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Small Law: It’s Like a Thermostat, Not a Light Switch

Commercial and Contracts

Everyone is familiar with the strategy of setting your vehicle air-conditioning to either “cryotherapy” or “blow-dryer to the face,” then choosing the opposite one once the system pushes past whatever the desired temperature might have been. (This isn’t *Popular Mechanics*, so I’ll spare everyone the explanation why this is an ineffective strategy, but please stop it.)

I recently observed an attorney applying this approach to legal work for his small corporate client, and realized I’d seen this often enough that I wanted to address it. Here’s the paradigm of this approach: a small business creates a product or service and outside lawyers to help prepare the standard purchasing or licensing agreement, limited warranty, and the like. Resources are limited, so the stated objective is to create a one-size-fits-all template package so the product can go to market without the need for additional legal input for each new customer.

Here’s where it gets fun. The counsel prepares an agreement and warranty where every possible variable overwhelmingly favors the client. Zealous advocacy, right? Maximum protection for a small and possibly vulnerable client, right? I don’t think so, at least not to the extent I’ve seen lately.

In my most recent experience, relating to a product that had both hardware and software elements, the proffered warranty excluded any responsibility for software failures or defects. The upshot being that this highly sophisticated piece of technology could become a doorstop, but the end user (and we) would be entirely without recourse. When we objected to this term during a videoconference, the business representatives expressed genuine surprise, stated they didn’t intend that approach, that the document either contained an error or we misunderstood it. They asked for time to consult with their counsel.

That counsel was present at the next videoconference. He insisted that we walk through the entire document in the order of our tracked[1] comments and edits, large or small. We eventually reached the

warranty language and, though I'd embedded a comment explaining my concerns, he asked me to explain. I did so, and the client then asked the attorney if that could possibly be true. After a few seconds of awkward silence, he said only "yes."

The client began to explain that that just wouldn't do, and that the language would have to change to cover such a failure, and the attorney interrupted to more or less scold the client — "You don't want to get into the habit of letting an individual client veto your warranty provisions" — which then recalibrated everyone's perspectives on how awkward the prior silence was.
The language *was* changed soon after this session. I thought about how this company had to pay this attorney to create that warranty, then probably also paid for the attorney to participate in this meeting, and then likely paid an additional amount to have the language changed.

Why start with a position you have no realistic expectation of maintaining? This is akin to setting the AC so low in your car that your passenger is provoked into surreptitiously (or perhaps defiantly, if this person is your significant other) switching to maximum heat at the earliest opportunity.

I hope that episode will prove to be the most egregious example I encounter during my career. Before this, to make my point I would've had to make do with a time when counsel for a SaaS application had included a force majeure clause that, in addition to the typical calamities, added something that amounted to "or anything else that, in our opinion, makes it difficult to perform our obligations, including stuff we ourselves caused." That vendor agreed the language was silly, but also stated that (1) he wouldn't change a word of the contract without approval of counsel, and (2) he'd already spent his annual budget for attorney's fees that year, so we'd have to either live with it or wait until January.

These examples made me chuckle, at least once the frustration passed, but they also remind me that the work we do to set our business partners up for success requires much more nuance than simply tilting every variable unequivocally in the client's favor, and then fighting like hell over any received pushback. It's important to distinguish between the "must have" and the "nice to have," and move efficiently to an outcome that beneficial and fair for those we serve. Remember, the most comfortable temperature for everyone is often the one in the middle.

[1] This particular attorney is also one who responds to tracked markups with untracked, locked PDFs, so I'm inclined to assume he is also opposed to things like freedom, kittens, and the Oxford comma.

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