

FRIEDMAN & FEIGER

ATTORNEYS AT LAW

We Never Give Up!



Last month, there was a verdict by a jury in a federal court case in Northern California between two companies whose names you might recognize: Apple and Samsung. Both parties claimed serious violations of the other's intellectual property rights, and their jury trial was the proverbial "high-stakes" litigation case. After almost three weeks of trial, and prior to sending the jury to deliberate, Judge Lucy Koh instructed the attorneys for both companies to discuss settlement one more time because, "It was time for peace." Judge Koh's plea for settlement did not work and the jury eventually decided in Apple's favor to the tune of \$1 billion dollars.

At Friedman & Feiger, I like to believe that we would not have had to have a judge plead for settlement. Having litigated cases for many years, I believe it is most important to listen carefully to my clients about their legal matters –

and I know every attorney in our firm is the same way. I take pride in the fact that in our firm our attorneys put our clients first. We treat each client as if they were our only client and we work hard to achieve each client's goals.

Working and treating our clients as if they were our only client encompasses everyone in our firm, not just the attorneys – all of us maintain the same mindset and work ethic in order to provide legal services uniquely suited for each client. However, there are some tenets we all follow no matter who our client is. First and foremost: We listen to our clients, we identify our client's goals, we aim for realistic goals, and we work hand-in-hand with our clients. Listening to our clients' concerns is extremely important in developing case strategy.

We also provide our clients with alternatives, when they are available, to resolve their legal problems. We pride ourselves as being "problem-solvers," not "problem-makers," so as not to waste our clients' time and resources. Friedman & Feiger is a firm with attorneys who practice in many different areas of law. We are fortunate that our firm can be a "full-service" firm to our clients.

Also critical to our success, is that we "never give up." By researching and investigating and digging deeper, we have frequently been able to discover valuable information that gives our clients the advantage in their legal matters. Research is an essential part of case development – "leaving no stone unturned" provides all of us much more confidence as a case unfolds. Research also involves understanding our clients' personal and business needs. Whether we represent a single entrepreneur or a multi-million-dollar technology company, we know that we must thoroughly understand each client's background.

"Fear of failure can also lead to success." Our attorneys hate to lose and are fueled by the fear of disappointing our clients. Fear is a powerful motivator – to a point. And this brings me back to Judge Koh – we need to understand the playing field, the competition, and the state of the game. In other words, we need to help you understand where you are and what your alternatives are at any given point in time. Understanding our clients and their goals, knowing our competition and their goals, and building a case from the ground up in order to lay a strong foundation most often results in a successful outcome.

As this year is rapidly approaching its end, I would like to take this opportunity to thank our past and current clients and friends for their business, their support, and their confidence. We look forward to bringing you victories in your legal arena and our sincere best wishes to you in all areas of your life.

Larry Friedman can be reached at (972) 788-1400 or e-mail him at lfriedman@flawoffice.com

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In The Spotlight: Michael L. Gaubert



The ISDA Master Agreement

Borrower Beware as these become mainstream in Retail Banking Transactions

In recent years a document known as an ISDA Master Agreement has made its way from complex hedge fund and derivative transactions into mainstream retail banking. The practical effect of these documents is that they are being used to attempt to "trump" no prepayment penalty clauses and to charge different interest rates than may be contained in the actual loan documents, resulting in alleged unfair charges to unsuspecting borrowers.

According to numerous articles and other reports on the ISDA, as well as my own experience in reviewing, researching, and dealing with these agreements, one can see many weaknesses in the ISDA Master Agreement that have been exposed. Some, without limitations: are a flawed negotiated document; contain harsh and confusing termination notice provisions; pose difficulties in forcing close-out of a master agreement; bear weaknesses in the market quotation mechanisms and fall-backs

in a distressed market; lack an agreed level of detail in calculation statements; have drastic contradictions between the loan documents and the ISDA; involve failures to abide by "Confirmation" protocol; and, lack infrastructure for counterparties dealing with defaults.

Specifically, notwithstanding "integration clauses" and "notices of final agreement" contained in the loan documents that are beneficial to the parties (and which are set forth therein to protect the parties, especially the borrower), and despite the fact that neither the ISDA Master Agreement nor the loan documents reference each other, banks may still insist that the ISDA controls to the detriment of the borrower.

Indeed, in the last few years, it has not been uncommon for counterparties to enter into a derivative transaction,

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Pitfalls in Responding to Claims of Discrimination By Melissa Kingston

How an employer responds to claims of discrimination by an employee can make the difference between resolving the issue within your organization or ending up in protracted litigation. Most employees who complain about being discriminated against are not looking for a lawsuit but instead want the employer to solve the problem. Employers often perceive a discrimination complaint as a threat and react overly defensive, which typically makes a bad situation worse. Remember, employees who believe that their situation is bad enough to formally complain are usually stressed by the situation and may be in fear of losing their job or being ostracized by co-workers. This heightened sense of stress makes them more likely to adversely react to an employer who does a poor job responding to the complaint, fails to investigate the complaint, or otherwise fails to take the complaint seriously and work diligently to address it.

To limit potential liability, employers should immediately respond to complaints of harassment, violence or threats of violence, and discrimination. Such complaints usually should be handled through a formalized process. Line supervisors generally should not attempt to resolve such issues alone, but rather should notify top management and human resource personnel for an organizational response. Additionally, the employer's response to a complaint should be carefully documented. The employer's complaint investigation and response process should include:

- Communication with an employment lawyer so that you know the employer's and employee's rights and have guidance throughout your investigation and response processes.
- Interview the complaining employee in private, ask questions, get the full story and take detailed notes.
- Evaluate the complaint, taking into account what you know about the people involved and the allegations made. Allegations that involve physical violence or threats may require immediate action.
- Plan your investigation. Decide who you want to interview, what information you need to make a decision, and how information will be shared.
- Conduct the investigation. The investigator's goal is to gather information objectively and not with the goal of proving or disproving the complaint. Remind participants that this is a confidential process and that retaliation will not be tolerated.
- Evaluate the information gathered in the investigation. Eyewitness testimony is more reliable than rumors and hearsay. Consider the agendas of witnesses, apply logic to the information and be mindful of participants' demeanor during the interviews.
- Write an investigation report, outlining the investigation steps taken and findings of the investigator. Include recommendations to decision makers if necessary.
- Report your findings and decisions to the complaining employee and the alleged harasser. Take appropriate disciplinary action. Document your conversations and any disciplinary action taken.

At Friedman & Feiger, we are here to help you navigate through the processes of investigating and responding to discrimination complaints and make sure that you take advantage of every opportunity to solve discrimination complaints internally and promptly.

Melissa Kingston can be reached at (972) 788-1400 or e-mail her at mkingston@flawoffice.com

The ISDA Master Agreement (Continued from page 2)

and deem an ISDA Master Agreement controlling. When this happens, language incorporated into the “Confirmation” states that the parties will use reasonable efforts to negotiate a Master Agreement soon, and indeed most ISDA templates provide optional boilerplate language to this effect. Although many believe ideally the deemed master agreement practice should cease, the fear is that, as a practical matter, the problem will always be with us. Some suggest that the best practice for the ISDA is to prepare a specific protocol.

Perhaps the biggest weakness in the Master Agreement relates to the confusion, traps for the unwary, and lack of options present for a non-defaulting party serving a termination notice on its defaulting counterparty. All of these can lead to a delayed or botched close-out. The 2002 version, although correcting several of the 1992 versions’ flaws (such as flaws relating to the quantum of default interest payable), also contains several problem areas. The vast majority of Master Agreements elect ‘Market Quotation’ as the payment measurement for calculating close-out amounts and indeed the 2002 version uses an element of market quotations in its close-out amount definition. When there is a breakdown in the operation of the market (i.e., following a major default where all market-makers are concentrating on closing out their own transactions rather than trying to enter new ones), it becomes difficult for a determining party to achieve the minimum three quotes from reference market-maker banks to calculate what the ‘Market Quotation’ for any transaction is. The fallback for failing to obtain a market quotation average price is the ‘Loss’ method with the determining party calculating what their loss is using reasonableness and doing so in good faith. This can bring its own problems and potential disputes between parties as to what the loss reasonably is.

In sum, to say that the ISDA Master Agreement and its formulas and application are complicated is an understatement; calling them mind-numbing and mind-boggling is more like it. One thing is for sure, think twice, and seek the advice of counsel, before entering into these agreements, especially where, among other things, you anticipate early pay-offs of the underlying loans or where refinancing is a real possibility—or you may find yourself trapped in an ISDA quagmire.

Michael Gaubert can be reached at (972) 788-1400 or email him at mgaubert@fflawoffice.com

Involuntary Bankruptcy—To File Or Not To File By Ernest Leonard

Here’s the scenario: a vendor owes you money, a lot of money, and you’ve worked with him again and again to catch up. Even though he has made some payments to you, he is getting further and further behind. You are thinking about suing him, but do not want to run up legal fees to get a judgment that you may never be able to collect on. Then over lunch, one of your friends says, “you should put the vendor in involuntary bankruptcy.” Sounds like a good idea. But is it? Like many things in law, the answer is, “it depends.”

The Bankruptcy Code allows three creditors, with claims totaling at least \$14,425, to file an involuntary bankruptcy petition. Once an involuntary petition is filed, a bankruptcy judge will hold a hearing to determine whether the debtor should remain in bankruptcy.

From the standpoint of a creditor, the benefits to filing an involuntary bankruptcy petition against a debtor include: a) a debtor can be quickly stopped from dissipating his assets; thus preserving assets which can be used to pay creditors; b) the bankruptcy claims process is quicker and less expensive than obtaining a court judgment; and, c) the Bankruptcy Code has strong remedies that can be used to reach a debtor’s assets, and the case will be supervised by an experienced bankruptcy judge.



However, an involuntary bankruptcy proceeding has its drawbacks which include: a) unsecured creditors will find themselves in line behind secured creditors and certain “priority” creditors such as taxing authorities; thus, your efforts in putting the debtor into involuntary bankruptcy may end up being for the benefit of others; b) creditors share equally in any distributions with other similarly situated creditors; (this is not the case for a single creditor who aggressively obtains and then collects a judgment in state court); and, c) a trustee is typically appointed who answers to the court. Unlike your lawyer, you do not control the trustee. Moreover, if you received pre-bankruptcy payments in amounts more than other creditors, you may find yourself a defendant in a “preference” suit by the trustee and find yourself giving back the money you have already been paid.

Many factors come into play in deciding whether to file an involuntary bankruptcy petition against someone who owes you money. In considering involuntary bankruptcy filing as an option, you should consult with an experienced bankruptcy lawyer.

Ernest Leonard can be reached at (972) 788-1400 or email him at eleonard@fflawoffice.com



FRIEDMAN & FEIGER
ATTORNEYS AT LAW

**5301 Spring Valley Road, Suite 200
Dallas, Texas 75254**

**Phone: 972-788-1400
Fax: 972-788-2667**

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**FRIEDMAN & FEIGER EXPANDS NATIONALLY
WITH OPENING OF NEW OFFICE IN PUERTO RICO**

It is with great pride that we announce the opening of Friedman & Feiger law offices at 221 Plaza in Hato Rey, Puerto Rico.

We view Puerto Rico as an exciting business community with great potential for growth and development. We are proud to expand our law firm’s main core values of high quality legal work, exceptional dedication to our clients and extraordinary personal service to this vibrant city.

Our attorneys have the proven experience and successful track record to fill an important niche and be of service to the Puerto Rican business community. All of our clients will benefit from the synergy created by this national expansion.

Upcoming Events

Friedman & Feiger Calendar

- October 10, 2012** Dallas Hispanic Bar Association’s 7th Annual Event, “Lighting The Path To The Legal Profession,” DHBA President Carlos Morales speaking, 7:00 p.m. Belo Mansion.
- October 11, 2012** Janelle Friedman hosts Essential Energy Networking Reception for Women Business Leaders at DUO, 6:00 p.m. to 8:00 p.m. Please join us!
- October 23, 2012** Friedman & Feiger Co-Sponsors the Phyllis Lister Brown For Judge Fundraiser at The Standard Pour, 5:30 p.m. to 7:30 p.m. Please join us!
- November 13, 2012** Janelle Friedman hosts Essential Energy Networking Reception for Women Business Leaders, featuring Mary Kay Marketing Director Sheryl Adkins-Green “Daring To Dream: Life Lessons of the Mary Kay Business” at Bistro 31, Highland Park Village, 6:00 p.m. to 8:00 p.m. Please join us!
- November 15, 2012** Friedman & Feiger presents the Annual “Texas Size” Courthouse Appreciation Reception At Bob’s Steak & Chop House.
- November 30, 2012** Texas Pest Control Annual Convention in Houston, Texas featuring speeches by Robert Feiger, LeAnn Diamond and Melissa Kingston.

Contact for Info: jfriedman@fflawoffice.com

