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The Dangers of Evergreen Clauses

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October 2014

The Evergreen Clause has recently reared its ugly head again with a number of my business clients. The calls from my clients usually go something like this:

Client: David, we recently decided to switch suppliers. But when I called the supplier to tell them, they informed me that the contract won't allow us to terminate the contract and that our company is obligated to continue using and paying the supplier for another term (whatever the term was in the contract).

David: Do you have a written contract with an Evergreen Clause?

Client: Yes, we have a written contract but what is an Evergreen Clause?

David: A clause in a contract that automatically renews itself from one term to the next without the requirement of notice by one of the parties.

Client: Is that legal?

David: In Michigan, yes.

The problem my business clients run into is that by the time they realize there is an Evergreen Clause in the contract they are stuck with a supplier they no longer wish to do business with. Many service and supply contracts, as well as leases, will include an Evergreen Clause, which, if not negotiated out before execution, will cause the contract to automatically renew at the end of the contract term, unless one of the parties notifies the other party that it does not want to renew. Often, this notice must be given within a specified time period prior to the end of the current contract term.

If upon your review of a contract you identify an Evergreen Clause, attempt to negotiate with the supplier to either remove the clause altogether or modify it so that it works for both parties. If your supplier refuses to negotiate or remove the Evergreen Clause then you have the following options: 1) accept it as is; 2) make sure you record and remember the specific date or time period in which you would need to provide notice that you will not be renewing the contract; or 3) refuse to enter into the contract and find a different supplier.

To avoid an Evergreen Clause, and having a discussion with me like the one above, review every contract before signing. If you are not sure if there is an Evergreen Clause, have your attorney review the contract before signing. The upfront cost of having an attorney review the contract is almost always more cost effective than trying to get out from under an Evergreen Clause after the contract is signed.