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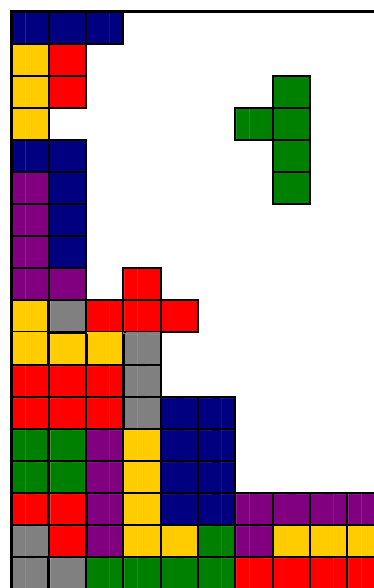
March – April 2008

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## *The Forthright Negotiator*

*You can't always get what you want, no!  
You can't always get what you want (tell ya baby)  
You can't always get what you want (no)  
But if you try sometimes you just might find  
You get what you need  
Oh yes! Woo!*<sup>1</sup>



*"The Perfect Fit for  
Your Business"™*

United Rentals, Inc. asked the Delaware Chancery Court to compel RAM Acquisition Corp. (an acquisition vehicle sponsored by private equity fund Cerberus Partners, L.P.) to complete RAM's contracted for merger with United Rentals. RAM had decided not to acquire United Rentals under negotiated terms, but rather sought a substantially reduced purchase price.

### **Breaking Up Is Hard To Do**

RAM was more than willing to pay the negotiated \$100 million breakup fee, but it would not pay the \$1.5 billion aggregate purchase price (which translated to \$34.50 per share) for United Rentals. United Rentals insisted that RAM perform under the contract because the stock price offered its shareholders a significant premium to the current trading price.

Both RAM and United Rentals had heavily negotiated their deal. There were many merger agreement drafts and negotiating sessions. RAM had insisted on contract provisions that it believed allowed a "walk away" for \$100 million, United Rentals' sole and exclusive remedy. United Rentals claimed that contract language that had survived negotiations allowed it to force RAM's purchase.

### **An Obscure Rule**

Notable mergers and acquisitions attorneys claim that the forthright negotiator principle is an obscure one rescued to notoriety from the *Restatement (Second) of Contracts* to allow RAM

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<sup>1</sup> ROLLING STONES, *You Can't Always Get What You Want, on LET IT BLEED* (ABKCO 1969) (lyrics by M. Jagger & K. Richards).

to renege on its deal with United Rentals.<sup>2</sup> This seems hardly fair to a contract interpretation principle that has been around for a long time and that makes good sense. In fact, *United Rentals*<sup>3</sup> is only the most recent case; the forthright negotiator has previously informed Delaware courts in resolving thorny contract ambiguities.<sup>4</sup>

So how might this rule affect any other kind of contract? Here is a recent example of a dispute resolution clause that is subject to more than one interpretation:

. . . any dispute or controversy arising out of this Agreement, or its interpretation, may be submitted to and resolved by arbitration under the rules then prevailing of the American Arbitration Association. A party seeking arbitration shall submit written notice of its request for arbitration to the other party, setting forth the specifics of the matter in controversy or the claim being made. If the parties agree to arbitrate such dispute, a formal demand for arbitration shall be submitted to the American Arbitration Association by such requesting party.

The word *may* in the first sentence is the problem. *May* can be interpreted in several different ways, and a college dictionary is little help. *Black's Law Dictionary* tells why when it defines *may* in this way, as one of several: "Loosely, is required to; shall; must . . . In dozens of cases, courts have held *may* to be synonymous with *shall* or *must*, . . ."<sup>5</sup>

### *Applying the Test*

The *United Rentals* court sets forth a three-step process for resolving a dispute over a contract provision – (1) Is the contract provision unambiguous (*i.e.*, consistent and clear internally or when contrasted to the terms of another contract provision)? (2) Does evidence from the contract negotiation process (*e.g.*, contract drafts or negotiation meeting notes) clearly demonstrate the parties' intentions? (3) Does the subjective understanding of one party bind the other party because that other party knew, or had reason to know of, that understanding and did not raise an objection?<sup>6</sup> A "yes" answer to any question stops the inquiry.

### ***Just For Laughs***

Information technology contracts rarely provide fodder for an "out loud" laugh. But, when they do, you will see it here.

One recent contract from a major vendor, in discussing the business recovery plan and the disaster declaration process, said this:

***We will notify you as soon as possible after we deem a service outage to be a disaster.***



<sup>2</sup> "Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made (a) that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; or (b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party." RESTATEMENT (SECOND) OF CONTRACTS §201(2) (1981).

<sup>3</sup> *United Rentals, Inc. v. Ram Holdings, Inc.*, 937 A.2d 810 (Del. Ch. 2007) available at <http://intl.fp.sandpiper.net/reuters/editorial/images/20071221/URI%20Opinion.pdf> [hereinafter *United Rentals*].

<sup>4</sup> See *US West, Inc. v. Time Warner Entertainment Company, L.P.*, C.A. No. 14555, 1996 Del. Ch. LEXIS 55 (Del. Ch. Jun. 6, 1996) available at <http://pages.stern.nyu.edu/~wallen/courses/B40.3346.20/warner.pdf> [hereinafter *US West*].

<sup>5</sup> BLACK'S LAW DICTIONARY 1000 (8<sup>th</sup> ed. 2004).

<sup>6</sup> *United Rentals* at 813.

The example above seems to contradict itself if *may* is read *shall*. The lead sentence suggests that a dispute must be submitted to arbitration, but the last sentence begins, “If the parties agree to arbitrate . . .” Assume that the parties to this contract never discussed this dispute resolution provision in their negotiations, but one party did stress to the other that its corporate policy was to include binding arbitration, as opposed to litigation, in all contracts. That other party did not object. Under the “forthright negotiator” principle, the contract likely would be interpreted to compel binding arbitration. In fact, the Delaware court in *United Rentals* denied United Rentals’ enforcement of the merger and allowed RAM to walk away for the \$100 million payment. RAM had consistently insisted during negotiations that the provision on which it relied at trial would allow only the breakup fee, not specific performance of the merger.

### *Value Clarity*

There are many ways to clarify the parties’ meaning in the above example dispute resolution clause. In legal writing clarity, among all others, is the highest virtue. Supreme Court Justice Antonin Scalia and University of Texas law professor David Garner have recently published their support for this judgment:

. . . one feature of a good style trumps all others. Literary elegance, erudition, sophistication of expression – these and all other qualities must be sacrificed if they detract from clarity. This means, for example, that the same word should be used to refer to a particular key concept, even if elegance of style would avoid such repetition in favor of various synonyms. It means that you must abandon interesting and erudite asides if they sidetrack the drive toward the point you are

## ***Hall Street Assoc. v. Mattel, Inc. The High Court Talks Arbitration***

*Short Circuited – Arbitration Redux*, a sidebar in the November – December 2007 client newsletter said:

On November 5 the U.S. Supreme Court will hear oral arguments in *Hall Street Assoc. v. Mattel, Inc.*, an appeal from the decision of the 9<sup>th</sup> Circuit Court of Appeals that deviates from the majority view by limiting the rights of contracting parties to craft their own arbitration process. . . .

If the Supreme Court upholds the 9<sup>th</sup> Circuit’s decision that the Federal Arbitration Act (FAA) does not permit parties to prescribe for court appeal of arbitration awards beyond the very limited bases set forth in the FAA, then parties will be forced to sacrifice transparency for elusive efficiency.

. . .

“Speculation is rampant on what the Supreme Court will do. If it sides with defendants and the American Arbitration Association, restraints on parties customizing a better arbitration process will tighten. This will surely short circuit the arbitration frenzy and send parties back to courts where expediency gives way to transparency.”

In late March, the Court began to short circuit alternative dispute resolution, at least arbitration. *Hall Street Assoc. v. Mattel, Inc.*, No. 06-989 (U.S. Mar. 25, 2008) *available at* <http://www.supremecourtus.gov/opinions/07pdf/06-989.pdf>, held that the FAA provides the only grounds for appeal and that parties may not contract for a broader review that would yield a more transparent arbitration process.

The Court did hold out some hope for freedom of contract for arbitration clauses:

. . . the FAA lets parties tailor some, even many features of arbitration by contract, including the way arbitrators are chosen, what their qualifications should be, which issues are arbitrable, along with procedure and choice of substantive law. But to rest this case on the general policy of treating arbitration agreements as enforceable as such would be to beg the question, which is whether the FAA has textual features at odds with enforcing a contract to expand judicial review following the arbitration.

To that particular question we think the answer is yes, that the text compels a reading of the §§10 and 11 categories [of grounds for judicial review of arbitration decisions] as exclusive.

*Hall Street*, slip op. at 9.

making. It means that you should never use a word that the judge may have to look up. . . .

Clarity is amply justified on the ground that it ensures you'll be understood. But in our adversary system it performs an additional function. The clearer your arguments, the harder it will be for your opponent to mischaracterize them. . . .<sup>7</sup>

### “You Get What You Need”

The May 2005 client newsletter *C<sup>3</sup> = The Right Word* endorsed virtuous contract drafting and added two other virtues to that of clarity:

*C<sup>3</sup> – “be clear, be concise, be complete”* – is a simple set of drafting rules that can improve any written document; but these rules are particularly appropriate for legal agreements. Legal agreements, or contracts, have long suffered from obfuscation, obtuseness and omission, or *O<sup>3</sup>*, the converse of *C<sup>3</sup>*. A clear, concise and complete contract best memorializes the parties' agreements and provides well-defined rules of behavior to govern their relationship.<sup>8</sup>

Many drafters opt for the vague (maybe even the “diplomatic” compromise of words) and advise clients that, if a dispute arises over what is intended, they will rely upon the parties' intentions. Thus, they advise that if they cannot get what they want in the drafting they will get it later, when a court decides the case.

But, if the forthright negotiator principle does not yield a conclusion as to interpretation, what happens? *US West*, a progeny of *United Rentals*, answers: “. . . inescapably, the parties have failed to contract on the subject and no contractual rights and duties have been created.”<sup>9</sup> In other words, both parties have lost the benefit of any bargain.

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<sup>7</sup> ANTONIN SCALIA & DAVID A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES (2008) *as reprinted in* ABA JOURNAL 41, 43 (May 2008) *available at* [http://www.abajournal.com/magazine/making\\_your\\_case](http://www.abajournal.com/magazine/making_your_case).

<sup>8</sup> *C<sup>3</sup> = The Right Word*, CARPENTER LAW OFFICE CLIENT NEWSLETTER (Robert H. Carpenter, Jr., Plano, Tex.), May 2005, [http://www.carpenterlaw.net/images/C3\\_The\\_Right\\_Word\\_May\\_2005\\_2007.pdf](http://www.carpenterlaw.net/images/C3_The_Right_Word_May_2005_2007.pdf).

<sup>9</sup> *US West* at \*35.