'Evergreen' Contracts Create Antitrust Issues

Courts emphasize fairness; reject restrictive clauses that may constitute unlawful limits on trade

By Steven John Fellman

Several waste-management companies servicing the commercial market on Long Island, NY, recently were sued in a class-action lawsuit alleging that the companies used-long term service contracts containing evergreen-renewal clauses, unreasonable liquidated damages clauses and right-to-compete clauses in violation of the antitrust laws. On Jan. 27, 2012, Judge Leonard D. Wexler certified the class and ruled that the plaintiffs could proceed to trial on their allegations of an attempt to monopolize in violation of the Sherman Antitrust Act. (*All Star Carts and Vehicles, Inc., et. al. v. BFI et. al.*)

Courts look at these contracts from a concept of fairness. If the courts find the contracts to be unfair and unduly restrictive, they will not enforce them.

According to the court, the defendant waste-management companies had a dominant share of the Long Island market for small, containerized waste-hauling and disposal services. Customers included commercial entities such as restaurants, apartment complexes and stores that utilized smaller containers provided by the defendants, rather than larger roll off containers.

Defendants entered into long-term (7-10 year) contracts with the customers. These agreements included evergreen clauses that rolled the contract over for another 7-10 years, unless the customer notified the waste-management company that it did not intend to renew at least 90 days before the end of the contract term. If the customer notified the company that it did not intend to renew, the contracts included right-to-compete clauses that required the customer to disclose the terms of offers from other waste-management companies and give the original service provider the right to compete. Finally, the contracts had burdensome liquidated damages clauses in the event that the customer breached the contract.

The defendants argued that all of the contract clauses were legal and could be justified. They claimed that the complaint failed to state an antitrust violation. Pointing to a Department of Justice consent order entered in a similar case in Georgia a number of years ago, the court found that the plaintiffs had made sufficient allegation to let the case go forward and certified a class, including all of the defendants' customers in Long Island who used small container services.

RESTRICTIVE TERMS CHALLENGED

For textile services companies, this case exemplifies why it's necessary to carefully review restrictive contract terms. Some states have enacted legislation limiting the use of evergreen clauses. Others have required those who use evergreen clauses in consumer contracts to notify the customer in writing before exercising such clauses. In the Georgia case noted above, (*U.S. v. Waste Management of Georgia*) the consent order limited new contracts to an initial term of two years and renewal terms to no more than one year. Customers couldn't be required to give notice more than 30 days prior to the end of the term. Liquidated damages were limited to three times average monthly charges during the first year of the contract and two times such charges during subsequent years. Right-to-compete clauses were prohibited.

Contracts are an essential part of the textile services business. Large new accounts often require a substantial investment in inventory that may not be usable for other accounts. Large accounts may also require an allocation of significant plant capacity, which limits the ability of the textile services company to take on additional customers.

It's reasonable for textile services companies to have multi-year contract terms recognizing these factors. However, when dealing with smaller accounts, such as a small restaurant that uses standard table linen, a 10-year contract with a 10-year evergreen roll over would clearly be excessive.

Courts look at these contracts from a concept of fairness. If the courts find the contracts to be unfair and unduly restrictive, they will not enforce them. What's more, if it looks as if the seller is imposing unreasonable restraints on trade to force the buyer to remain a customer, antitrust liability may result.

The lessons from the waste-management company cases are clear: Push too far and an antitrust suit may result. TS

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All About Contracts—TRSA Updating Guide

TRSA offers a publication titled *Contracts for the Textile Rental Supplier* to help textile service operators understand what can be included when companies design customer contracts to suit their individual needs.

Originally written in 1993 by TRSA General Counsel Steve Fellman and colleague Cynthia Hurwitz of the GKG Law, P.C. in Washington DC, *Contacts* was last updated in 2001. The TRSA Legal Committee will complete a second revision of this 104-page guide in 2012.

This publication offers examples of what companies can do in a contract, while determining what's best for their particular needs. The book includes descriptions and explanations of commonly used contract clauses. Examples include "Term," "Losses and Replacement," "Buy back," "Security deposit" and "Payment terms," among others.

The publication also offers guidance on avoiding common contract pitfalls. Although it's not a legal document, the publication is designed to help textile suppliers draft and update their own contracts with assistance from legal counsel.

As the authors state in their preface to the 2001 edition, "You must use this book only as a starting point to help you develop your own contract. But like a menu in a Chinese restaurant, although you can pick a selection from Column A and a selection from Column B, the true gourmet carefully reviews the entire menu and then orders a meal specifically designed to his or her own tastes. They analogy is clear: You must work with your attorneys and design a contract that fits your business and its own particular needs. You may even need separate contracts for small and large accounts.

To order the current edition of *Contracts for the Textile Rental Supplier*, go to **http://bit.ly/Contractspub**, or watch for an upcoming announcement of the revised edition later this year.