FRANKLIN & PROKOPIK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

# MIND YOUR OWN BUSINESS

THE BUSINESS & COMMERCIAL NEWSLETTER OF FRANKLIN & PROKOPIK

**Editor: Michael J. Lentz** **Summer 2015**

**Franklin & Prokopik**

**UPCOMING EVENTS**

**September 9, 2015**
Virginia Workers' Compensation Seminar
Fairfax, VA

**September 17, 2015**
Western Maryland Workers' Compensation Breakfast-N-Learn
Hagerstown, MD

**November 3, 2015**
Labor & Employment Seminar
Turf Valley, MD

**April 19, 2016**
Maryland Workers' Compensation Seminar
Hunt Valley, MD

See website for more details on all of our events.

**www.fandpnet.com**

INSIDE THIS ISSUE:



# CONTRACT PROVISIONS TO GET YOU PAID

Alright, you've finished the hard part – you've found a client who wants to purchase your goods and services. Now it's time to make sure your contract with them is structured in such a way to maximize your client's incentive to pay you, while protecting you if you're forced to take legal action to get paid. First, as always with lawyers, a caveat – we absolutely recommend that you have competent legal counsel draft any contract that your business will be using, or review any contract prepared by customers, vendors, or suppliers. We can provide some basics, here, though. We always recommend including at least the following types of provisions:

## *Carefully-Drafted Explanation of Goods to be Provided or Work to Be Performed*

Simply put, you must clearly define exactly what you're promising to do or sell. If there are critical things that you're NOT promising to do or sell, your contract should spell those out as well.

Of course, if you sell goods, this is often as simple as providing a quantity and an accurate description. If you provide services, though, a clear description of exactly what's expected is one of the two most significant provisions in your contract. Invariably, if you sue a customer to get paid, the customer will claim either that you didn't do what you were supposed to do or that you did it wrong. The description of your services in your contract (often called a "Scope of Work") is your best – and often your only – response to this knee-jerk defense raised by customers.

## *Carefully-Drafted Payment Provisions*

The payment provision of your contract seems to be a no-brainer. Do the work, then get paid. The problem is, depending on your business, this can mean carrying on at a loss while waiting 30 days or more to get paid for work that you've already done. In a worst-case scenario, you could be stuck doing additional work for a customer who hasn't been able to pay you in months.

Consider alternatives that might help you avoid the problem in the first place. Many customers won't agree to pre-paying in full, but a surprising number will be amenable to placing a deposit or paying a percentage on order, and the balance on completion.

Whatever you negotiate with your customer, your contract should state the payment terms as clearly as possible. Your contract should *always* indicate – at a minimum – how much is due, when, where, from whom, and in what form.

## *Clearly-Explained Defaults and Remedies*

Make sure that your contract clearly defines what a default or breach of the

contract is, and what your remedies are. If a customer has 30 days to pay and does not, does that mean you can stop providing goods and services under the contract? Your customer will almost certainly argue that you're not allowed to stop providing services for missing one payment. If you want to be able to, your contract should clearly state that you can. Clearly defining the terms of default and breach allows you to stop throwing good money after bad, and lets you get started collecting earlier.

We also recommend charging interest, at a fairly substantial rate, on past due balances. A contract that charges no interest, or low interest, for late payments actually incentivizes shrewd customers not to pay. When even the best credit cards charge 10-12% annually, and the worst charge more than twice that, a contract that doesn't charge substantial interest on past due balances urges your customer to send his money elsewhere if finances get tight.

### *Attorneys' Fees*

Your contract should require your customer to reimburse you for legal fees and costs incurred in the event that you have to hire a lawyer to collect money (or force some other performance) under the contract. If your customer is willing, or if your superior bargaining position allows, you'd prefer a unilateral provision. That is, a provision under which the customer is responsible for your fees and costs if you win, but you aren't responsible for the customer's fees and costs if the customer wins.[1] ***(Endnotes are located at the end of each article.)***

Of course, if you're in the inferior bargaining position and are considering a contract drafted by another party, the reverse is true. You should insist on either the removal of an attorneys' fee provision or at the very least a prevailing-party clause, so that either party is at risk of paying the other side's fees and costs.[2]

Finally, be aware that, under Maryland law, a contract clause allowing for the recovery of attorneys' fees is "merged" into any judgment that you obtain. This means that after entry of a judgment, the contract – and therefore your attorneys' fees clause – functionally disappears. So, unless your clause makes clear that it will not be merged into any judgment rendered on the contract, you will lose the ability to collect post-judgment attorneys' fees. These can be significant, especially in collection cases, in which collecting the judgment is often as hard or harder than obtaining the judgment in the first place.

### *The Right Kind of "Boilerplate"*

"Boilerplate" refers to fairly standardized language that appears in most or all documents of a certain type. It's an oft-overlooked area where businesses can make collection faster and easier at no cost, and with little burden to their customers. The list of potentially helpful provisions is substantial, but several such provisions, discussed briefly below, are indispensable:

1. **Severability** – A severability clause provides that the entire contract can't be invalidated just because a judge determines that one clause is unenforceable. Without a clause like this, you risk losing your right to payment if a court decides some other provision is unenforceable.

2. **Jury Trial Waiver** – You and your customer both agree to give up the right to have your dispute heard by a jury. Cases tried before juries uniformly take longer and cost more than the same case would if tried before a judge.[3] So, preventing a jury trial will save your business time and money.

3. **Consent to Jurisdiction** – Especially if your business frequently deals with customers from other states, or from distant counties within your home state, your contract should provide that your customer agrees that any dispute will be heard in your home county. Collection simply doesn't make economic sense if you have to chase delinquent customers wherever they happen to be.

This is a non-exhaustive list. You might also add things like mandatory arbitration provisions, class-action waivers, waivers of the right to file counterclaims in certain types proceedings, and consent to service by ordinary first-class mail. The right list depends on your spe-

cific business and your specific customer base, and should be discussed with counsel familiar with your business.

---

[1] Costs are a very important addition … they can include filing fees, the cost of personal service of the opposing party, and expert witness fees and expenses, which can run into the thousands of dollars.

[2] Fees and costs awarded will usually be limited to reasonable fees actually incurred, as opposed to some fixed amount or percentage of the debt, so make sure you can document your expenditures on fees and costs.

[3] Juries are often assumed to be pro-consumer and anti-business. A jury trial waiver is valuable and important even if that assumption is wrong, because of the enormous time and cost-saving that comes from avoiding a jury trial.

# THE KLUTZY CUSTOMER:
## Slips, Trips and Falls on Your Property

Maryland courts are littered with plaintiffs seeking damages because they slipped on a puddle in a grocery store aisle, or on a patch of ice on a sidewalk or parking lot, or some similar, allegedly unseen hazard. These unfortunately frequent cases can present significant exposure for businesses, in terms of both actual liability for damage awards and increased insurance premiums. But, there are cheap, simple steps that businesses can take to minimize the risk from these accidents.

### *What Does the Law Require?*

Maryland law requires you, as a business owner, to protect your customers and other visitors to your business (called "business invitees") from any unreasonable risks that you knew about (or should have known about) but they didn't know about (and couldn't have known about). It's important to note that this duty applies not just to customers, but to anyone invited or allowed to come onto or into your property for purposes related to your business. So, your duty might obligate you to protect visitors like delivery drivers, repairmen, inspectors – almost anyone – as long as the visit relates to your business.[4]

This means, of course, that you have to not injure them through your own negligence, or that of your employees. But, your duty requires more than simply refraining from injuring your customers. You have to: (1) WARN your invitees about dangers that you know about, (2) INSPECT your property to discover possible hidden dangers, and (3) PROTECT your invitees from dangers that are foreseeable from use of your property.

### *Are there any Limits?*

Thankfully, yes. Most importantly, your invitees have to take reasonable care of themselves. This usually means they have to be reasonably aware of their surroundings, and pay reasonable attention to what they're doing and where they're going. For example, Maryland courts have held that shoppers in a grocery store should expect things like boxes, bags and crates in the aisles, and must take reasonable care to avoid or notice them, just as store owners must provide safe aisles and reasonable warnings.

Also, Maryland courts recognize that businesses (other than insurance companies, of course) aren't in business to insure their customers' personal safety. So, your efforts only have to be reasonable under the circumstances. What is "reasonable" depends on a variety of factors, and it's impossible to give a quick or simple answer here. Your business won't likely be required to conduct continuous, roving inspections for potential hazards, but can't ignore the condition of its property, either.

### *What Does This Mean for My Business?*

As a practical matter, this means that if one of these accidents results in a lawsuit, your plaintiff will have to prove that you either created the dangerous condition (the puddle or the ice patch, for example) or you should have discovered and fixed it, and failed to do so. Because it is generally difficult for a plaintiff to prove what the business's employees actually knew, plaintiffs

usually rely on so-called "constructive knowledge" … a claim that the business *should have* known of the danger, even if it didn't actually know. Usually, plaintiffs rely on the passage of time to prove constructive knowledge. That is, the longer a danger exists, the more likely that a business knew or should have known about it.

### *What Can I Do?*

First, if your business gets lots of foot traffic, and portions of the property aren't always visible to employees, schedule regular inspections, and enforce the schedule. Document the results of the inspection. Of course, make sure that an employee who discovers a potentially dangerous condition like a puddle or broken tile knows to promptly fix the problem.

When you discover and fix a problem, document when, how, and by whom. The "documentation" doesn't have to be fancy or expensive -- paper forms kept on a clipboard and filled out by hand will work fine, as long as the completed forms are maintained so that they can be found if they are ever needed.

*A note about records: Inspection, maintenance and repair records are terrific evidence that your business has acted reasonably to protect its invitees, and thus has satisfied its duty to them and shouldn't be held liable for any damages to them. However, just as an entry in a record or log can prove that an inspection or repair was completed, the absence of an entry where one ought to be can prove that no inspection or repair was ever done. For example, if a maintenance log shows that a foreman inspected a warehouse on Monday at 10:30 and 2:00, Tuesday at 10:30 and 2:00, and Thursday at 10:30 and 2:00, that log can also be used as evidence that the foreman did not inspect the warehouse on Wednesday. So, once you start keeping and maintaining records, you must do so continuously and carefully.*

If you discover a problem, but can't fix it right away (usually because you need to involve some third-party maintenance company or contractor), immediately post large, obvious warning signs.

Contact any necessary third parties as soon as possible, request a repair as soon as reasonably possible, and if the needed help does not arrive when promised, follow up diligently. Of course, document your contacts with the third party.

Though premises liability lawsuits are a genuine risk to business owners – especially those whose customers must come to their premises – a few simple, inexpensive steps can make the road to a legal recovery much tougher for potential plaintiffs.

---

[4] You're also subject to other, lesser duties, with respect to different types of individuals, such as trespassers and social guests. Those duties are beyond the scope of this article.

## DEFAMATION ON THE INTERNET: FREE SPEECH A WEAPON, NOT MERELY A RIGHT

Most view the First Amendment as an unconditional shield, but what happens when it becomes a weapon? Online reviews have an increasingly significant impact on business success, and businesses rightly worry over the power of such reviews to attract or deter customers. Online reviews – both positive and negative – can quickly and significantly impact your bottom line if the review draws enough online traffic to appear prominently in search results. A single damning online review can wreak havoc, even if entirely false. Worse, many review sites provide potential reviewers with the courage of anonymity -- it can be extraordinarily difficult to identify and confront an anonymous poster.

How, then, can a business handle an anonymous, harmful and false customer review that shows prominently in online search results? Once a harmful, false review is posted, a business has three options, and may wish to pursue any or all of them in response to a given review. It can attempt to have the review removed from the site on which it appears, or attempt to ensure that the review, while still on the site, will not appear in searches run on the major search engines. However, these answers are fraught with obstacles and delay. Often, businesses will wish to sue the author of the review for defamation in addition to or instead of the foregoing.[5]

The first step should always be contacting the site, attempting to demonstrate the falsity of the review, and requesting that it be voluntarily removed. The site's response will likely be a polite refusal, coupled with a reminder that the business is free to respond or post different information. Of course, more posts addressing or relating to the false review will increase its prominence in search engine results, so businesses must weigh the benefit of posting a response against the potential cost of making the false review more likely to appear in the first place. Take-down policies vary from site to site, of course, but one site refused to take down reviews *even after the reviewer acknowledged that the review was false*. Court orders compelling removal of defamatory material can be difficult to obtain because (among other reasons) it is often difficult for the business to sue the internet service provider or host company in the business's home state. Search engines will usually require an acknowledgement of falsity and/or a court order before altering results.

Often, the business's best response will be a defamation claim against the reviewer. The reviewer is usually a disgruntled current or former customer or employee, or a competitor posing as a former customer. Defamation is, broadly speaking, making false statements about a person or business that cause that person or business harm. A plaintiff suing for defamation must prove that: 1) the defendant made a defamatory statement to a third person; 2) the statement was false; 3) the defendant was legally at fault in making the statement; and 4) the plaintiff suffered harm from the defamatory statement. Internet defamation cases often carry with them an additional burden for the plaintiff – the burden of simply identifying the author of a defamatory post or review. Usually, the discovery process in a lawsuit would permit the plaintiff to obtain relevant information in the hands of a third party – such as the name of an anonymous author. Defamation cases can be different though.

In the landmark case of *Indep. Newspapers, Inc. v. Brodie* Maryland's highest court recognized that ". . . posters have a First Amendment right to retain their anonymity and not be subject to frivolous suits for defamation, brought solely to unmask their identit[ies]."[6] The Court correctly recognized that anonymity could serve an important purpose in furthering debate, and that forcibly removing it could "discourage debate on "important issues of public concern.: The Court also recognized that absolute protection of anonymity would essentially render those who post on the internet immune from claims for defamation.

To try to balance the critical First Amendment rights of authors against the need for some form of accountability for speech, the *Brodie* Court determined that before a plaintiff could force disclosure of the identity of an anonymous author, the plaintiff must: 1) undertake reasonable efforts to notify the author of the efforts to obtain his identity, 2) allow the author reasonable time to oppose those efforts, and 3) demonstrate that it has at least a *prima facie* case for defamation.[7] The author may nonetheless retain his anonymity if the judge determines that the need to protect the author's anonymity outweighs the plaintiff's need for the author's identity, given the apparent strength of plaintiff's case.

All of this, of course, deals only with finding out who the defendant is, and not with proving the case and collecting damages. At trial, even if a business identifies the author of a harmful review, and proves the review is false, it must still prove that the negative review damaged the business. This will likely require an expert witness to analyze web traffic, and possibly another to analyze cash flow and business profit margins, to prove that the review caused reduced web traffic and the reduction in traffic led to lost profits.

The legal quagmire created by First Amendment considerations, and the potential cost of a trial, combine to make internet defamation actions against authors a difficult remedy to a growing problem. Unfortunately, these actions may be the only meaningful option, given the difficulty of either pursuing other defendants or obtaining relief voluntarily.

---

[5] Internet review sites, and the companies that host them, are generally not liable for defamatory content posted by users of the site. However, a more thorough discussion of the liability of these entities is beyond the scope of this article.

[6] 407 Md. 415 (2009). The Court's opinion in *Brodie* advises that, at the time, the issue of disclosure of identi-

ties of internet authors had been addressed by the highest court of only one other state.

[7] What makes a *prima facie* case is inexact, and not susceptible of a simple determination. Essentially, the plaintiff must produce evidence -- on each of the elements of defamation – such that he would win his case if the defendant produced no evidence in response.

## THREE THINGS TO KNOW WHEN FILING A BANKRUPTCY

Let's face it, bankruptcy is a topic that no business owner wants to discuss, or even consider, especially when your own personal finances are stretched to the point where you are flirting with experiencing it first-hand. The mere mention of the term can elicit thoughts of dashed dreams and anguish from business owners. However, bankruptcy does not invariably mean a catastrophe is imminent, and can actually be a valuable tool for owners looking to get back on the course to profitability.

If you are a business owner interested in restructuring the business's debt and continuing to operate, you'll have to file under Chapter 11, which is used primarily to allow a business to streamline its operations, reorganize its existing debts, and establish a plan to satisfy its debts, all while meeting its ongoing financial obligations and continuing to operate. A liquidation, in which the business does not intend to continue to operate, can be accomplished under either Chapter 7 or Chapter 11. A liquidation is usually simpler and cheaper but, of course, eliminates the possibility of post-bankruptcy operation.

Of course, it is imperative to remember a business bankruptcy will not eliminate or avoid any personal debts or obligations that the owners of the business may have, but may trigger defaults under contracts, such as a home mortgage. Before filing, you should consult with experienced bankruptcy counsel, and be aware of the following:

1. The business's financial condition, past and present, will be carefully scrutinized. To initiate a bankruptcy, the business will have to file a petition with accompanying schedules that describe its financial condition in exacting detail. The business will have to meet with, and answer questions from, its creditors. Later, the business will have to propose a plan for reorganizing, and the plan will be subject to approval by its creditors. The length of the plan, and therefore the amount of time that the business will be in bankruptcy, can vary widely.

2. *If* you are allowed to continue to operate your business as a debtor-in-possession, you will do so under the supervision of the Court, your creditors, and (sometimes) a trustee. You will have to file budgets and monthly operating reports. You will have to seek permission from the Court to do even basic things like using the cash in your bank accounts and hiring professionals such as attorneys and accountants.

3. Any money paid out by the business in the 90 days immediately preceding the filing may have to be repaid by the companies or people who received it. This look-back period is extended to *one year* for money paid to owners, officers, directors, and other "insiders."[8] One of the primary goals of the bankruptcy process is to ensure that equally-situated creditors are treated equally. Payments to certain creditors or insiders (called "preference" payments in bankruptcy law because they allow the debtor to prefer certain creditors over others) can generally be reversed, forcing the recipient to return to the bankruptcy estate some or all of the money received.

To summarize, a Chapter 11 filing can be time-consuming, laborious, and potentially quite expensive. However, it can also be an extremely valuable tool for a businesses looking to right its ship and return to profitability. A successful Chapter 11 bankruptcy requires commitment, active participation, and patience – particularly from the owners of the business – but can be a lifeline to a business needing to shed debt to return to a successful future.

---

[8] What constitutes an "insider" is a fact-specific determination, beyond the scope of this article. Payments to insiders (or their family members) should always be carefully discussed with experienced counsel before filing.

# COMMERCIAL LITIGATION & BUSINESS PRACTICE GROUP

Crawford, William A. Δ
410-230-1099

Dwyer, Ami C.
410-230-3635

Goorevitz, Tamara B.+
410-230-3625

Randall, Jr., Albert B.
410-230-3622

Skomba, David A.
410-230-3616

Erwin, Zachary L.+
410-230-1092

Fowler, Bradley F. *
410-230-3050

Lentz, Michael J.* §
410-230-1080

Marshall, Stephen J.
410-230-3612

Archibald, John K. *

Bennett, Michael T. *

Chiarizia, Emily M. *

+Admitted to D.C. Bar

Δ Admitted to DE Bar

* Newsletter Authors

§ Admitted to NV & CA Bars

**Email: FirstInitialLastName@fandpnet.com**

## Speakers Available!

*We can provide presentations tailored to your specific needs and can satisfy your annual training requirement. Contact Joan Hartman, our Director of Events and Communications, at 410-230-3631 or email jhartman@fandpnet.com to make arrangements.*

**Franklin & Prokopik**
A Professional Corporation
The B & O Building
Two North Charles Street, Suite 600
Baltimore, Maryland 21201

*F&P MIND YOUR OWN BUSINESS*
*SUMMER 2015*

32 South Washington Street
Suite 6
Easton, Maryland 21601
410-820-0600
Facsimile 410-820-0300

1101 Opal Court
Hub Plaza, Second Floor
Hagerstown, Maryland 21740
301-745-3900
Facsimile 301-766-4676

2325 Dulles Corner Boulevard
Suite 1150
Herndon, Virginia 20171
703-793-1800
Facsimile 703-793-0298

100 South Queen Street
Second Floor
Martinsburg, West Virginia 25401
304-596-2277
Facsimile 304-596-2111

10150 Highland Manor Drive
Suite 200
Tampa, Florida 33610
813-314-2179
Facsimile 813-200-1710

300 Delaware Avenue
Suite 1210
Wilmington, Delaware 19801
302-594-9780
Facsimile 302-594-9785

A PROFESSIONAL CORPORATION - ATTORNEYS AT LAW

**www.fandpnet.com**

**2015 Franklin & Prokopik. *F&P Mind Your Own Business* is a quarterly publication of Franklin & Prokopik. This publication is not intended to provide legal advice. Specific questions regarding any legal issue should be addressed to counsel. All Rights Reserved.**