KILLER CONTRACT CLAUSES

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Are you a winner or loser when it comes to business disputes?

Here's the quick test:

Question #1: Do you run away from legal fights because you're afraid you won't win?

Question #2: When you do fight, do you lose business battles that you should have won?

Question #3: When they hand you a settlement check, are you more likely to sign the front or the back?

If you don't like your answers, this article is for you (and the winners might also want to read on, too).

In business, disputes are inevitable. The key is winning. And, in most cases, winning requires key contract clauses–these are the "killer" clauses that turn an even playing field into a home field advantage.

Tilting the Playing Field

For example, a client recently lost a battle before it ever started because of a bad attorneys' fees provision. The client was involved in a fight to collect $70,000 and had me review the contract prepared by its prior attorney. Well, I quickly figured out that a one-sided attorneys' fees provision — buried in the fine print — killed the case. Forget the facts. Forget the law. Forget right or wrong. A bad attorneys' fees provision rendered them all irrelevant.

The contract said that if my client lost, it had to pay the opponent's legal fees. But, if my client won, the opponent did not have to pay my client's fees. So, no matter what, my client was stuck with its own legal bill — and faced the risk of paying the other side's bill, too. In short, my client would lose money EVEN IF IT WON. Going to court is expensive and would easily end up costing more than the $70,000 it stood to win. So, even if my client won (add $70,000), it had to pay its own legal fees (subtract more than $70,000) and would have suffered a net loss. And if, by chance, my client lost in court, it would win nothing and have to pay a bundle for the other side's legal fees and its own costs. It was a classic "heads you lose, tails they win."

I had to recommend that my client not sue and instead invest in improving its contracts.

Lesson: You almost always want an attorneys' fees provision in your contracts — but, make sure this provision guarantees payment of your legal fees if you win.

"Shall be entitled" vs. "Shall pay"

The tiniest of details in your contract can have big consequences. Contrary to widespread expectations, an attorneys' fees provision that says you "shall be entitled" to reimbursement of your legal fees does not guarantee you anything. Rather, if you win, a "shall be entitled" provision means that the judge decides, in his or her discretion, how much — and even if — you get reimbursed for your legal fees. That's not much of a guarantee. Instead, you want a provision that flat out says that the other side "shall pay" you for your legal fees if you win. In the eyes of the law, "shall be entitled" means "maybe" or "who knows — I'll think about it." But, "shall pay" means you get the money.

Lesson: When it comes to the law, details matter. In a 100 page contract, a couple of words can change the outcome. Work with someone who knows which ones count.

Magic Words

Deadlines are the subject of countless contract disputes. But, it's not enough to simply include a deadline. Insiders know you need the following magic words: "TIME IS OF THE ESSENCE." This "abracadabra" makes all the difference in a legal battle.

Let's say you own an office building and — in a moment of weakness — you gave one of your tenants an option to renew

his/her lease at a very favorable rent. Of course, the lease says your tenant must exercise by a certain date or the tenant loses the option. Not so fast! That's right, without those magic words "TIME IS OF THE ESSENCE" your tenant still may be able to get that favorable rent even if he/she is late notifying you. Along with the secret handshake, lawyers are taught "the rules." One of those rules says ordinary deadlines are kind of like suggestions or preferences. They may not be enforceable. If you really want a deadline, then you need to let everyone know that you're not kidding around by adding: TIME IS OF THE ESSENCE.

Lesson: Contracts and the law are not about common sense. They're about rules. Know them and win. Ignore them and forget about retiring on time.

Prohibited Words

The rule book also prohibits certain words, like "penalty." A penalty is some arbitrary, and usually excessive, amount that the other side must pay for breaching your contract. Let's say the other side violates the deal, causing you a loss of $10,000. But, your agreement provides that the breaching party must pay $25,000 — regardless of the actual harm you suffer. That provision will likely be considered a penalty and you can't collect penalties.

Of course, you can make someone pay your "damages." Your damages are the dollar value of the actual harm you suffer because the other side breaches your contract. In the example above, you would be able to get the $10,000 caused by the other party's breach of contract.

Sometimes, though, you know in advance that it will be really hard — perhaps impossible — to calculate your damages if the other party defaults. If so, the parties can agree in advance on a reasonable estimate of the harm you will likely suffer. This estimate is called "liquidated damages." Drafted properly, you should be able to collect your liquidated damages when the other side breaches.

But, don't just wing it. You have to be careful with the drafting. And your estimate of liquidated damages must be reasonable. If you just use some crazy number designed to punish the other side for violating your contract, you're back to having a penalty and you risk walking away empty-handed.

The Biggest Lesson: Businesspeople spend a lot of time and take a lot of pride negotiating deals. They high-five when they get key points. But understand what it takes to win if there is a fight later. You only win a "feel-good" battle in the negotiation. You win the real war in the contract. That's where the killer contract clauses rule.

ABOUT JACK GARSON

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Jack Garson's practice focuses on Real Estate, Construction and Business law. He serves as a legal advisor for numerous local, regional and national companies. In his role as legal counsel, Jack also serves as a strategic advisor and lead negotiator. Further, Jack provides guidance on the structure of complex transactions, the resolution of business disputes, the growth and sale of companies, and the management of issues such as liability and risk reduction, employment practices, and enhancing profitability.

ABOUT OFFIT KURMAN

Offit Kurman is one of the fastest-growing full-service law firms in the United States. With offices in six states and the District of Columbia, Offit Kurman is well-positioned to meet the legal needs of dynamic businesses and the individuals who own and operate them. For over 30 years, we've represented privately held companies and families of wealth throughout their business life cycles

In the past two years, we've grown by 50% through expansions in New York City and, most recently, Charlotte, North Carolina. This growth has provided immense value to our clients and attorneys.

Wherever your industry, Offit Kurman is the better way to protect your business, preserve your family's wealth and resolve your most challenging legal conflicts. At Offit Kurman, we distinguish ourselves by our quality and breadth of legal services—as well as our unique operational structure, which encourages a culture of collaboration and entrepreneurialism. The same approach that makes our firm attractive to legal practitioners also gives clients access to experienced counsel in every area of the law.

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