CONTRACT OF ADHESION WITH A CONSUMER’S TWIST?

By Keith A. Jones, Esq.

You’ve received them. Those fine-print, pre-approved credit card applications with comprehensive, one-sided terms and conditions presented in a ‘take it or leave it’ fashion by mammoth, multi-billion dollar financial institutions. As a consumer, you do just that. Sign and ‘take’ the terms without an opportunity to negotiate, or reject the credit card offer and ‘leave’ it on the table (or more likely, toss it in the trash).

Many California court decisions consider whether terms of such credit agreements are unconscionable, and thus unenforceable as contracts of adhesion. The courts consider such factors as the lack of negotiation and meaningful choice constituting oppression, whether the allegedly unconscionable provision is buried in fine print causing surprise, and whether the terms reallocate risks in an objectively unreasonable or unexpected manner.

A recent credit card case in Russia centered on an enterprising consumer who turned the tables on a credit card application that he received from Tinkoff Credit Systems. Dissatisfied with the lopsided terms favoring the bank, he scanned the bank’s form into his computer and modified a few key provisions to be very favorable to him. For instance, he revised the interest rate to zero percent interest, increased it to an unlimited credit limit, and deleted any late fees. He also added provisions that imposed fines on the bank if it violated the agreement or terminated his credit line, and then submitted the credit application for the bank’s approval.

Undoubtedly much to his surprise, the bank sent him a credit card and a copy of his revised credit application approved by the bank. Eventually the bank terminated the consumer’s credit card for late payments, and then sued him to recover his unpaid balance of about $575.00 plus credit card fees. The court ordered the consumer to pay the unpaid balance but did not award the bank any interest or credit card fees in light of the consumer-revised and bank-accepted credit application.

The consumer’s attorney has since sued the bank for the termination fees and fines for violating the agreement totaling over $700,000.00 based on the terms inserted by the consumer. The attorney contends that the bank should be held responsible since the bank pursues borrowers based on the typical argument that the borrowers are liable even if they signed the applications without reading them.

Whether a Russian court could find such an agreement as an unenforceable contract of adhesion has not been addressed in August 2013 news reports. One wonders whether the bank would succeed with a contract of adhesion defense since it presumably had a chance
to negotiate the terms which the customer had changed presumably as a counter-offer to the bank’s standard language. Moreover, it would seem that the bank would not be successful arguing that the terms were buried in fine print since the bank’s initial application contained fine print.

The bank’s president maintains as a matter of principle for the bank that the consumer should spend four years in prison for fraud. The bank’s president may want to proceed with caution with such an argument since sage consumers may urge that the bank’s action of burying the details in fine print could also be construed as fraud. Maybe the bank would succeed on arguing the consumer reallocated the risks of the contract in an unreasonable manner. However, couldn’t consumers potentially raise the same argument for the bank’s standard, pre-printed terms?

Time will tell if California consumers try similar “negotiating” tactics against financial institutions promoting credit cards. Maybe the Russian consumer’s twisting of the bank’s credit application form will cause the age-old contract maxim ‘buyer beware’ to be rewritten to ‘lender beware.’ What will you do with your next credit card application? Take it or leave it?

EAST COUNTY DIVISION’S JUDICIAL OFFICERS HOLD MCLE PRESENTATION ON BASICS OF REPRESENTING DVTRO CLIENTS.

By William A. Hannosh

On July 16, 2013, all three judicial officers from the East County Division’s family law department gave an informative round-table discussion entitled “Basic Dos and Don’ts of Representing Parties in DVTRO Proceedings”. The judges’ presentation was a well-attended event – and nearly standing-room only.

A practical, general rule reiterated by the Honorable Darlene White was that courts do not often issue orders on the division of money or assets via a restraining order proceeding. A party seeking a court order on disputed assets is strongly discouraged from using the domestic violence restraining order as a vehicle to do so.

Also, too many times, respondents in such proceedings will file and mail their responses (to either the Court or petitioner) late or too late for the response to be adequately reviewed. Commissioner White stated that it is “helpful to no one” to “drop a Response to a DVTRO in the mail two days before the hearing.”

Of course, the judges reminded the audience that when it becomes apparent that a proceeding will be continued (either by a stipulation or other circumstances), attorneys are not only urged to inform the Court of the continuance, but to also have the necessary Reissuance of a Domestic Violence Restraining Order ready to present to the Court – prior to the end of the scheduled hearing.

As for attorneys representing protected parties, Commissioner White stated that it is acceptable to have the Restraining Order After Hearing completed in handwritten form if necessary – but that more importantly – it be filed with the Court by the close of the business day of the hearing.
A FIDUCIARY AS TRUSTEE

By Tina Senteno, CLFP
Professional Fiduciary

In 2007, the legislature passed laws requiring professional fiduciaries to be licensed. The Department of Consumer Affairs created the Professional Fiduciaries Bureau to license and regulate professional fiduciaries. A private fiduciary is a non-family member who serves professionally, for a fee. A professional fiduciary can be appointed by the court or hired privately. A professional fiduciary may serve in the capacity of conservator of the person, conservator of the estate, guardian, personal representative, administrator and trustee.

In today's society, the number of individuals that are aging and developing disabilities are increasing, and correlate to the aging process and our environment. Private fiduciaries serve those who are vulnerable and faced with challenges that vary, from active productive individuals who are unable to manage their daily affairs, to individuals who are abused, neglected, elderly or disabled.

A fiduciary as trustee has the responsibility of carrying out the terms of the trust instrument. The trustee is usually a person named by the creator of the trust, but in some cases, the named trustee may opt to resign from the appointment, become incapacitated, or die. If there is no successor trustee who can
serve, the court has the responsibility of appointing a trustee, usually someone nominated by the trust beneficiary.

As the trustee of a decedent’s trust, there are certain duties to perform and certain rules that a fiduciary must follow. A fiduciary can become open to being confronted with questions and problems beyond the scope of a brief explanation. If in doubt, consulting the attorney for the trustee may be in order. Fiduciary law does not demand absolute perfection in judgment, but it does demand absolute loyalty, absolute honesty, and absolute disclosure, even if that disclosure hurts. Fiduciaries serving as trustees are treated differently by law. A quote from Justice Benjamin Cardozo (a former United States Supreme Court Justice) provides instruction:

“Many forms of conduct permissible in a workaday world for those acting at arm’s length are forbidden to those bound by fiduciary ties. A (fiduciary) is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the “disintegrating erosion” of particular exceptions...Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd...”

There are three sources where the trustee may find authority. The trust instrument itself in which the duties and powers as described are the first instructions. Any fiduciary, whether a professional or otherwise, must read the trust instrument thoroughly and repeatedly. The instrument may contain provisions that are against public policy, however the instrument cannot protect the trustee from liability for provisions that go against public policy, for example, if the trust instrument states that a beneficiary is not entitled to an accounting, it is against public policy (specifically the probate code) leaving the beneficiary no way to determine what the trust assets are or how they are being managed. Thus, the trustee should perform an accounting in accordance with the probate code. The second source of authority comes from the California Probate Code. The third source of authority is the “common law”, that is case law surrounding this subject. Cases are brought to court because the trust instrument and California Probate Code may be silent on issues.

As trustee, the fiduciary, including a professional fiduciary, has the primary duty to administer the trust solely for the benefit of the beneficiaries, and has a duty of absolute loyalty to them. Constant communication between the professional fiduciary, the beneficiaries, and the attorney for the trust is therefore paramount to insure the beneficiaries’ interests are protected.

Tina Senteno, Principal of Fiduciary Matters, has three decades of experience working in banking, real estate (transactional and appraising), special needs trust administration and serving as a professional fiduciary.

CIVIL LITIGATION SECTION UPDATE

By: Cheryl L. Stengel, Esq.

On October 14, 2013, the Civil Litigation Section will present the MCLE program, “Debt Collection Abuse, a primer on the Fair Debt Collection Practices Act (FDCPA),” with speaker, Patrick Howe, Esq. The program will be from 12:00 noon to 1:15 p.m. at BJ’s Restaurant in Grossmont Center in La Mesa.

In today’s economy, many people are experiencing economic difficulties. Some have lost their jobs. Some have had their work hours reduced. Some have suffered illnesses that keep them from working. As a result, some people are falling behind on their bills and are getting calls, letters and lawsuits from debt collectors. Debt collectors are entitled to attempt to collect, but they must do so in a way that is legal, truthful, dignified and respectful. There are several laws that govern how debt collectors must act. Unfortunately, many people are unaware of their rights under these laws and some debt collectors take advantage of that
lack of knowledge. The seminar will provide an overview of the laws governing the fair collection of debts. The seminar is for consumers and attorneys with consumer clients who are receiving communications from debt collectors or who have been served with a collection lawsuit.

Attorney Patrick Howe is a civil litigation attorney based in downtown San Diego. Part of his practice is devoted to the representation of consumers in abusive debt collection cases under the federal Fair Debt Collection Practices Act and California’s Rosenthal Fair Debt Collection Practices Act.

If you have any suggestions for speakers or upcoming meetings, please contact section co-chairs, Mark Raftery at mraftery@epsten.com or Cheryl Stengel at clstengel@outlook.com.

SAN DIEGO LAW LIBRARY UPDATE

What is the Future of the Law Library?

It’s up to you. This is the last push to ask you some important questions. Your answers supply the Library with valuable data needed for grants and other funding. The Library needs 100 more participants to get an accurate statistical representation of the people they serve. Your participation is crucial. YOU can shape the future of the Law Library, please take the survey http://www.surveymonkey.com/s/P56GL95.

The San Diego Law Library frequently offers MCLE and educational programs. Upcoming events include:

“What Employers Should Know About Visas When Hiring Foreign Professionals”

Wednesday, September 4th, 12-1 pm

This session will present an overview of the most practical visa solutions for employers seeking to hire foreign nationals. The session is geared to help San Diego employers, employees and non-immigration lawyers alike identify the most common issues and pitfalls of employment-based visa sponsorship under the federal immigration law. Topics to be covered will include: employer’s responsibilities, length of work visas, compliance with wage laws, education and experience requirements, and options for family member dependents.

Cost: $10 - 1 Hour MCLE - Sign up online at: https://visas4sept2013.eventbrite.com/

“Using Lexis”

Thursday, September 12th, 12-1 pm

Learn how to quickly find useful content related to your search. This one hour class will cover search techniques, finding databases, Shepardizing, emailing and printing, etc. Sign up for this class and become a more efficient and productive researcher.

Cost: $10 - 1 Hour MCLE - Sign up online at: https://lexis12sept2013.eventbrite.com/

“Federal Tax Controversies”

Wednesday, September 18th, 12-1 pm

Do you have a dispute with the IRS? Did you receive an IRS Audit? Come to this 1 hour seminar that will cover how to resolve tax disputes with the IRS. Topics include how to respond to IRS Audits, IRS Collection notices, IRS Liens and garnishments, and much more.

Cost: Free - Sign up online at: https://tax18sept2013.eventbrite.com/

Isabel Eustaquio, Esq. | Librarian, San Diego Law Library | 1105 Front St., San Diego, CA 92101
Phone: (619) 331-3900  E-mail: ieustaquio@sdlawlibrary.org

PAGE 5
FOOTHILLS BAR ASSOCIATION
FAMILY LAW SECTION MEETING

Tuesday, September 17, 2013
12:00 pm – 1:15 pm

LOCATION:
East County Court House – Department 6
250 East Main Street, El Cajon, CA 92020

TOPIC:
“Determining the Appropriate Court for Custody Cases involving Non-Parents”
(Family? Probate? or Juvenile?)

SPEAKER:
Catherine Tancredi
Attorney – Certified Family Law Specialist

COSTS:
* Free for Members of Foothills Bar Association
* $10.00 for Non-Members or Guests.

**The Foothills Bar Association has submitted its application for renewal of provider status to the State Bar of California and expects this program will be approved for 1.0 hour of MCLE general credit by the State Bar of California.

For questions, please contact Will Hannosh at (619) 244-9835 or Williamthelitigator@gmail.com
2013 FBA OFFICERS, DIRECTORS, SECTION CHAIRS & COMMITTEES

OFFICERS

President          Bradley Schuber  BSchuber@a-khoa.com  619-589-8800
Vice President     Keith Jones      kjones9001@gmail.com  619-462-6220
Treasurer          Mark R. Raftery  mraftery@epsten.com  858-527-0111
Secretary          Cheryl L. Stengel clstengel@outlook.com  619-269-2126
Immediate Past President Carolyn R. Brock  carolyn@crbrocklaw.com  619-741-0233

DIRECTORS

Lauri Croce       lauricrocelaw@gmail.com  858-720-1590
Nancy Ewin        nancy@nkewinlaw.com  619-698-1788
William Hannosh   whannosh@gmail.com  619-579-4200
Mark R. Raftery   mraftery@epsten.com  858-527-0111
Kim Marie Staron  kstaron@lawinsandiego.com  619-574-8000

REPRESENTATIVES

Sheryl S. Graf, SDCBA  619-440-5716
Judy M. Marolt, Lawyers Club  619-442-1857

SECTION CHAIRS/MEMBERS

FAMILY LAW:         Will Hannosh
CIVIL LITIGATION:   Cheryl Stengel, Mark R. Raftery
ESTATE PLANNING:    Nancy Kaupp Ewin, Carolyn R. Brock

COMMITTEES

ADVERTISING        Chair: Nancy Kaupp Ewin
LAW DAY             Chair: Carolyn R. Brock
HARD-TO-GET         Chair: Keith Jones
CREDITS SEMINAR     
MEMBERSHIP          Chair: Lauri Croce, Gerald Sherwin
ADDRESS CHANGES     Chair: Lauri Croce, Gerald Sherwin
SUBMISSIONS
Your submissions are welcome! Send articles, letters, flyers, and other non-advertising submissions to Cheryl Stengel at clstengel@outlook.com.

ADDRESS CHANGES
Send change of address or telephone number to Lauri Croce, Esq. at lauricrocelaw@gmail.com or 858-720-1590.