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# Armor Plating Your Business Strategies for Business Protection



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# Customer Payment – Contract Terms

- Include in standard terms for agreements with customers:

**Payment for all purchases is due in full within \_ days. All amounts owing after the \_\_\_ day shall incur interest at the rate of 1 1/2% per month, which equals an ANNUAL PERCENTAGE RATE of 18%.**

**Customer agrees to pay all reasonable costs, including attorney's fees and court costs, incurred in connection with collecting customer's indebtedness to Company. Post-judgment interest shall accrue at the contract rate of interest set forth herein.**

# Customer Payment – Confession of Judgment

- Add confession of judgment provisions in your contract to obtain immediate judgment, in a manner unique to Pennsylvania. You obtain a judgment without notice or hearing, and the judgment debtor then has the challenge of trying to strike or open the judgment.
- You can immediately execute on the judgment:
  - (1) if money judgment, you might garnish the debtor's bank account.
  - (2) If the judgment is for possession in a lease, you can arrange for the deputy sheriff to immediately evict the tenant.
- Must have the power clearly declared in large bolded font. Add an additional document – Disclosure for Confession of Judgment.
- Cannot be used in consumer transactions.

# Customer Payment – Third Party Guaranties

- Owners of a business. Sensible to expect the principals of a business to guarantee obligations of the business.
- Parent or child. This creates obvious hardship for family members, but it is becoming more important for health care providers, nursing homes, retirement homes, and other personal service providers, to be compensated for services to family members. Most agreements you might sign – thinking you are merely acting as agent under a power of attorney for an elderly parent – include provisions whereby you are personally guaranteeing payment to the service provider.

# Law of Necessaries

- Law of necessaries. Even without any written undertaking, family members are personally liable by statute to pay the bills of businesses offering services necessary to sustain life – housing, food, health care. Duty to Support Law, 26 Pa. C.S. A. Ch 46.

# Goodwill and Trademarks

- Goodwill is “a business’s reputation, patronage, and other intangible assets that are considered when appraising the business, esp. for purchase . . . .”
- “Because an established business’s trademark or servicemark is a symbol of goodwill, infringement is a form of theft of goodwill.”

(Black’s Law Dictionary, 9<sup>th</sup> Edition)

# What is a Trademark

- “A word, phrase, logo, or other graphic symbol used by a manufacturer or seller to distinguish its product or products from those of others.”
- Distinguished from Copyright, which is “[t]he right to copy; specifically, a property right in an original work of authorship (including literary, musical, dramatic, choreographic, pictorial, graphic, sculptural, and architectural works; and sound recordings) fixed in any tangible medium of expression, giving the holder the exclusive right to reproduce, adapt, distribute, perform and display the work.”

(Black’s Law Dictionary, 9<sup>th</sup> Edition)



# Methods of Brand Protection

- USPTO federal trademark registration
- PA trademark registration
- Common Law trademark rights
- Domain name registrations
- Entity formation with PA Dept. of State
- Fictitious name (d/b/a) filing with PA Dept. of State

# USPTO Federal Trademark Registration

- How much have you invested in branding? Is the value of your brand more than you can afford to lose?
- Do you desire to have a long standing brand?
- Have you spent dollars and effort building a brand and enhancing your brand's recognition?

# Some Key Advantages of obtaining a Federal Trademark

- Exclusivity to use that mark in a given commercial niche in the entire United States of America
- Statutory damages plus attorneys fees for “willful infringement”
- Constructive notice – notice of your claim of ownership and evidence of ownership
- Jurisdiction of federal courts may be invoked
- Evidences rights for the purposes of scrutinizing debt or sale of those rights
- Superior status for website recognition

# Cybersquatting and ICANN

- Cybersquatting generally
- Mechanisms to combat Cybersquatting
  - Litigation
  - ICANN (Internet Corporation of Assigned Names and Numbers) Arbitration – Favors trademark registrant of active brand

# Obtaining a Federal Trademark (Application Support and Prosecution)

- Searching - Mark clearance
- Application with USPTO
- Examining Attorney review
- Publication for opposition
- Opposition period – 30 days
- Registration

# Preserving and Protecting your Trademark

- Necessary filings with USPTO post-registration
  - First 10 years
    - Declaration of Use (between the 5<sup>th</sup> and 6<sup>th</sup> years)
    - Section 15 Declaration of Incontestability (5 years or more)
    - Declaration of Use and Application for Renewal (between the 9<sup>th</sup> and 10<sup>th</sup> years)
  - Successive 10 year periods
    - Declaration of Use and Application for Renewal (between every 9<sup>th</sup> and 10<sup>th</sup> years)

# Preserving and Protecting your Trademark

- Using your Trademark(s) consistently in close connection with your goods and/or services
- Marking things consistently with your Trademark
- Care in altering Trademarks and filing for additional Trademarks
- Entering into Licensing Agreements
- Monitoring your Trademark(s) – generally

# Protecting your Trademark

- Find and Prosecute infringers through grassroots information and internet searches
- Cease and Desist letters (considerations, negotiation and litigation)
- Takedown notices to platforms
- Review of newly filed and/or published marks and filing opposition



# Trademark Protection Summary

- Name filings with Department of State
- USPTO federal trademark registration
- Consistently use your Trademark(s)
- Preserving and protecting your Trademark(s)
- Further resources – [www.uspto.gov](http://www.uspto.gov) and [www.icann.org](http://www.icann.org)

# Insurance – Closely Held Businesses

- Disability insurance. In closely held businesses, life insurance policies are commonly understood and used as a funding source to buy out the interests of a deceased owner. What if an owner or key person is disabled? Disability insurance is common but it protects the disabled person and the family of the disabled person. Other insurance products are available to protect the business and the other business owners in this situation: disability income protection, business overhead expense insurance, disability buyout insurance, key person disability insurance

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# D & O Insurance

- Sit on a board of a nonprofit? If you are sued for actions as an officer or board member, do the nonprofit's bylaws require it to provide you a defense and indemnification? How about advancements for litigation costs?
- Does the nonprofit have D&O coverage?

# Title Insurance

- Is it worth it?
  - If there is purchase money financing involved, the lender will require title insurance for its loan amount.
  - Owner pays the extra premium for an owner's policy.
- What's covered and what's not covered
  - Mechanics' lien claims
  - Zoning and subdivision matters
  - Environmental issues
  - Sink holes

# Commercial General Liability Issues

- Contractual Liability Coverage
  - Many contracts require you to indemnify the contracting party for claims and loss caused by a third party or even for negligence of the contracting party.
  - To protect yourself, you will want an endorsement to your commercial general liability policy that expressly covers you for these indemnity provisions.
  - “Contractual liability coverage” is a misleading label because coverage is limited to bodily injury and property damage. Insurance coverage is not afforded, for instance, for damages in a breach of contract action.
  - Coverage is also limited by dollar amount even though the contractual exposure in the indemnity is unlimited.
  - Before signing the contract, provide a copy of your contract to your insurance agent or broker to make to review.

# Commercial General Liability Issues

- Additional Insured Provisions
  - A contract may require you to name the contracting party as an additional insured under your insurance policy.
  - You may obtain a certificate of insurance naming that contracting party as an additional insured, but it is possible that even though the certificate names the additional insured, your actual insurance policy does not include coverage for additional insureds.
  - Your coverage limits may be lower than the loss claimed by your contracting party who is named as an additional insured under your policy.
  - Before signing the contract, provide a copy of your contract to your insurance agent or broker to make to review.

# Stakeholder Problems

- Divorce
- Death
- Disability
- Competition/Solicitation/Disclosure

# Divorce

- If spouse is a non-stakeholder-ensure that the spouse agrees to be bound by the terms of the operating agreement or shareholders agreement
- If both spouses are stakeholders: limit interest to marriage-require sale of interest in the event of divorce via pre-nuptial agreement



# Spousal Consent

## CONSENT OF SPOUSE

The undersigned is the spouse of Member,\_\_\_\_\_. I have read and hereby approve the foregoing Operating Agreement. In consideration of the mutual rights, covenants and obligations of the Company and the other Members of the Company, as set forth in the Operating Agreement; I hereby agree to be irrevocably bound by the Operating Agreement. I further agree that any community property interest shall be similarly bound by the Operating Agreement. I hereby appoint my spouse as my attorney-in-fact (with full power of substitution) with respect to any amendment or exercise of any rights under the Operating Agreement.

# Death/Disability

- Require sale of interest upon death or disability.
- Limit sale or assignment to specific parties.

# Disability Cont.

- Is stakeholder required to be employee?
- Is the stakeholder allowed to continue to hold interest even if stakeholder is disabled?
  - If no, define what is a disability and what triggers sale.
- Can stakeholder assign any voting rights to proxy?

# Restrictive Covenants

- Post sale of interest restrictions on former stakeholder
  - Non-compete
  - Non-solicitation
  - Non-disclosure of confidential information

# Status of Data Breach Laws

- California October 2014 data breach law update (SS#'s cannot be sold)
- Current Federal laws limited to certain sectors:
  - Banks/finance (e.g., the Gramm-Leach Bliley Act (“GLBA”)) and
  - Healthcare (e.g., Health Insurance Portability and Accountability Act (“HIPAA”))

# Status of Data Breach Laws

- New Federal laws possible due to newsworthy massive breaches
  - Target, Home Depot, JPMorgan = billions of dollars at risk
  - FTC and Attorney General Holder urged Congress to act to protect public
  - Trickle-down effect on small businesses?

# Defining PII

- Personally identifiable information is key starting point
- Information that is used for the express purpose of distinguishing individual identity
- Regulators and laws have varying definitions of PII
- Definition used by the [National Institute of Standards and Technology](#) provides for these

[Full name](#) (if not common)

[Home address](#)

[Email address](#) (if private from an association/club membership, etc.)

[National identification number](#)

[IP address](#) (in some cases)

[Vehicle registration plate](#) number

[Driver's license](#) number

[Face](#), [fingerprints](#), or [handwriting](#)

[Credit card numbers](#)

[Digital identity](#)

[Date of birth](#)

[Birthplace](#)

[Genetic information](#)

[Telephone number](#)

[Login name](#), screen name, [nickname](#), or [handle](#)



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# Data Protection of PII must be “Reasonable”

- What is commercially reasonable in your industry may vary by industry
- Typically encryption at least 128-bit SSL minimum
- Talk with your IT provider about what is “normal”



# Cyberinsurance

- Policies for breach liability
- Notification and credit protection for several months is minimum response
- Mailing notifications can be very expensive (postage for each of the notification recipients!)
- Check with your insurer to see if this would be a policy rider or separate policy (depends on insurer and industry)

# Public Relations

- If you have a breach, it is best to already have a contingency plan that has been reviewed by your attorney and your insurer
- Will your customer understand why you had that data, subject to breach
- Were your protections reasonable?
- Can you defend your practices if you are sued?

# Best Practices

- Don't gather more than you need
- If you gather, protect reasonably
- If there is a breach, give timely notification
- Consider cyberinsurance

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QUESTIONS & ANSWERS

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