

NEWSLETTER

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

Upcoming Events Calendar

September 12

Estate Planning and Probate Section
12:15 – 1:15 p.m.

Law Office of Nancy Kaupp Ewin, Esq. 8166
La Mesa Blvd., La Mesa

Topic: TBA

September 17

Family Law Section
12:00 - 1:15 p.m.

East County Court, Dept. 6, 250 E. Main
Street, El Cajon

Topic: "Determining the Appropriate Court
for Custody Cases involving Non-Parents"

Speaker: Catherine Tancredi, Esq., CFLS

October 14

Civil Litigation Section
12:00 - 1:15 p.m.

BJ's Restaurant, Grossmont Center, La Mesa

Topic: "Debt Collection Abuse, a primer on
the Fair Debt Collection Practices Act,"

Speaker: Patrick Howe, Esq.

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 DV/TRO 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 DV/TRO 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 DV/TRO 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.

Family Law Settlement Panel Calendar

Date	Temporary Judge
4-Sep	Judi Sanzo
	Shawn Weber
	Connie Zimmerman
	Scott Finkbeiner
	Meridith Levin
11-Sep	Daniel Grunbaum
	Cynthia Baker
	Charles Schmidt
	Bruce Beals
	Timothy McDermott
18-Sep	Wells Lyman
	Judi Sanzo
	Marilyn Bierer
25-Sep	Sarah Shaffer
	Anthony Starks
	Garrison Klueck
	Sandra Mayberry
	Thomas Marshall
	Gary Glouser

The Honorable Steven Stone informed the audience (of mostly attorneys) that in the case of longer matters with multiple witnesses, due to the demands of his busy docket, he will call those cases toward the end of his calendar. Judge Stone also has a unique (but helpful) method of issuing tentative rulings at the beginning of a proceeding in order to provide litigants from both sides a final opportunity to reconsider their stance before commencing litigation. Of course, as with most judges, if it appears that the case's prevailing theme is over custody or visitation, then the petitioner's case will naturally become suspect – the question becoming “whether this is really a domestic violence case”, stated Judge Stone. Judge Stone gave a stark reminder that using the domestic violence restraining order as a tool to gain a tactical advantage in a case will be “looked at negatively”.

The Honorable Robert Amador was asked whether a Response must be filed in a domestic violence restraining order case before the matter can be heard, and he indicated that he would proceed without one being filed, if neither party objected or made issue of it. The Honorable Darlene White also agreed with this approach.

Judge Amador, like Judge Stone, has been on the family law bench for less than a year now, but both have done a commendable job of “coming up to speed”. The Honorable Darlene White has become a sort of “de facto” supervising judge for East County Division's family law department, as this is her second year here. Judges Amador and Stone, who took the family law bench at perhaps

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\$25.00 for two months

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Foothills Bar Association Notice of Board Meeting:

The Foothills Bar Association Board of Directors meets on the third Tuesday of each month. The next meetings will be September 17 and October 15 at the office of Clayton Anderson & Associates at 8220 University Avenue, 2nd Floor, La Mesa, CA 91942. Meetings begin at 4:45 p.m. and continue until business is completed. If you want your voice to be heard in policy discussion and upcoming events planning or would simply like to learn more about the organization, your attendance is welcome.

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) 531-3900 E-mail: ieustaquio@sdlawlibrary.org

**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

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Your submissions are welcome! Send articles, letters, flyers, and other non-advertising submissions to Cheryl Stengel at clstengel@outlook.com.

ADDRESS CHANGES

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