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BUSINESS NOTES
SEPTEMBER 2004

THE SINGLE BUSINESS ENTERPRISE THEORY AND CONTRACTUAL INTERPRETATION

There has been much discussion about the Single Business Enterprise Theory (SBE) developed by the Louisiana First Circuit Court of Appeal first under *Green v. Champion Ins. Co.*, 577 So.2d 249 (La. App. 1st Cir.), writ denied, 580 So.2d 668 (La. 1991). This theory has spread around the different circuit courts of appeal but the Louisiana Supreme Court has not yet upheld this theory. In the interim, there is a movement to have the Louisiana legislature statutorily overrule this theory.

The background of the *Green* case involved the regulation of a failing insurance company in which the parties had been involved in some very questionable behavior, so it was not surprising or too troubling to see the court find a creative theory to help the Department of Insurance. However, since *Green*, courts have become all too willing to find an SBE without any evidence of unfairness, fraud or inequity.

In the recent case of *Haynesville v. Entergy Corporation*, 840 So.2d 597 (La. App. 2d Cir. 2003), the Second Circuit Court of Appeal seemed to be willing to find that Entergy and all of its subsidiaries were part of an SBE such that a most favored nation's clause in a contract saying that one subsidiary of Entergy would give the City of Haynesville its best rate should also apply to an even better rate given by a different subsidiary of Entergy (Gulf States, which was acquired by Entergy years after the Haynesville contract was signed) to another customer in another region of the State. If this is true then imagine all the ramifications in other contracts involving subsidiaries of multi-national companies especially in the areas of most favored nations clauses and requirements contracts.

There is no easy way to avoid a determination of an SBE. In the contract setting it would be advisable to have the parties denounce the SBE theory and waive any right to assert that theory. Courts have not interpreted such a provision but something like the following would be advisable:

"The parties are aware of the single business enterprise theory established by the First Circuit Court of Appeal in *Green v. Champion Ins. Co.*, 577 So.2d 249 (La. App. 1st Cir.), writ denied, 580 So.2d 668 (La. 1991), and its progeny. The parties to this Agreement hereby renounce this theory and waive any right to assert this theory for any purpose, including without limitation, to attempt to impose liability under this Agreement on any party(ies) other than the contracting party(ies) on which the Agreement imposes the liability and to otherwise interpret any provisions of this Agreement."

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UNDERSTANDING A LEASE OBLIGATION TO RESTORE TO "ORIGINAL CONDITION"

A lease usually imposes on the tenant an obligation to return the leased property in the same condition as when delivered, excepting ordinary wear and tear. Even in the absence of such a contractual clause, an obligation to so restore the leased property is imposed by law. This type of obligation may impose on a tenant more far-reaching consequences than anticipated.

For instance, in a recent case the landlord and tenant entered into a lease of a building, part of which had been a Mexican restaurant, but which had been vacant for over five years. *Gravolet v Fair Grounds Corp.*, Fourth Circuit, 2003-0392 (La.App. 4 Cir. 7/14/04) 878 So.2d 900. The lease gave the landlord the option, upon termination or expiration of the lease, to require that the building be replaced in its original condition. The tenant converted the building to an off track betting parlor. Upon termination of the lease, the landlord demanded that the tenant restore the building to a restaurant facility. Although the improvements were made with the landlord's express consent and the salvageable fixtures and appointments pertaining to the Mexican restaurant were returned to and sold by the landlord when the betting parlor was under construction, the court agreed with the landlord. It awarded to the landlord expenses associated with restoring the leased premises to a restaurant, lost rent during the restoration period and the amount of income tax the landlord would have to pay because the tenant would be paying damages, as opposed to restoring the premises.

To protect the tenant against this scenario, the lease should define what is meant by returning the property to the same condition as when received. The lease should expressly allow for any improvements made with the landlord's consent to remain on the property upon termination of the lease.

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