your deal, but does not want those promises set forth in the written contract itself. They may be aiming to take advantage of you by making fraudulent representations or promises, and seeking to hide behind an integration clause and the parol evidence rule later.

Although the California Court of Appeal has recently restricted a party's ability to use an integration clause as a defense to its own fraud, the best course of action is still to "get it in writing," and more specifically, to "get everything in writing."

4) Failing to Include an Integration Clause.

By the same token, the absence of an integration clause can put you in the same "he said, she said" dispute you might have been in had your agreement been entirely verbal. In the absence of an integration clause, or any other evidence showing that the agreement is "fully integrated," the other party can seek to avoid its obligations under the agreement by claiming that an extrinsic or written agreement varies or alters the terms of your written agreement. As a general rule, make sure that there is an integration clause in all of your written agreements, and if you do not see one, insist that an integration clause be included.

5) Failing to Define Terms, or to Carefully Read Defined Terms.

In addition to the pitfalls involved with not reducing your agreement to writing described above, BKCG has handled countless cases where the parties simply do not carefully read the language of the agreement. Many times this involves the terms used throughout the contract.

For example, a contract might provide that one party is entitled to receive "20% of all profits" from each sale. However, without a definition, or at least some clarification of the term "profits," a party might argue that it is entitled to 20% of gross profits instead of net profits. Similarly, a party might define "profits" in the "definitions" section of the contract to mean gross profits, net profits, or some odd definition that is completely different from what business persons in the industry usually understand "profits" to be.

Look out for language within your contract that might be susceptible to more than one reasonable interpretation. If you find any such terms, make sure they are defined in a clear and straightforward way that leaves no room for any party to argue that they mean something different. At the same time, pay careful attention to the way that commonly understood words or phrases are actually defined within the contract. They could be defined much differently than how you would expect them to be defined.

6) Failing to Notice Last Minute Changes in "Final" Drafts.

A common, albeit unethical "dirty trick" BKCG has seen time and again is a party who sneaks a last minute change into a final draft of a contract without telling the other parties. Many times, this is a change regarding a significant deal point that the parties had previously agreed upon in their exchange of prior drafts.

While this kind of chicanery is not necessarily unassailable, an "integration clause" within a contract as explained above can present a hurdle once a party realizes the deal as written does not reflect that party's understanding of the deal. Be sure to carefully compare your final agreements with previous drafts to ensure that no last minute changes have been made.

7) Agreeing to Limit Your Inspection Rights as a Minority Owner in a Business Entity.

All business entities are generally required to provide their owners with the right to inspect the books and records of a business, which is particularly important when you are not the one managing or controlling the entity. BKCG has seen many instances where one party contractually limits its right to inspect the books and records of a business, which effectively hamstrings that party's ability to make sure that management or the majority owners are acting in the best interests of the business. Watch out for these kinds of provisions whenever you are a minority interest holder and/or where powers of management and control over a business entity are vested in anyone other than you.

8) Agreeing to Personally Guarantee an Obligation of a Business Entity.

Contracts made on behalf of a business entity must be signed by someone with authority to bind the business entity to the contract. However, many contracts include language providing that the person signing on behalf of the business entity agrees to personally guarantee the business entity's obligations under the contract. Failing to hone in on this nuance could make you personally responsible under a contract when you never intended to be. Pay careful attention and watch out for this kind of language any time you are signing a contract on behalf of a business entity and you do not intend to be a personal guarantor.

9) Failing to Notice Arbitration Clauses.

Arbitration is a private out of court proceeding before an arbitrator (or panel of arbitrators) who essentially acts like a private judge and jury, weighs the evidence, considers the law, and issues an arbitration award. Many contracts contain "arbitration clauses" providing that disputes must be resolved via binding arbitration, which often require arbitration before a specific alternative dispute resolution company (JAMS, Judicate West, and American Arbitration Association are among the most common).

Proponents and opponents of arbitration tend to disagree on whether it is actually cheaper or faster than resolving disputes in court. Arbitration fees tend to be much more expensive than civil filing fees or posting jury fees in a court of law, but arbitration can also result in a speedier resolution of disputes than our very overcrowded and underfunded court systems.

Sometimes, dispute resolution via arbitration is in your best interests, particularly if you are a large business or a majority interest holder who can afford to pay the sometimes expensive fees associated with arbitration. However, agreeing to binding arbitration might not be in your best interest if you are a minority interest holder and/or cannot afford to pay arbitration fees throughout the course of the proceedings.

Regardless of whether you determine that arbitration suits your interests, the important thing to remember about arbitration is that 1) you are generally giving up your right to resolve disputes regarding your contract in a court of law; and 2) the arbitrator's award is nearly impossible to overturn once it is issued. In fact, the arbitrator can make mistakes in applying the law (or even apply the wrong law) that would otherwise be appealable, but courts will still uphold such arbitration awards absent a few highly exceptional circumstances.

Also watch out for provisions within arbitration clauses that limit your right to obtain discovery from the other parties during the arbitration proceedings. This can make gathering evidence to support your claims or defenses extremely difficult, particularly if you are the party that has the burden of persuasion in providing evidence to establish a claim or defense.

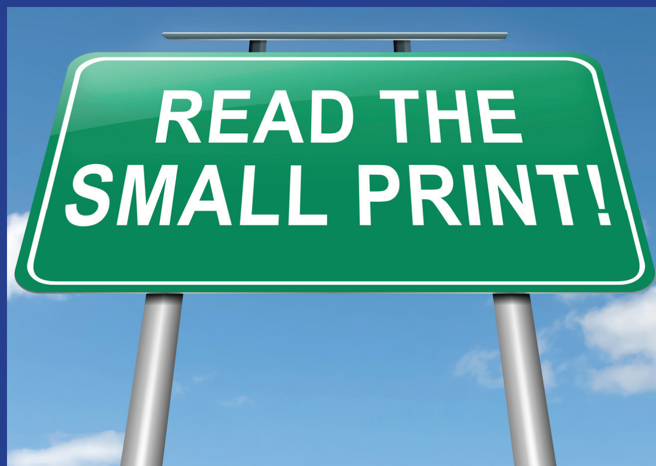
10) Failing to Notice Forum Selection Clauses or Choice of Law Provisions.

You might live in California and sign your contract in California, but many contracts have "forum selection" provisions which require any lawsuit or arbitration proceeding to be filed in an entirely different state. This can make it much more difficult and expensive to litigate any dispute that might arise regarding your contract if you are required to travel to a different state to do so. Even more problematic can be a choice of law provision, which could provide that disputes regarding your contract must be governed by the laws of a different state.

Courts generally uphold contractual choice of law provisions except in limited circumstances, and the law that governs the contract can significantly affect the parties' rights and obligations. For example, the rights and obligations of majority and minority interest holders in a corporation can vary from state-to-state. While majority shareholders owe "fiduciary duties" to both the corporation and the minority shareholders under California law, Delaware law only extends these fiduciary duties to the corporation itself. Be on the lookout for these kinds of provisions, particularly when all the parties to a contract reside in California and you might ordinarily assume that the agreement would be governed by California law.

11) Using Form Language You Obtained from an Internet Search.

There are an immeasurable amount of sample contracts floating around the internet from various sources. There are even some websites such as Legalzoom.com that claim to be able to provide you with various sample contracts in exchange for a fee. Unfortunately, none of these things are actually providing you with legal advice, nor are they tailoring the terms of the sample language to suit your needs or to reflect the understanding of the parties.



BKCG has seen all manner of strange provisions that have nothing to do with the contracting parties' contemplated deal within contracts where one or more parties have relied on a sample obtained from the internet. As a practical matter, there is no such thing as a "one size fits all" contract, and you should not assume that samples you obtain from the internet are either well drafted or suited to your needs.

12) Not Consulting with an Experienced Attorney First.

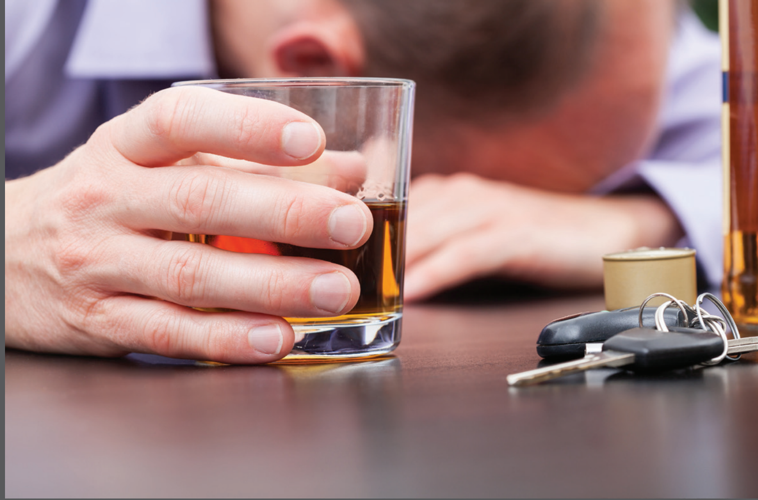
The above-described points are just the tip of the iceberg in terms of the potentially expensive mistakes parties can make in negotiating and entering into agreements. You should consider consulting with an attorney first if you are presented with an agreement or proposal involving a major business or investment decision. Although there is no sure-fire way to entirely eliminate the risk of litigation when entering into a contract, a few hours of attorney time can help minimize this risk, and help you better understand the parties' rights, obligations, and remedies so you can make an informed decision about your anticipated deal.

At the same time, you should find an attorney who is familiar with the subject matter of your anticipated agreement. For example, an attorney with significant experience in real estate, but no intellectual property or licensing experience, could provide sound advice regarding a commercial real estate deal. However, this same attorney might not be the best candidate to handle your computer software royalty licensing arrangement. Almost every contract has subject-matter-specific nuances, so make sure the attorney you hire to assist you with your deal has sufficient experience regarding the nature and subject matter before retaining counsel.

Please contact Eric Hardeman at (949) 975-7500 or at ehardeman@bkcglaw.com if you have questions about this article or any other related matter.

HO HO HO-rrendous Potential Liability for Company Holiday Parties (continued from page 1)

Landri left the party and drove home without event. He stayed at home roughly twenty minutes but then decided to drive back to the party to pick up another employee. On his way back to the party, Landri crashed into another vehicle and killed that vehicle's driver. The family of the accident victim sued Marriott.



Initially the trial court found that Marriott could not be liable for Landri's drunk driving and the fatality because Landri was not acting within the scope of his employment during the accident. However, the Court of Appeal reversed the trial court's decision and found Marriott could be liable for Landri's conduct because Marriott both provided alcohol to Landri and allowed him to drink hard alcohol at the party.

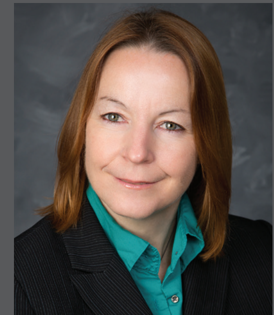
The Court also found that when Marriot provided alcohol as a "thank you" to its employees, "the party and drinking of alcoholic beverages benefitted Marriott by improving employee morale and furthering employer-employee relations." The Court concluded, therefore, that it was possible for a jury to find Landri's intoxication at the party occurred within the scope of his employment with Marriott.

The Purton opinion is one of a growing number of California court cases which demonstrate how employers create significant legal risks for themselves when they provide alcohol to employees or permit employees to consume alcohol at company sponsored events.

The liabilities range from cases like Purton, where an employee injures or kills another individual drunk driving, to workers compensation cases where intoxicated employees injure themselves or other employees, to sexual harassment cases where an employee complains an intoxicated co-worker made inappropriate advances or comments.

Obviously, the most drastic step an employer can take to manage these risks is to forbid alcohol at company events, including holiday parties. Short of this step, however, there are a number of other measures employers can take to limit the legal exposure caused by the poor choices of intoxicated employees. For example, employers can limit the number and type of drinks provided to employees at the party or event. Once this measure is in place, the employer must enforce it.

The Court in Purton found it significant that Marriott did not enforce the two-drink ticket rule it had implemented at its party. Additionally, employers can establish a cut-off time beyond which alcohol will not be served, they can make sure food is available along with the alcohol, they can offer plenty of non-alcoholic beverages as an alternative and they can make attendance at the party voluntary. In addition, it is a good idea for the employer to ensure alternative modes of transportation are available to its employees leaving the company event.



In short, employers should be mindful that hosting a holiday party, or any company event, can be risky without careful planning. To that end, it is always a good idea for the employer to consult legal counsel prior to the party to make sure measures are in place that allow everyone attending the event a relaxed and enjoyable time.

Please contact Rosamund Lockwood at (949) 975-7500 or at rlockwood@bkcglaw.com if you have questions about this article or any other related matter.

The BKCG Bulletin is Published By:

Burkhalter Kessler Clement & George LLP

2020 Main Street
Suite 600
Irvine, CA 92614
Attn: Alton G. Burkhalter
949.975.7500
949.975.7501 fax
www.bkcglaw.com

340 North Westlake Blvd.
Suite 110
Westlake Village, CA 91362
Attn: William C. George
805.373.1500
805.373.1503 fax

Visit our new web site at www.bkcglaw.com

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