

## Don't Click "I Accept" So Fast – Standard Software Licenses and Service Contracts May Leave You Unprotected

**S**ophisticated business management software now available for commercial enterprises, large and small, ranges from off the shelf programs for discrete tasks like billing to integration of marketing, sales, manufacturing, customer relations and financial operations in a customized Enterprise Resource Planning solution. High tech software can work tremendous positive change in your business and may be required for effective competition. But standard contracts in use by sellers of software and consulting services may leave you without meaningful recourse if a newly discovered bug or unsuccessful implementation causes an economic disaster.

Consider the initial failure of Nike's cutting edge Supply Chain Management software which led to \$48 million in lost profits, a public feud with the implementer damaging stock prices and reputations, and an expensive 3 year turnaround. Imagine the impact to a smaller business if due to the fault of others, the accounting software installed by the IT manager opened to the blank screen of complete data loss, or the Customer Relationship Management program melted down on a Monday morning, never to reboot. Would a free download of the same accounting program or a refund of the CRM installation price be adequate?

That may be all that the terms of the software license agreement or

implementation contract provide, and they will likely be the exclusive source of the purchaser's rights and remedies, even if it fell victim to a defective disk, new bug or negligent customization. The majority rule of law is that purely economic losses by commercial entities must be dealt with under contract law, precluding tort claims such as negligence, misrepresentation or fraud that allow recovery of replacement costs, lost profits and other consequential damages.

Standard licenses offered by providers of both simple and sophisticated software commonly contain many terms that protect them from such damages and limit the purchaser's available remedies. Examples of these provisions, which are routinely enforced by courts, include: (1) disclaimers of all warranties advising that software is sold "as is"; (2) limitation of remedies for malfunction to a replacement copy of the software or reperformance of the services; and (3) limitation of liability to the price paid for the product or services, precluding recovery of any other loss or damage. Similar terms are found in the service contracts of companies that do software implementation (i.e., installation, customizing and end-user training). Obviously, negotiation of better than standard terms is

advisable and a different software strategy might be dictated where that is not possible.

Better terms may be obtained if more sophisticated, customized software is purchased or implementation is performed by professionals willing to bargain. There is no negotiation, however, with off the shelf, fully functional software, which invariably has a "click-wrap" license agreement (the installer must click on an acceptance of the license terms to proceed). While "shrink-wrap" licenses on CD boxes were questionable, click-wrap agreements require affirmative choice and are enforced as binding contracts. Given the standard terms, the easiest, most economical choice may not be the best one, so pause before you click "I accept."



### By Kevan F. Hirsch, Esquire

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# Highlights of the 2010 Tax Relief Act

On December 17, 2010 President Obama signed the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010 ("Act"). The Act gives taxpayers some certainty in tax planning for the next two years, especially concerning the individual income tax rates, capital gains/dividend tax rate and the estate tax. Below are some highlights of the new law:

- Extension of 2009 income tax rates for all taxpayers for an additional two years. The top marginal rate on ordinary income will remain at 35%. Long-term capital gains and qualified dividends will retain a top rate of 15%.
- Personal exemption phase-out, which subjects individuals to a 2% phase-out for each \$2500 that adjusted gross income exceeds certain levels, has been repealed through 2012.
- Itemized deductions "phase-out", which can disallow up to 80% of otherwise allowable itemized deductions which was repealed for 2010 but set to return in 2011, is repealed through 2011.
- Provides an alternative minimum tax ("AMT") patch intended to prevent the AMT from encroaching on middle income taxpayers by providing higher exemption amounts and other targeted relief.
- Income limitations for Roth conversions have been eliminated.
- Reduces social security taxes from 6.2% to 4.2% for wages earned during 2011 up to the taxable wage base of \$106,800.
- Reinstates estate tax at a maximum rate of 35% and an exclusion amount of \$5,000,000.
- Provides a \$5,000,000 generation skipping tax exemption amount.
- Bonus depreciation increase from 50% to 100% for qualified investments from September 9, 2010 and before January 1, 2012.
- Provides for a \$125,000 dollar limit (indexed for inflation) and a \$500,000 investment limit (indexed for inflation) for expensing qualified property for tax years beginning in 2012.
- Extends for another 12 months the 100% exclusion of gain from the transfer of qualified small business stock to non-corporate taxpayers.

The above highlights focus on some of the tax provisions in the Act that will provide for greater certainty, at least in the short term, and that I believe are most likely to interest our clients.

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See article on page 4 to learn how this Act creates a "Two Year Window."



## Congratulations

### NEW PARTNER

We are pleased to announce that **Dirk M. Simpson** has become a principal of Kaplin Stewart. In his practice, Mr. Simpson concentrates on trust and estate planning, business planning for closely-held companies, taxation and representation of tax-exempt entities. He also handles Orphans' Court litigation matters. Mr. Simpson regularly speaks on estate planning and estate administration topics to various business and professional associations. He has been a guest speaker on estate planning topics on local and nationally-syndicated radio programs, and has co-authored *My Will Book*, an instructional book on estate planning.

### MAJOR VICTORIES

**Marc Kaplin**, principal in the Land Use, Zoning & Development group, won a major victory for our client, Berwind Properties Group ("BPG"), in the case of *Newtown Square East v. Zoning Hearing Board of Newtown Township, Delaware County, PA*. Newtown Square East ("NSE"), and its principal Claude de Botton, filed an appeal of the Township of Newtown's Planned Residential Development Ordinance ("PRD") under which BPG had received approval to build a mixed use town center development on a tract of land in the Township. Mr. de Botton's appeal of the PRD Ordinance prevented BPG from proceeding with its development. BPG, as Intervenor in the lawsuit, filed a petition requesting the Court to require NSE to post a bond as a condition of proceeding with its appeal, based upon the frivolousness of the appeal. Common Pleas Court Judge Chad Kenney found in favor of our client BPG, calling de Botton's appeal to Commonwealth Court both "frivolous and cynical" and said that the appeal was nothing more than a "delaying tactic." On January 25, 2011, Judge Kenney upheld BPG's request for a bond and ordered de Botton to pay \$1.3 million monthly during continuation of the appeal. The amount of the bond represents a pro-rated estimation of the damages BPG will suffer by not being able to proceed with the development while the appeal is pending. **Such findings are considered very unusual given the high standard for proving an action to be frivolous.**

**Andy Cohn** and **William Auxer**, principals in the Construction Law group, won a victory in the Pennsylvania Commonwealth Court which affirmed on appeal a multi-million dollar arbitration award they won in favor of a structural steel subcontractor against a Berks County School District (*Amthor Steel v. Oley Valley School District*). On December 10, 2010, the Commonwealth Court issued its opinion affirming the entry of judgment, which was in excess of \$2,000,000, in favor of the steel subcontractor against the School District. The School District had withheld payment based on project delays which it claimed were caused by the steel subcontractor. However, an arbitration panel unanimously concluded that the project delay was caused by design deficiencies and other factors unrelated to the subcontractor's work. The panel also affirmed the decision of the arbitrators that the Pennsylvania Steel Act, which requires that steel products used on PA public projects be manufactured in the United States, does not require proof that any scrap steel from which those products were manufactured also originated in the United States. This is the only known PA state decision addressing this issue.



# Meet Our Litigation Professionals

This month Kaplin Stewart shines the spotlight on David L. Black. David is an Associate in the Commercial Litigation group and routinely handles landlord-tenant disputes, employment claims, and title litigation.

David was born at the New Jersey shore, but soon after moved to North Carolina, where he attended high school and college. Growing up, David could often be found on either the soccer field or on the basketball court. From the time he was 8 until he was 16, David travelled the southeast with his select soccer team playing in tournaments and state league games almost every weekend. The team's hard work and discipline culminated in a North Carolina state championship trophy, which is still prominently displayed in David's home. While soccer is his first love, basketball, and college basketball in particular, is a close second.

After a Duke University basketball player (the incomparable Robert Brickey) visited his third grade class, David instantly became a Duke fan and became embroiled in the Tobacco Road rivalry with his fellow classmates, who all seemed to be Carolina



DAVID L. BLACK

fans. Passionately debating the finer points of college basketball, as it turned out, was good practice for the courtroom.

After graduating from high school, David attended the University of North Carolina at Asheville (not Chapel Hill lest anyone think he became a Carolina fan) and majored in economics. It was there, during a course entitled "Business Managers and the Legal Environment", that David became fascinated with the law. David signed up for the LSATs and a year later found himself at the Villanova University School of Law. While planning a swift return to the South after enduring three bitterly cold, seemingly never-ending Northeastern winters (what's a Nor'Easter?), David met his wife, Katie, who is from Delaware County, and knew that he had better invest in a winter coat and a pair of snow boots.

Upon graduating from Villanova, David joined Kaplin Stewart and has since purchased both a winter coat and a pair of really good snow boots.

## Do You Know...

that Pennsylvania entities formed prior to January 1, 2002 are required to make a filing with the Corporation Bureau prior to December 31, 2011 to confirm their continued existence?

Pennsylvania law requires that any Pennsylvania entity (i.e., corporation, limited partnership, limited liability company, etc.) that was formed prior to January 1, 2002 and which has not made a subsequent filing with the Pennsylvania Corporation Bureau between January 1, 2002 and December 31, 2011, must file a "Decennial Report" with the Corporate Bureau. There will be an ongoing requirement in Pennsylvania to file Decennial Reports every ten (10) years thereafter during the years ending with the number "1" (e.g., 2011, 2021 etc.). The Department of State will be sending notification of the Decennial Report filing requirement to all affected associations or entities; however, failure by the Department of State to give notice does not relieve an entity's obligation to make the filing.

If an entity fails to file a required Decennial Report between January 1, 2011 and December 31, 2011 there can be serious consequences. A failure to file will cause an entity to forfeit exclusive rights to the use of its name beginning on January 1, 2012. The entity will continue to exist in good standing; however, its name will be available for use by any other entity registering in the Commonwealth. If another entity files in the Commonwealth using the now available name, the non-compliant entity will be required to change its name with the Department of State.

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# Legal Perspectives

## Two-Year Window of Opportunity to Establish Irrevocable Trusts

As discussed in this newsletter, the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 restores the estate tax for 2011 and 2012, after its one-year repeal in 2010, and sets a top rate of 35% and a \$5 million (per individual) unified gift & estate tax exemption amount.

As a result, clients now have a two-year window of opportunity to fund irrevocable trusts that leverage the \$5 million gift tax exemption and are capable of transferring tens of millions of dollars to beneficiaries without gift, estate, or generation-skipping transfer taxes, and with possible asset protection benefits.

As a result, there should be renewed interest in establishing irrevocable trusts.

Taking time to properly design and implement an irrevocable trust is critical to its success since there are numerous issues to address. The best results are achieved when all advisors – the attorney, CPA, financial planner, etc. - are united with the client around a shared vision and understanding.



DIRK M. SIMPSON

As the attorney helps determine which assets should fund the trust, the client's CPA or financial advisor can develop projections regarding the growth of trust assets and anticipated after-tax cash flow. Working together, concepts can be "triangulated" with pictures, text, and numbers. For example, the attorney can prepare flowcharts to visually depict how assets will flow into or out of the trust, while another advisor prepares cash flow charts that numerically illustrate the projected income going to the client each year or the aggregate inheritance going to the children. Ideally, the cash flow charts will be integrated with annual cash flows from other trusts or accounts within the client's family. When all people agree that the trust makes sense graphically, numerically, and textually, the client can proceed confidently with implementing, funding, and maintaining the trust.

With a multidisciplinary approach, estate planning combines with portfolio management to produce true wealth optimization. We encourage you to contact us to discuss how we can help leverage your existing network of professional advisors and resources to take advantage of current planning opportunities.

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Unless otherwise expressly stated herein, all discussions and opinions are based upon the law of the Commonwealth of Pennsylvania and the State of New Jersey. **Your comments or suggestions are welcome... Phone: 610.260.6000 • Fax: 610.260.1240 • www.kaplaw.com**

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