

Do You Have A Form For That?

By Ann K. Chandler

Legal documents are not known for their creativity. In fact the terms “legalese” and “boilerplate” are often used to describe provisions in contracts that non-lawyers and lawyers alike deride as superfluous and inconsequential to a transaction. It is no surprise then that clients may be under the impression that a pre-printed form will be sufficient for the client to use in transactions such as property or business purchases, residential or commercial rentals. It may also lead to a client attempting to prepare a will through an on-line service or form a limited liability company or other form of business entity by using the admittedly easy to use state government website.

This “one size fits all” approach has been reinforced by the prevalence of use of some of the standard forms in Wisconsin. The WB-11 Residential Offer to Purchase form approved by the Wisconsin Real Estate Examining Board (“WREB”) is used exclusively in almost all residential transactions in Wisconsin even when attorneys are representing parties involved in the transaction. Similarly, in complex commercial real estate transactions, attorneys often use the WB-15 Commercial Offer to Purchase form approved by the WREB although both the WB-15 and, although usually to a

lesser extent, the WB-11 forms are commonly supplemented when used by experienced real estate attorneys representing a party to the transaction. What then are the pitfalls of using a standard form when even professionals in the field utilize standard forms?

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Lack of Customization of Standard Forms. No two transactions are exactly alike and the standard form may not offer the alternatives needed to fully describe the intent of the parties or provide additional protection to a party from liabilities. In regard to the standard real estate offer and lease forms, Wisconsin licensing law requires real estate agents use only the standard forms approved by the WREB or forms prepared for the real estate agent by an attorney. Real estate agents are not allowed under Wisconsin licensing law to draft addi-

tional provisions not found in the standard forms even if the provision is necessary to protect the interests of one of the parties unless the real estate agent is also a licensed attorney.

The Offer to Purchase forms approved by the WREB address the basic issues of a real estate transaction. The forms were drafted with the intent to be fair and reasonable to all parties in a real estate transaction. But, the individual circumstances of a transaction often require the alteration of the provisions of the standard form offer to better protect the interests of one of the parties. For example, when representing a client acting as a trustee, the WB-11 residential Offer to Purchase should be revised to eliminate the requirement that the trustee furnish a real estate condition report (assuming the trustee has never lived in the property). The standard form also contains representations the trustee is not under Wisconsin law required to make regarding the condition of the property if the trustee has never lived in the property and those representations should be deleted from the form.

Changes to the Law and Outdated Forms. The standard forms approved by the WREB reflect provisions required to be contained in these documents due to laws passed by the State of Wisconsin and regulations enacted by the



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INSIDE

Do You Have A Form For That? (continued) 2

When Is Too Much Protection A Bad Thing? 3

At the Firm... 4

Do You Have A Form For That? (continued from cover)

federal government. The provisions addressing Fair Housing, lead-based paint, property condition disclosures, sex offender notifications, carbon monoxide detectors, smoke detectors, and numerous other clauses in offers, leases and other transactional documents reflect either mandatory disclosures required to be included in the agreement or included for the protection of one or more of the parties to the transaction. Many attorneys and real estate agents belong to electronic form services and will be provided with updated forms as soon as that form has been revised. However, even with those services there may be a delay before that form is updated. The law requiring that provision may be in effect prior to the form reflecting the change is available. Such is the case for any party entering into a new lease agreement in late April, 2012. Many of the revisions to Wisconsin landlord-tenant law became effective in early April. Even the legal form providers that were quickest to react to the changes in the law were not able to furnish the revised residential lease form until several weeks following the effective date of the law. A landlord that developed a lease form several years ago and has not had that form updated or one that relies on a form it obtained from a legal supply store without determining if it has been updated to reflect changes in the law

will very likely be in violation of current landlord tenant regulations.

Beyond the Transaction. I know it can be frustrating to a client when the client asks a lawyer for advice regarding a specific transaction and the lawyer asks the client questions which the client thinks are not relevant to the transaction. The lawyer is not necessarily trying to sell additional legal services but instead is making the client aware that there are many issues which must be considered in a transaction which are not necessarily items addressed in an offer. The form will not help the party purchasing a property to determine which type of entity would be best to hold title to the property or be able to discuss with the seller of the property the potential tax consequences of the sale and whether a tax-deferred exchange of the property would be feasible. Those are only two of the hundreds of issues that arise in a transaction that are not touched upon in a form agreement but which could have negative consequences if not addressed. An attorney may be able to suggest alternative methods of structuring a transaction that will lessen those potential liabilities.

Above I have listed the reasons why you should be hesitant to rely on standard forms especially in real estate and leasing transactions. At the same time I understand that

some clients may not want to pay attorneys to draft or review standard forms. One practice I suggest a client follow to reduce the amount of attorney's fees to be paid for drafting of an offer - especially on a residential transaction, is to have the real estate agent (or client if no agent is involved) complete the first draft of the offer and provide the attorney with that draft and a copy of the real estate condition report and any marketing materials. A client should not sign the offer before the attorney has reviewed the offer. This will not save the client money and makes it harder for the attorney to negotiate changes even if the offer provides that it is "subject to attorney's approval".

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A good portion of the documents I draft today contain provisions that I have previously included in other documents I have pre-

pared. I am also fairly certain other attorneys are using my contract provisions just as I use theirs. The reason I have included those provisions is because I have developed a comfort level with the way the provision will be interpreted due to the numerous times I have included the provision in a transaction. The fact that a document is a form that has been used previously or that a provision is one that is frequently found in a type of transaction document I have prepared does not detract from the importance of having the appropriate form with all the relevant provisions prepared for your specific transaction to protect your individual interests. What attorneys do in preparing contracts is not usually original or creative and even a well-drafted contract is not very interesting to read but the preparation of the contract is much more significant and complex than filling in the blanks. **WBB**

When Is Too Much Protection A Bad Thing?

By Richard J. Rakita

It is common in a real estate purchase agreement for one or the other of the parties to want a contingency provision which will permit them to get out of the transaction without liability under certain stated circumstances. Commonly, we see contingencies for things such as financing, zoning, inspections, and sale of other properties. A problem can arise in these kinds of provisions if there is no limit on the discretion the provision gives to the buyer or seller, as the case may be.

Beware the illusory provision, where: "whoever drafted the contract on behalf of the buyer was so concerned with protecting the buyer that the buyer ends up with a contract which neither side can legally enforce."

Take, for example, a situation where a buyer says, "My obligations under this offer to purchase are expressly contingent upon my ability to get financing that I am satisfied with." Assume, further, that the buyer decides he no longer wants to buy the property. The buyer then goes to a bank and says, "Will you give me a mortgage to

buy this property with 1% interest?" The bank, of course, will say no. The buyer may then go back to the seller and say, "I tried to get financing on terms that were acceptable to me, but the bank won't do it." Although the example is a little exaggerated, the point is that, if there is no way that a court can determine objectively whether or not the conditions of the contingency have been met, the provision itself could be determined to be what is known as an illusory provision, which would then make the entire contract illusory and not enforceable by either side. This would be a situation where whoever drafted the contract on behalf of the buyer was so concerned with protecting the buyer that the buyer ends up with a contract which neither side can legally enforce.

Similar results could happen on a subject to buyer getting a building permit without in any way describing what it is that the buyer wants to build, or subject to buyer getting zoning without in any way talking about what use the buyer has for the property. There are ways that lawyers attempt to get around the illusory provision. One of these is putting a provision in the contract which specifically provides that, if a court were to rule that one or more of the provisions in the contract were illusory, the contract shall nevertheless be enforceable. Frankly, I have never

seen a court rule on whether that would be sufficient to protect the contract from an illusory finding. As a business lawyer, I would hope that language like that would make all of the provisions enforceable, particularly when it is an arm's-length transaction between sophisticated parties. In a situation where it is not sophisticated business people on both sides, I would think a court would be very reluctant to enforce such language.

One area where we often see illusory provisions is with commercial real estate offers drafted by out-of-state lawyers. The fact that you see such provisions so often with out-of-state buyers leads me to think that Wisconsin may be alone in the way that it enforces these provisions. In any event, the best advice is to accurately spell out what it is that the contingency should deal with and then, for the benefit of both parties, eliminate the possibility of unenforceability of the contract. **WBB**



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AT THE FIRM...

For the past **thirty years**, the Weiss Berzowski Brady **Annual Tax and Business Seminar** will again provide an afternoon of topics and current events applicable to **you** and **your business**. Please join us on Wednesday, September 19th, at the Wisconsin club for a half day of engaging presentations from our attorneys.

Topics for this year's seminar include: "What do you do if you can't agree on a price? How about an earnout," "Developing a Clearer Connection—an Explanation of Nexus Standards Applicable to State Sales Taxes," "Rush to Judgment? The Legal and Practical Effects of Obtaining a Civil Judgment," "Counseling the Owner of Distressed Real Estate,"

"Beneficiary Designations," "Personal Liability - What's New Under Section 6672 and in Wisconsin Sales/Withholding Tax Cases," "Passive Activity Loss Rules and the LLC Form of Doing Business," "Now is the Time to Review and Update Buy-Sell Agreements"

Registration for the Seminar is now open. Please see the WBB website for further information and to register, or contact Megan Wiseman, 414-270-2559 (mkw@wbb-law.com)

2012 Schedule of Events

30TH ANNUAL TAX & BUSINESS SEMINAR
September 19, 2012

EMPLOYMENT LAW CONFERENCE
October 17, 2012

All upcoming conferences for 2012 are to be held at the Wisconsin Club at 900 W. Wisconsin Ave., Milwaukee.

Please check our website (wbb-law.com) for more event information.