

Here's why you should draft fair contracts

My Dad told me as a boy that there's only one definition of fair, and that's a place where you can ride a Ferris wheel, eat cotton candy, and where a big, fat pig gets a blue ribbon. I think he was trying to teach me that the world was a rough place, and it isn't always a win-win situation. And he was right. But does buying into the hardball school of negotiating an agreement really get you where you want to be?

As an attorney it is my duty to zealously represent my clients. In the business context of representation, that means that I should maximize the legal and business advantages for my client when drafting a contract. Additionally, there's not duty of good faith and fair dealing before you enter into a contract. But is it really to the advantage of the business client to be the 900-pound gorilla and have as heavy handed a contract as possible? I don't think so, and here are three reasons why.

1. Drafting a one-sided agreement with terms that are overreaching may damage the business relationship you have with the other party. If you focus only on maximizing your advantage over the other party with unreasonable and unfair contract provisions, you risk any goodwill that your business has built up with the other party, strain the business relationship, (or worse, destroy it) and possibly prevent any new business that may have grown out of that relationship.

2. Using heavy-handed agreements can give you a reputation in your industry as someone to be avoided. If you go too far in drafting provisions that are only good for you, then you risk the diminution of that valuable business asset known as goodwill. A reputation for being difficult or contentious is a sure way to lose out on future business opportunities.

3. If you use language that is unfair or oppressive in your contracts, and you end up in litigation, you may be defending that contract against the doctrine of unconscionability. Under that doctrine, which has been partially codified in Texas, a court can either consider severance of the provision if only the provision is unconscionable, and does not constitute the entire purpose of the agreement. If the entire contract is deemed to be grossly one-sided, the whole contract will be found unconscionable and thus unenforceable.

So while using one sided terms in your agreements may seem like the best way to go in the short term, you may risk the loss of that business relationship, garner a poor reputation in the business community, and possibly even lose should you decide to enforce the unreasonable terms of that agreement in court.

This article was written by Seth J. Hinkley. Mr. Hinkley has been advising entrepreneurs and businesses on multiple aspects of corporate and business law since 1997. This is not legal advice and does not give rise to an attorney-client relationship. If you have any questions regarding the issues discussed in this article please contact Mr. Hinkley at:

Seth J. Hinkley
HINKLEY LAW, PLLC
4301 Yoakum Boulevard
Houston, Texas 77006
(281) 364-8490
www.hinkleylaw.com