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LITIGATION

Don't wait to refine boilerplates

By Rob Herrington and Jeff Scott

Most business leaders and many lawyers give only passing thought to the boilerplate provisions in their companies' consumer contracts. You know — those "miscellaneous" provisions at the end of an agreement that almost no one reads: choice of law, an integration clause, maybe a choice-of-venue or severability clause.

Where do these provisions come from?

In many cases, contract drafters copy these provisions from old forms, assuming there must be a good reason behind them. Others "steal" language from market leaders or competitor's consumer agreements, many of which are available online. Few lawyers take the time to strategically think through and research the types of provisions that can, and often should, be included in a customer agreement. Even fewer invest the resources to ensure that their consumer agreements are providing the maximum protection available under the law.

A recent decision reminds us that, when it comes to drafting the boilerplate, sweating the details literally can save millions.

In *Winestyles, Inc. v. GoDaddy.com, LLC*, No. CV 12-583-PHX-SRB (D. Ariz. Aug. 15, 2012), the plaintiff claimed it was being defrauded by advertising stating that a "private registration service" for Internet domain names was "free," when in truth customers were being charged when the domain names were renewed. The defendant asserted that several claims were barred based on a provision in its terms of service requiring that any suit be filed within one year, in effect shortening the statutes of limitations (which otherwise would be three or four years) to one year. In the context of a class action, where the class period often is measured by the applicable statute of limitations, the difference between a four- versus a one-year limitations period can mean millions of dollars.

Predictably, the plaintiff in *Winestyles* argued that the shortened statute of limitations was unconscionable and should not be enforced. The court disagreed, granting the defendant's motion to dismiss with prejudice based on the contractual statute of limitations. In reaching this conclusion, the court relied on a long line of 9th U.S Circuit Court of Appeals decisions holding that contract provisions shortening the statute of limitations are enforceable, provided they permit a reasonable time to file suit. See, e.g., *Janda v. T-Mobile USA, Inc.*, 378 Fed. App'x 705 (9th Cir. May 10, 2010) ("Even if a contract is one of adhesion, a provision shortening the applicable statute of limitations is enforceable so long as the limitations period is substantively reasonable."); *Soltani v. Western & Southern Life Ins. Co.*, 258 F.3d 1038, 1043-44 (9th Cir. 2001) ("[T]he weight of California case law strongly indicates that the six-month limitation provision is not substantively unconscionable."); *Han v. Mobil Oil Corp.*, 73 F.3d 872, 877 (9th Cir. 1995) ("A contractual limitation period requiring a plaintiff to commence an action within 12 months following the event giving rise to a claim is a reasonable limitation which generally manifests no undue advantage and no unfairness.").

> Without the protections provided by its consumer agreement, the defendant in *Winestyles* would have been left defending against multiple claims and ... spending millions on unproductive litigation.

Business leaders and in-house counsel should take advantage of this reminder by working with experienced counsel to review their consumer contracts with the goal of ensuring maximum protection for the company from class actions and other costly litigation. Without the protections provided by its consumer agreement, the defendant in *Winestyles* would have been left defending against multiple claims and engaging in expensive electronic discovery in a putative class action, spending millions on unproductive litigation activity that potentially also would distract at least some of the defendant's employees from their normal business duties and otherwise disrupt normal business operations. With those protections, the company was able to quickly extricate itself from class action litigation and avoid millions in defense costs and lost productivity.

What about your company and clients' consumer agreements? Do they include provisions shortening the statute of limitations? Are they drafted so as to maximize the chances of enforceability? Do they include choice-of-law provisions, which can significantly increase the risk of a nationwide class action? Has your company considered the benefits of other provisions, such as arbitration or other alternative dispute resolution approaches, choice-of-venue clauses, and pre-suit demand requirements, each of which can help reduce the risk of consumer class actions, product liability lawsuits and other costly litigation? If not, now is the time to take action — before your business or your clients become the next target.

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