OTIS, BEDINGFIELD & PETERS, LLC
ATTORNEYS AT LAW

Newsletter

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Inside this issue:

Why is My Contract So Long?

By: Brandy E. Natalzia

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"The time to repair the roof is when the sun is shining."

-John F. Kennedy

You entered into a pretty basic commercial deal, and decided to do things properly and get it drawn up by an attorney. You've now received a 'draft' from the attorney and it's long. It was a simple deal. Why are there so many terms? Why is it several pages in length? The answer lies in risk-shifting, or preparing for the rain.

Contracts are generally signed in good times, when the sun is shining. The parties typically have high expectations of the success of the agreement and may not consider what happens if and when things don't go as planned. However, it is important to prepare for the bad times, to formulate terms that consider risks that may arise after the contract is signed. There are many ways a contract can be drafted to guard against the rain - two of the more common ones are representations and warranties and indemnity provisions.

Representations and Warranties

A representation is simply a statement of fact upon which another party is expected to rely, while a warranty is a party's assurance as to a particular fact coupled with an implied indemnification obligation if that fact is false. Representations and warranties are generally used to allocate risk by (1) apportioning exposure to potential losses and shifting risk from the recipient to the maker; (2) creating a direct

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Congratulations to attorneys Timothy R. Odil and Lee J. Morehead

We are pleased to announce the promotion of Timothy R. Odil to Equity Member and Lee J. Morehead to Senior Associate.

Tim is a key member of the firm's litigation team. His practice focuses on disputes among private parties as well as disputes with local, state, or federal government agencies. He handles complex business litigation and appeals, government and commercial contract disputes, regulatory compliance, licensing disputes, and rulemaking issues, as well as employment law matters.

Lee is an outstanding contributor to the litigation team. His practice focuses on oil and gas, general business transactions, probate administration, employment law, and related litigation matters. Lee received his undergraduate degree in International Business and his master's degree in Legal Administration from the University of Denver. He graduated cum laude from Vermont Law School.

Meet OBP's Newest Members

Leigh Downing - Senior Transactional Paralegal

Leigh is attorney Fred L. Otis' paralegal and has worked with him for over 20 years. She grew up in Greeley and graduated from Greeley West High School. She is currently attending Metropolitan State University in Denver working towards her Bachelors of Science in Integrative Healthcare.

Jason Dickerson — Document Manager

Jason is the document manager for the firm. He earned his B.A. in Political Science and Minor in History from CSU and also has a paralegal certificate.

Why is My Contract So Long? (Continued)

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claim against the maker if representations and warranties are inaccurate; and (3) serving as a basis for the parties' indemnification rights.

Indemnification

An indemnification clause is a promise to protect and defend another in the event a particular set of circumstances leads to a loss suffered by another party. Indemnity provisions are the primary vehicle by which parties typically shift or apportion risk in a contract. Indemnity provisions may include any, or all, of three obligations to (1) indemnify, (2) defend, and (3) hold harmless the other party. A well-drafted indemnification provision allows parties to customize their risk allocation by shifting the burden of loss and compensating an indemnified party for risks it did not assume and expenses that may not be recoverable under common law, like attorneys' fees.

Having an attorney draft or review your contract before signing is recommended. It is imperative that you understand the potential consequences of the risk-shifting provisions in any contract. By carefully drafting and negotiating a contract before execution, during the good times, you can best protect yourself or your company from the inevitable rain.

-By: Brandy E. Natalzia, Esq.

Utah Rodent in Middle of Ideological Tug-Of-War

By: John A. Kolanz

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Against the backdrop of the Trump Administration's determined deregulatory efforts, the Tenth Circuit Court of Appeals (which covers Colorado) recently affirmed substantial federal authority to regulate activity on private lands. While the Court delivered its opinion in the context of the Endangered Species Act ("ESA" or "Act"), the case has broader implications for environmental regulation in general.

Congress passed the modern day ESA in 1973, with barely a dissenting vote. The Act's main goal is to conserve threatened and endangered species along with their supporting ecosystems. The ESA quickly gained a reputation as one of the most powerful environmental laws ever enacted when it stopped a massive and nearly-completed federal water project in its tracks to save a newly-discovered diminutive fish (snail darter) that is unsuitable for rod and reel. (Congress eventually had to pass special legislation to allow completion of that project – the Tellico Dam.)

The Act can likewise affect private actions. Once a species is "listed," the Act's keystone provision prohibits the "take" of that species without a permit or other authorization. While "take" includes killing, the prohibition encompasses a much broader range of actions, such as harassing, harming, pursuing, or capturing. It can even include significant habitat modification or degradation.

With respect to some species, this broad prohibition can complicate routine land management activities. Such was the case with the Utah Prairie Dog ("UPD"), a listed species that lives only in Utah, and mostly on non-federal land.

People for the Ethical Treatment of Property Owners ("PETPO") is a group of over 200 private landowners and other entities who say that regulation of the UPD has prevented them from building homes and starting small businesses. PETPO challenged the authority of the United States government to regulate the take of UPDs on private land.

The United States Constitution delineates Congress's powers. Those not granted to Congress are reserved to the states or the people. The Constitution's Commerce Clause authorizes Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Congress relied on this authority to pass the ESA and other environmental laws.

PETPO argued that the Commerce Clause does not authorize Congress to regulate the take on non-federal land of a purely intrastate species that does not itself substantially affect interstate commerce. The Circuit Court, however, declined PETPO's invitation to evaluate the prohibited activity in isolation, and instead considered its place in the ESA as a whole.

The Court determined that Congress had a rational basis to believe that regulating the take of the UPD is essential to the Act's broader regulatory scheme. The Court found this broader scheme to substantially affect interstate commerce, and therefore upheld the federal government's authority to protect the UPD.

To hold otherwise, the Court said, would leave a "gaping hole" in the ESA, since almost 70% of species listed under the Act exist solely within one state. The Court further explained that excising a specific activity governed within a larger statutory scheme would subject Congress's Commerce Clause authority to "death by 1000 cuts." This would call into question the validity of the ESA itself, as well as other environmental laws.

The result in this case was not really surprising. Every other Federal Circuit Court that has considered the issue has

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Attorney Spotlight
Katie L. Butler, Esq.

Katie is a fitness enthusiast, and appreciates the abundance of activities that Northern Colorado offers. Katie is an avid hiker and paddle boarder, and she is learning how to snow board.

Katie graduated from the University of Arkansas School of Law. She received her Bachelor of Arts degree in Spanish and English from the University of Texas at Arlington. Before joining Otis, Bedingfield & Peters, she was In House Counsel for CrossFit, Inc., where she managed a large international trademark portfolio and navigated the company in its business issues. While in law school, Katie worked as a student attorney for the Transactional Clinic, aiding nonprofit businesses with organizational legal issues. Also, Katie served as a law clerk to the City Prosecutor in the home of her Alma Mater where she prosecuted misdemeanors and minor felony offenses. She currently volunteers at the Boys and Girls Club of Weld County.

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Utah Rodent in Middle of Ideological Tug-Of-War

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upheld the federal government's authority to protect purely intrastate species under the Act.

That is not to say that the UPD should rest comfortably in its burrow. The stringency of the Act itself has long generated calls for legislative relief. Today's political climate may make such efforts more likely.

Perhaps more importantly, since the mid-1990s the United States Supreme Court has showed renewed interest in reassessing Congress's Commerce Clause power. Landmark opinions in 1995 and 2000 began to curb a power that some legal scholars had begun to regard as virtually limitless.

The Trump Administration's deregulatory effort envisions a stronger state role in environmental regulation. This effort will undoubtedly encourage further legal challenges, and one – perhaps the UPD case – will eventually find its way to the Supreme Court. When that happens, the makeup of the Court will play a significant role in the outcome.

The Supreme Court's conservative justices show a decided preference for stricter limits on Congress's Commerce Clause power. Depending on the case and the makeup of the Supreme Court at that time, the resulting decision could profoundly and forever change the structure of environmental regulation in this country.

John Kolanz is a partner with Otis, Bedingfield and Peters, LLC in Loveland. He focuses on environmental and natural resource matters and can be reached at 970-663-7300 or JKolanz@nocoattorneys.com.

-By: John A. Kolanz

As Seen In BizWest

Dance like no one is watching; email like it may one day be read aloud in a deposition.

Christian J. Schulte
Otis, Bedingfield & Peters, LLC

The title comes from journalist Olivia Nuzzi, reminding us that technology, however useful, can bite us. Nowadays, evidence in lawsuits can be mostly emails, instead of more carefully edited letters and memoranda. This matters, because people write stupid things in emails they would not elsewhere. Policy and training do not help, and even if they did, there are limits; candor among coworkers is too important.

So, when faced with a lawsuit, it can be tempting to try to delete and cover up, even from your own lawyers, damaging internal emails—BUT DO NOT. Emails propagate in a network like rabbits in a field, and everything eventually comes out. Better to get the worst into your lawyers' hands quickly, to help them help you develop a strategy to deal with it early on.

Otis, Bedingfield & Peters, LLC

NoCo's leading corporate law firm in Real Estate and Business Law, Environmental Law, Oil and Gas Law, Estate Planning, Probate, Trust and Commercial Litigation, Appeals, Tax Law, and Agricultural Law. Our clients are landowners, business owners, business professionals, businesses of all sizes, and individual families in need of guidance or representation in court proceedings involving any of these legal issues.

For more information about our lawyers or practice areas, please visit our website at www.nocoattorneys.com or contact us at 970-330-6700, 970-663-7300. ◄

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