Business Law 101: Ignorance Is No Defense – Read the Contract!

By ALAN S. WERNICK, ESQ.

Warning labels abound in the marketplace for consumer goods.[1] Perhaps contracts should contain a warning label paraphrasing a common warning heard on certain TV shows: "What you say, and sign, may be used against you [or your business] in a court of law."

Contracts are a way for parties to agree on terms and conditions, and to allocate risk, concerning transactions. When a contract dispute arises, judges, triers of fact, and/or arbitrators are tasked with trying to understand what the parties to the contract intended. When one party tries to avoid promises or obligations set forth in a contract, judges, triers of fact, and arbitrators, absent clear evidence of fraud, misrepresentation or undue influence, are unlikely to accept as justification an argument by the business person contracting party that they did not read the contract they signed because they were in a hurry or did not want to spend the time or money discussing the contract with counsel before signing the contract.

In a recent case from the Supreme Court of Texas we find an example of the consequences of a sophisticated businessman failing to read an agreement. In National Property Holdings, L.P., et al., vs. Westergren (Supreme Court of Texas, 2015) Mr. Gordon Westergren ("Westergren") entered into an option contract to purchase a highly desired parcel of real estate. Subsequently, he discovered that the property owner had later entered into similar options with two other parties. Westergren filed a lawsuit against the seller and the other interested buyers along with a *lis pendens* action against the subject property. Meanwhile, other developers, including National Property Holdings, L.P. ("NPH") took an interest in the subject property.

The parties to the lawsuit participated in mediation in which NPH, although not a party to the litigation, had a representative, Russell Plank (identified as a consultant to NPH), present. The mediation was successful and NPH agreed to purchase the subject property and all claims,

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[1] By way of example, and not limitation, consider (from a 20150208 Google search): Lawn mower: "Do not put hands under mower when blades are rotating." Football helmet: "No helmet system can protect you from serious brain and/or neck injuries including paralysis or death. To avoid these risks, do not engage in the sport of football." Printer ink toner: "Warning: Do not drink." Three pronged fish hook: "Harmful if swallowed." Electric razor for men: "Never use while sleeping."

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cross-claims, counterclaims, and the *lis pendens* action were settled and released. Separately, in exchange for Westergren's agreement to settle the lawsuit, release the *lis pendens*, and allow NPH to purchase the property, an oral agreement between Plank and Westergren was entered in which Westergren was to receive $1 million plus an interest in the profits from NPH's development and future sale of the property.

When 20 of the 190 acres of the subject property were sold Westergren asked for the promised $1 million and a share of the profits, and received the response from Plank that they could only pay Westergren $500,000 "right now." When Plank and Westergren later met Plank presented a $500,000 check from NPH and a release which Westergren, without reading, signed in the presence of a notary.

At trial, Westergren said he did not read the document because he was "in a hurry" and did not have his reading glasses. According to the Court, "…the title of the document, stated in bold and underlined capital letters, read '**AGREEMENT AND RELEASE**.' The release stated that Westergren agreed to relinquish any and all interest in the property and all claims against NPH, Michael Plank (president of NPH), and other listed parties in exchange for the total payment of $500,000. Without reading the release, Westergren signed it in front of a notary and accepted the check."

Several months later when Westergren requested the additional payments NPH and the Plank brothers (Mike and Russell) refused and asserted that Westergren had released all claims by signing the release and that the oral contract was unenforceable under the statute of frauds. A lawsuit ensued in which a jury found in favor of Westergren on all claims but awarded $0.00 in damages. The trial court, on motion from the Planks, granted a judgment notwithstanding the verdict and entered a take-nothing judgment as to all parties, assessing costs against Westergren.

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The parties appealed to the court of appeals[2] and then to the Supreme Court of Texas. The Supreme Court, in a *per curiam* opinion, held that "…Westergren's decision not to read the release and instead to rely on Plank's representations because he did not have his glasses and was 'in a hurry' was not justifiable." The Court noted that it had recently observed that "...it is not the courts' role 'to protect parties from their own agreements.'" The Court went on to quote from a long standing United States Supreme Court case:

> It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission.

Upton v. Tribilcock, 91 U.S. 45, 50, 23 L. Ed. 203 (1875).

Most experienced lawyers (particularly those who are experienced both in business transactional work and dispute resolution) who have an established relationship with a client would much rather have their client pick up the phone and call the lawyer before signing any business agreement. As Ben Franklin said, "An ounce of prevention is worth a pound of cure." The bottom line is that the courts will not, in most cases, find justifiable defenses in the claims that a sophisticated business person did not read an agreement or want to spend the time or money to seek the advice of knowledgeable counsel before signing an agreement for a business transaction.

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[2] The court of appeals thought it relevant that Plank knew that Westergren had an attorney and had communicated with him but did not involve him in the drafting of the Release or send him a copy.