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BKCG
BURKHALTER KESSLER CLEMENT & GEORGE LLP

When Elderly Parents Require Assistance

As estate planners, we map out how a client's estate is to be administered and distributed when a client passes away. We also put in place a plan for managing a client's estate if they become mentally incapacitated or simply become unable to adequately manage their financial affairs. With life expectancies increasing, the incidence of diminished mental capacity is steadily increasing as well.

While estate plans will indicate who manages the affairs of an individual in the event of mental incapacity, it is not usually easy to implement that plan when it is needed. For example, if a parent has a bank account at Bank X in their name or the name of their revocable living trust, and they become mentally incapacitated, how does the agent under a power of attorney or successor trustee establish their right to manage the account? First, the agent or successor trustee will have to obtain a written opinion letter from the parent's doctor, documenting the parent's inability to handle their financial affairs. Some documents require two such written opinions. The medical opinion is then provided to the bank along with the power of attorney or trust document in order to establish the individual's bonafides to act on behalf of the incapacitated parent. This process could take a few weeks and is often burdensome on the agent or successor trustee, who is often a child of the incapacitated parent.

One way to make this process less burdensome on the children and in order to facilitate continuity in the management of the parent's affairs, is to begin the process of transitioning managerial authority to the next generation while the parent is still well. If a parent is handling his or her affairs without issue, then such a transition is not necessary. However, as often is the case, a parent will begin to show signs of slowing over a period of time, prior to entirely losing capacity. The needle that must be thread is to identify when a parent has experienced some minor diminished capacity issues, and to present an option to them when there is a higher likelihood of the parent accepting it. The solution is often having the parent appoint another individual, often a child, to serve as a Co-Trustee with the aging parent, with the parent and the child having the right to act independent of one another. By doing this, the child can be added onto the Trust account as a Co-Trustee and have managerial authority over the account along with the parent. The parent is the one actually adding him or her while they are still mentally competent. Consequently, no physician's opinion is required.

By engaging in this planning, when and if a parent ultimately becomes unable to handle his or her affairs, the successor trustee or agent under a power of attorney is already in place, and the parent's affairs may be handled seamlessly without a delay of several weeks. Additionally, while the parent is still competent, they still have signing authority over their affairs, along with the Co-Trustee child. This dynamic makes it easier to convince the parent to put this arrangement in place rather than asking them to resign and hand over all authority to the successor trustee.

Depending on the family dynamic, this can be an easy process or one filled with acrimony. If the children of the parent are often at odds with each other, choosing who the Co-Trustee should be is critical. Often times an independent person or Bank or Trust Company is the best choice. It is best not to wait until incapacity is a reality. Children should have the discussion with the parent or parents, even if it is a little uncomfortable.

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Arbitrator Upends Boilerplate Limitation on Damages in Business Dispute

Clauses appearing near the end of contracts are often referred to as "boilerplate" because they seemingly get reused over and over without much change. In one of our recent cases, an arbitrator reviewed the enforceability of one such provision which limited the parties' ability to recover lost profits – a form of consequential damages. Buried near the end of a 70 page agreement that was heavily negotiated by the parties' legal counsel appeared one innocuous clause prohibiting the arbitrator from awarding punitive, exemplary or consequential damages. Despite over a dozen drafts exchanged between counsel, that clause was never altered, and it appeared in the final document with exactly the same language that appeared in the initial draft.

Fast forward eight years, the parties no longer get along and, worse, one of the parties is being taken over by a large player in the industry. As part of the takeover, the new owner intentionally interfered with our client to take away one of its customers. Damages from this type of misconduct are commonly referred to as "lost profits" and fall into the category of consequential damages. So, one of the key defenses we faced was the contractual prohibition on awarding such damages. In his ruling, the arbitrator found that the clause was enforceable unless we could prove "willful injury".

California Civil Code §1668 provides that "all contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." In our case, the arbitrator interpreted this law to require us to prove some other independent tortious conduct requiring an element of "scienter" (i.e., knowledge of wrongdoing). And, he found intentional interference with our client's contract to meet that legal standard.

So, irrespective of which side of a contract you are on, if things go south don't assume that the battle will necessarily be decided based on the "boilerplate". Sometimes it won't be.

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5 Things You Should Do to Reduce Your Company's Risk of Employment Claims

In recent years, there has been an explosion in the number of wrongful termination and wage and hour claims filed against our firm's clients, both in state court and at the administrative level, the Division of Labor Standards Enforcement, also known as the dreaded Labor Board where, as I often tell clients, the former Soviet Union is still alive and well! In assisting our clients in dealing with these claims over the years, a number of recurring themes have emerged. The following list of do's and don'ts is based on our clients' experiences and will almost certainly help your company to reduce the incidence and impact of potentially expensive and time-consuming employment claims. Please read it and ask yourself whether your company is doing as good a job as it could be in following these simple suggestions.

1. Take Your Time Hiring and Conduct Criminal Background Checks on Applicants. Time and again, I hear clients tell me they wish they had done their homework better before hiring a now-problem employee, but they instead rushed to fill an important position and now deeply regret doing so. Conducting a criminal background check is really a no-brainer, but so is carefully reading your candidate's employment application form, verifying the information on it, asking the candidate's references pointed questions and asking the applicant to explain unaccounted-for gaps in employment. Is your applicant claiming skills or qualifications he or she really does not really possess? Does the explanation given for leaving his or her last job really make sense or is the applicant trying to gloss over an act of dishonesty or gross incompetency? Is the candidate avoiding eye contact when answering your tough questions? These are things you need to know *before* you make your decision to hire the person. And my final piece of advice: if a little voice inside your head tells you something isn't quite right about the candidate, listen to that instinct and don't ignore it. On many occaisions I have had clients tell me that they heard - and then ignored - that voice, to their company's great detriment.

2. Carefully Evaluate Whether Your New Hire Qualifies as an Exempt Employee or Not. Let's face it, treating an employee as exempt from overtime pay requirements is far easier in many respects than treating an employee as non-exempt: no tracking hours, no policing meal and rest breaks and, what's more, no having to pay overtime pay if the employee has to work into the evening or on the weekend. However, many employers wrongly assume, to their company's peril, that if the employee is performing any kind of skilled or analytical task, or has a quasi-managerial role (or job title), they can safely treat that employee as exempt. While an analysis of the State and Federal requirements for an employee to be properly classified as exempt is beyond the scope of this article, a few general principles are worth mentioning. To begin with, job titles have little bearing on the analysis; what matters are the actual tasks that the employee performs, the relative time he or she spends performing them and even where the tasks are performed. The "outside salesperson" who spends only 25% of her time calling on customers does not qualify as exempt, nor does the HR manager who spends two-thirds of his time dealing with routine HR paperwork and only one-third of his time formulating personnel policies and solving personnel problems. Generally speaking, to be exempt in California, an employee must regularly exercise discretion and independent judgment in their jobs, or manage two or more employees more than 50% of the time and receive a salary of at least, currently, \$800/week or \$41,600 per annum (twice minimum wage), but for computer software employees, for example, the minimum permissible exempt hourly rate of pay is \$41.85. There are many traps for the unwary in making the exempt versus non-exempt determination and the consequences of misclassifying a non-exempt employee as exempt can be dire indeed, especially as the sued employer will rarely have any time employee records with which to rebut the employee's inflated claimed overtime hours after the fact.

3. Don't Pull Your Punches on Documenting Employee Counseling and Discipline Issues. For some reason, employers are often very squeamish about adding things to an employee's personnel file that relate to counseling or discipline, unless the conduct in question was very serious one, or involves the employee being "written up." This is a big mistake! While a good deal of thought does need to go into what items are added to a personnel file, since it can be inspected by the employee at any time and is discoverable in a lawsuit, failing to properly document employee performance issues can cause huge problems down the road. For example, in a wrongful termination lawsuit, it can create major credibility issues when an employer is claiming it terminated an employee for poor performance, rather than due to her return from pregnancy leave, when the employee in question received the maximum discretionary performance bonus each year, yet her personnel file contains not a shred of evidence of her alleged poor performance. Don't let this happen to you! Consistently and timely document performance issues, even if all you do is to add a one paragraph memo to the file memorializing the fact that you "counseled" your employee on the day for her repeated tardiness, or failure to follow her supervisor's explicit instructions. No formal "write-up" signed by the employee is needed, though you can certainly do one if you wish. Conversely, in a future lawsuit, a lack of such evidence to corroborate your legitimate grounds for termination could well come back to haunt you.

4. Make Prompt, Smart Termination Decisions. The old adage that one bad apple spoils the bunch is very true when it comes to employees. An inept, indifferent, sloppy or disruptive employee can massively affect and undermine an entire company's workforce and must be swiftly dealt with. Assuming you have already counseled/disciplined the employee, explored alternatives to termination such as job reassignment, and concluded that termination is the only viable option, you then need to follow through and terminate the employee in question, but in an intelligent, thoughtful and respectful manner (however egregious the employee's conduct has been!). This process encompasses everything from making sure the employee's personnel file is complete and reflects all attempts made, if applicable, to rectify the underlying problem (see point #3 above), to having a checklist of all items of property you need to get back from the employee upon termination or address (e.g., terminate his company email access and alert key customers) to more strategic decisions, such as when to terminate the employee, what the legal risks involved are, and whether to offer the employee severance pay. Put bluntly, it can be a very wise decision to offer an exiting employee a few weeks', or even a few months', severance pay in exchange for having the employee sign a properly-drafted separation agreement, releasing the employer from all future employment-related claims. An employee should never be given severance pay without the employer getting such a release in return, in the same way that an outright termination should never be euphemistically characterized as a "layoff" or the "elimination of your position" when it is not. The foregoing decisions can obviously implicate a number of complicated legal issues and it is highly advisable for an employer to discuss the situation with legal counsel before embarking on a course of action that could, if gotten wrong, make a potentially bad legal situation even worse.

5. Periodically Audit and Update Your Personnel Practices and Procedures. Employment laws in California are complicated and change at least annually. There is no grace period or forgiveness for ignorance and failure to timely implement changes, whether it is the now-mandated sick pay policy, or using a new required State form, can be brutally expensive: all the more so due to California's expansive Unfair Competition Law, Business & Professions Code Sections 17200 et seq., which converts many statutory violations into civil causes of action. This statute can result in an expensive class action lawsuit, brought on behalf of one or more of your disgruntled former or current employees, by an opportunistic plaintiffs' contingency employment lawyer who really does not care about the financial impact that paying a settlement of several hundred thousand dollars might have on your company. A good way to avoid occurrences such as this, or to lessen the impact, is to have your employee handbooks, hiring forms and practices reviewed by an expert, at least annually, obtain Employment Practices Liability Insurance (EPLI) with a wage and hours endorsement for your company and to consider implementing a properly-drafted arbitration policy with a class action waiver to resolve all employment disputes with your employees. BKCG can help you with all of these things and your commercial insurer broker can likely obtain EPLI quotes for you. Now that the use of employment arbitration policies has been consistently upheld by the courts in California, they are becoming increasingly common and advisable.

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A Fair Day's Pay Act Promotes Gender Pay Equality and Imposes Personal Liability for Wage Violations

On January 1, 2016, Labor Code Section 558.1, known as "A Fair Day's Pay Act", went into effect. The statute represents a progressive move by the state legislature to remedy gender-based wage differentials and is one of the strictest of such laws in the county. The old California law required that an employee complaining of wage differentials to find comparable employees performing the same job with the same skill, effort, and responsibility. The new standard is more relaxed and pro-employee– the complaining plaintiff

must now only identify others performing "substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions". Interestingly, the comparable employees need not even work in the same establishment. Moreover, the statute shifted the burden of proof to the employers to "affirmatively demonstrate" that a wage disparity is based on one or more valid factors, such as a seniority system or merit system.

This statute also significantly expands liability for wage and hour violations to owners, directors, officers, and managing agents of an employer, and it establishes new procedures that California Labor Commissioner can use to enforce judgments based upon unpaid wages. Specifically, the statute provides that "any employer or other person acting on behalf of an employer, who violates or causes to be violated, any provision regulating minimum wages or hours and days of work … may be held liable as the employer for such violations."

Some commenters have opined that business owners and officers will only face liability for willful (i.e., knowing) wage and hour violations. Since this law only recently went into effect, no appellate court has weighed in on its scope. In our opinion, the statute contains no such limiting language, and until a court of appeal restricts this provision, the best practice is for owners and officers to assume that any violation might expose them to personal liability. Accordingly, owners and management should be vigilant in their compliance with wage and hour statutes, particularly with respect to 1) prompt payment of all wages owed and termination, and 2) proper designation of certain employees as exempt from overtime.

A Fair Day's Pay Act also amends other provisions of the Labor Code and empowers the Labor Commissioner to investigate, hold hearings, and recover civil penalties and citations from individuals who are found to be liable for the foregoing violations.

Finally, A Fair Day's Pay Act targets "pay secrecy" by allowing employees to disclose, discuss and inquire about their own and other employees' wages for the purpose of assisting others with their fair pay claims. The statute expressly establishes a private right of action for retaliation or discharge based upon employees' discussions about their wages.

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WHEN BOILERPLATE IS NOT JUST BOILERPLATE

Parties to contracts frequently focus their attention on the negotiated deal points that they believe are important to their business interests, such as price, but tend to ignore the so-called "boilerplate" language that often exists in agreements. To many, the boilerplate language is not worth reading and certainly not worth negotiating. However, failing to read, understand, and when necessary, negotiate the "boilerplate" terms can have serious consequences. A BKCG client's recent experience demonstrates this point well.

A BKCG client recently wanted to file a lawsuit against a company we will call Acme, that owed our client $75,000. In most respects, the case was simple, as Acme had entered into a contract that obligated it to pay our client $75,000 after our client performed certain tasks. Our client performed the work necessary to trigger Acme's payment obligation–but Acme refused to pay what it owed. Although this should have been an "open and shut" breach of contract case in favor of our client, it turned out the case was not even worth pursuing due to some of the "boilerplate" terms in the contract that our client neglected to read before signing. Acme buried these "boilerplate" provisions at the very bottom of the agreement, after it already addressed the seemingly far more important and heavily negotiated deal terms, such as price, quantity, and duration. From our client's perspective when they signed the contract, the boilerplate language addressed insignificant issues, like "Arbitration", "Attorney's Fees", "Venue", "Limitation on Damages", and "Statute of Limitations."

Unfortunately, our client did not then fully understand or appreciate these provisions. It was not until Acme breached the contract that our client recognized how critical these so-called boilerplate provisions really were. For example, the contract included terms titled "Arbitration" and "Venue" that required resolution of all disputes through an arbitration hearing to take place in New York before a three-arbitrator panel, which was incredibly inconvenient for our Southern California-based client. Those terms required the parties to evenly split the cost of the arbitration and obligated each side to pay its own attorneys' fees and litigation costs, regardless of who prevails. Moreover, the contract included a "Statute of Limitations" term that limited a party's right to recover for claims that arose more than three months before the initiation of the arbitration, as well as "Limitation of Damages" provision that restricted the types and amount of damages that either party could recover. Based on the onerous nature of these dispute resolution provisions, it appears that Acme included these "boilerplate" terms in its contract with the specific intent to dissuade others from ever suing it, even if, and more likely, when, Acme breached the contract. Although our client was undoubtedly owed at least $75,000 and would certainly "win" any action it would file against Acme because its contract breach was so obvious, we begrudgingly advised our client that the case was not worth pursuing.

We gave this advice because the "boilerplate" terms in this agreement completely changed the landscape of the litigation and essentially immunized Acme for its breach. The unrecoverable costs of traveling to New York for a lengthy arbitration hearing before a three-arbitrator panel collectively charging upwards of $1,500 per hour, combined with attorney's fees and costs our client would incur–but never recover from the other side–meant that our client would undoubtedly spend more to litigate this case than it was worth. The limitation of damages provision essentially eliminated our client's ability to seek significant consequential and punitive damages, to which our client may otherwise have been entitled. The statute of limitations provision arguably eliminated our client's right to seek damages that occurred more than three months prior, even though the law generally allows a party four years from a breach to initiate a claim for breach of written contract.

In short, the "boilerplate" terms in this contract turned an otherwise "sure thing" into a "sure thing loser". This unfortunate story for one BKCG client presents a learning opportunity for others. The lesson to be learned here is that boilerplate is not necessarily *insignificant* boilerplate – it often has serious consequences. Before entering into contracts, we recommend that you speak with an attorney first to make sure you understand the meaning and ramifications of all that so-called "boilerplate" language.

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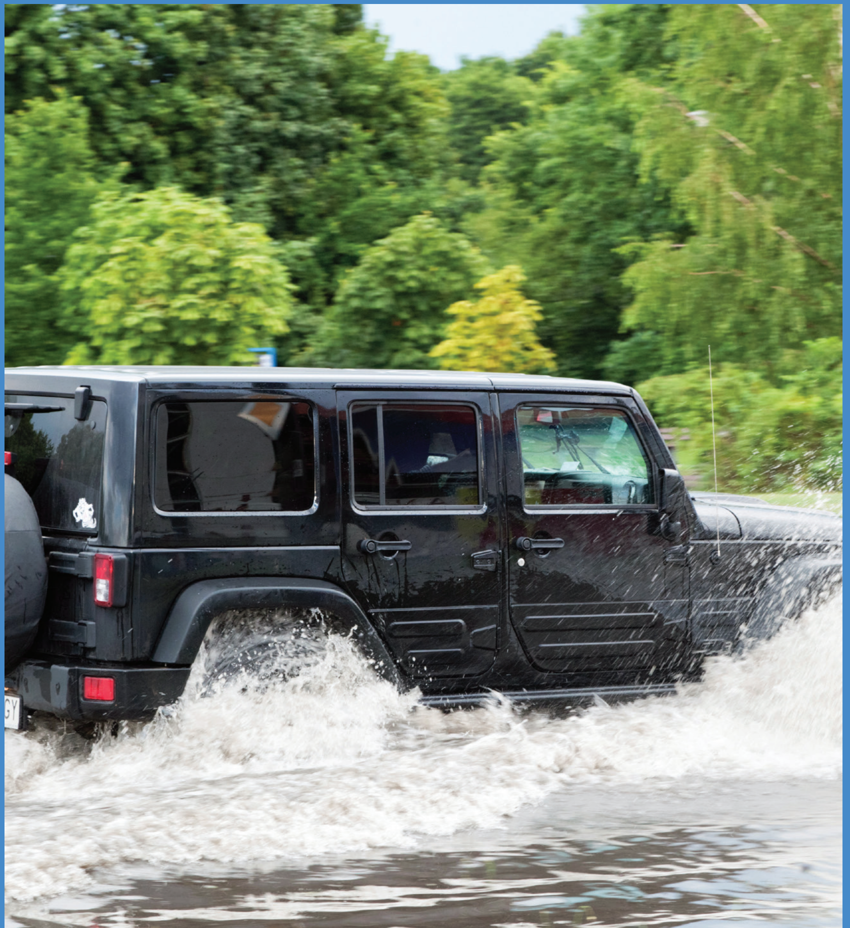
New Case Finds Vehicle Code Section 11713.18 Is Satisfied by Placing the Required Pre-Sale Inspection Report in the Glove Box Prior to the Vehicle's Sale

The Fourth Appellate District recently published another noteworthy case affecting our vehicle dealer clients. In *Brooks v. CarMax Auto Superstores California, LLC* (Cal. Ct. App., Apr. 1, 2016, No. D067491) __ Cal.Rptr.3rd__, 2016 WL 1615560, the Court of Appeals, once again, schooled California's "Lemon Law/Consumer Rights" lawyers on the actual requirements of California's Vehicle Code. This time the Court clarified what dealers must do to comply with pre-sale inspection report requirements under Vehicle Code Section 11713.18.

In the *Brooks* case, the Plaintiff bought a used Jeep from CarMax. CarMax inspected and "certified" the Jeep prior to delivery and the form documenting the scope of the inspection (CarMax's Certified Quality Inspection Document, or "CQI Certificate") was placed in the glove box. CarMax delivered the Jeep to the Plaintiff with the CQI in the glove box. After her purchase, the Plaintiff drove the Jeep through very deep water causing the engine to seize. She had the engine replaced but the Jeep continued to suffer mechanical problems. Plaintiff did not want the Jeep after she ruined it, so she sued CarMax for rescission, claiming neither the contents of the CQI Certificate nor the delivery method (placing it in glove box) satisfied Vehicle Code Section 11713.18. The Court of Appeals disagreed.

First, the Court shot down Plaintiff's claim that a violation of Vehicle Code Section 11713.18 could act as the basis for liability under the Consumer Legal Remedies Act ("CLRA") or the Unfair Competition Law ("UCL") without proof of "actual injury." The Court concluded, however, that a consumer purchasing a "certified" vehicle without an inspection report that satisfied Section 11713.18 could show "actual injury". The Court noted, "the legislative scheme contemplates certain minimal standards must be met before a dealer may promote or sell a vehicle as certified, among which is that a dealer must provide a 'completed inspection report indicating all the components inspected' to the buyer."

Plaintiff lost her appeal, however, as the Court concluded CarMax's CQI Certificate adequately disclosed the scope of its inspection and that CarMax adequately provided a copy of the CQI Certificate to Plaintiff by placing it in the glove box. Interestingly, the Court noted, "the statutory language employed by section 11713.18 ... imposes no minimum amount of inspection a dealer must perform" and that the language on CarMax's CQI Certificate indicating that "over 125 points including but not limited to" the items listed on the Certificate and certifying the Jeep had "passed" inspection was sufficient to comply with Section 11713.18. The Court refused to find that either less or more of a disclosure was necessary under the Vehicle Code.



As to the requirement that a dealer "provide" a copy of the report "prior to the sale", the Court concluded that "provide" means to "make available" and that CarMax had made the certificate available to Plaintiff by placing it in the Jeep's glove box, which is where it was when the Plaintiff examined the vehicle prior to purchase. "Although she may have conducted only a cursory examination of the Jeep before deciding to purchase it, and therefore ignored the paperwork contained in the vehicle that was 'available' to her, this did not detract from the fact that CarMax did 'make available' the CQI Certificate to [Plaintiff] 'prior to sale' of the Jeep."

The *Brooks* case is another welcome example of how California's Appellate Courts are willing to take a fair and reasonable look at the rigorous statutory requirements imposed on California's dealers. The Plaintiff in *Brooks* was left empty handed (rightfully so) because her lawyers filed a lawsuit based upon a hyper-technical interpretation of the Vehicle Code and ignored the policy reasons behind the law. Hopefully, we will see more cases like *Brooks* in the future and "Lemon Law/Consumer Rights" attorneys will be more mindful about trying to extort dealers with baseless claims.

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CONTRACTS MEAN WHAT THEY SAY BKCG Scores Knockout on Day 1 of Trial

On the first day of what was forecast to be a 5-week jury trial in Orange County Superior Court, BKCG lawyers secured a complete judgment in favor of their client before the jury trial got underway.

The lawsuit stemmed from the uncompleted sale of about 2 acres of land in Costa Mesa. BKCG client, Red Mountain Retail Group, a Santa Ana based company specializes in revitalizing neglected and challenging properties into attractive, productive parts of the community. Consistent with this, back in

2006, Red Mountain acquired a blighted group of parcels suffering from some pre-existing contamination. Red Mountain set out to remediate the property and redevelop it. After weathering the Great Recession, the property was ready to market, and Red Mountain found a willing buyer in South Coast Communities, LLC. South Coast billed itself as an experienced home builder with the sophistication to handle environmentally challenged properties. Red Mountain and South Coast entered into a formal contract in August 2012.

Under the terms of the deal, Red Mountain agreed to help South Coast get the City of Costa Mesa to approve South Coast's planned housing development, and Red Mountain would work with the environmental agencies on remediation and to get the clearances required to allow development.

All of the agreements between the parties (there were a total of seven amendments to the original contract), always maintained a clear "outside closing date"—an automatic termination date that would kick in if the deal had not closed by a date certain. The evidence in the case made it clear that these outside closing dates were commonplace in real estate contracts—especially where the parties are dependent on government approvals that are

difficult to predict. Ultimately, despite everyone's best efforts, the necessary government approvals were not obtained before the outside closing date. South Coast refused to close escrow, and the deal terminated on October 31, 2014, the "outside closing date"

Despite the clear language of the contract, South Coast sued Red Mountain just seven days later, claiming the contract could essentially go on forever waiting for the government agencies to issue approvals. In addition, ignoring clear language in the contract that specifically limited the available remedies, South Coast asked the court to improperly force Red Mountain to sell the property to South Coast, or award over $9 million in claimed "damages."

Red Mountain turned to long time BKCG trial counsel, Daniel J. Kessler, to defend the case. Kessler had successfully defended another Red Mountain related entity years prior in a real estate dispute.
From early in the lawsuit, it became evident that South Coast's strategy was to muddy the waters of a simple contract dispute with complicated, but irrelevant, environmental and land use issues.

Utilizing a team including experienced litigators, Ros Lockwood and Amber Sanchez, and despite being besieged with nearly 26,000 documents in discovery, Kessler and the BKCG team expertly kept the Court focused on the issue at hand: the contract. BKCG filed several key pre-trial motions directing the judge to the critical contract language regarding the outside closing date. The strategy paid off. Before the plaintiff could even begin jury selection, Superior Court Judge Ronald A. Bauer agreed with BKCG's contract interpretation, ruled that the contract had indeed terminated, and entered judgment in favor of Red Mountain.

Reflecting on the result, BKCG litigation head Dan Kessler stated, "I am very pleased for our client. It is very gratifying to see a Superior Court Judge like Judge Bauer spend the time to dig into the dense documents, apply the law, and make the right call. We felt very confident that a jury would have made the same call, but it would have been a tremendous waste of resources to go through the exercise of that trial." Kessler added, "The next step is getting back all of the legal fees and costs Red Mountain was forced to spend on this lawsuit that never should have been filed in the first place."

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Preserving the Attorney-Client Privilege for Legal and Business Advice

When corporate officers seek the advice of in-house counsel on delicate matters, they frequently assume that the attorney-client privilege will ensure that sensitive information will not be disclosed in future litigation. It is true that the privilege protects from disclosure of confidential communications between an attorney and their client made for the purpose of giving or receiving legal advice to the client.

Moreover, courts have repeatedly stated that the privilege applies to in-house, as well as outside counsel. But modern corporate counsels frequently wear many hats – negotiator, business strategist, lobbyist and investigator – in addition to serving as an attorney. And it is this multi-hat function of in-house lawyers that makes application of the privilege more complex and nuanced when applied to their communications with corporate officers.

The general rule is that an attorney-client communication will be protected if its "primary purpose" is to request or receive legal advice. But as courts have recognized, legal advice is often intimately intertwined with and difficult to distinguish from business advice. Accordingly, the question arises as to what steps may be taken by in-house counsel to prevent unnecessary disclosure of mixed-purpose communications.

Below is some practical advice for in-house counsel and their clients to increase the likelihood of preserving the privilege:

1. Clients should make a clear request for legal advice. Although an email that begins, "Joe, I'd like your legal advice on the following situation..." may sound stilted or overly formal, this communication signals to a reviewing court that the client is requesting legal advice. In-house counsel should provide a clear link between their legal advice and its legal justification.

For example, if it is the company's argument that the primary purpose of a communication was to obtain legal advice, the assertion of the privilege will be strengthened if the in-house lawyer's revision to draft advertising is accompanied by a statement such as "To comply with FDA rules...".

2. Avoid sending mixed purpose emails. If in-house counsel is providing both non-privileged business advice on a particular transaction and legal advice, the two should be kept separate. Some courts have taken the position that corporations that choose to communicate with legal and non-legal staff simultaneously should recognize that the privilege may not attach to such mixed purpose communications.

3. The company should give consideration to email formatting. If an employee sending an email to in-house counsel is seeking legal advice, it is not helpful if multiple non-lawyer recipients are listed in the "To" field. If non-lawyers are receiving a copy of a request for legal advice so that they know that the request was made, only the lawyers should be listed in the "To" field. Although this may seem like a minor point, these issues can take on a life of their own during heated motion practice before a judge.

4. Courts reviewing privilege claims often review the job descriptions for the staffers involved. For non-legal employees, it may be helpful to provide a discussion in the job description about what kind of legal information or advice they may have to be kept apprised of to avoid the claim that the non-legal employee's receipt of legal advice was not necessary. In the case of counsel, the job description should clearly define the attorney's business-related functions.

5. In-house counsel's advice should not be broadly disseminated. Management should provide a separate communication to company employees to put into effect the operational changes recommended by counsel rather than circulate the lawyer's work product

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BEWARE OF RECENT SCAM DIRECTED AT LAWYERS AND THEIR CLIENTS

Please be guarded if you are contacted by telephone from anyone who says that they represent our law firm and that they are calling to collect on an outstanding invoice. We have been warned by the State Bar of a new scam targeting law firm clients. The scam works through a process called "Caller ID Spoofing." "Spoofing" allows a caller to create a new caller ID for their phone. Previous "spoofing" scams, for example, have involved callers using a number that belongs to the IRS.

What makes this recent scam especially troubling is that the scammers have linked the attorney with the client. The case we heard about involved a bankruptcy court matter and the client was told that they needed to pay more money to a creditor. Fortunately, the scam was caught in time and no money was lost. Beware of this type of scam, and make sure you double check with one of our partners before you send any money anywhere. If you are a victim of this or any other scam, please promptly report it to the FBI's Internet Crime Center at http://www.ic3.gov.

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