

“DON’T WORRY, IT’S JUST BOILERPLATE” AND OTHER CONTRACT DANGERS (Part I)

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It’s very common in business. After the “essential” terms of a deal have been negotiated, the other side will make sure all of those standard “boilerplate” provisions are thrown in for good measure. It’s heard so frequently that it’s often ignored by unsuspecting parties. While it may seem harmless, it’s anything but. In short: Beware of boilerplate.

So what is “boilerplate?” It’s all-purpose, widely used, and standardized contract language. The party which provides the first draft of a contract typically inserts boilerplate favorable to itself. Widespread usage, however, doesn’t make boilerplate any more acceptable than other terms. I’ve been involved in many cases where boilerplate has created major headaches and spawned time-consuming litigation.

Why would such widely used and all-purpose language have this effect? Because it can have a dramatic impact upon your legal rights. The other side knows this, so make sure you do too. In this article, I discuss three common boilerplate provisions: (1) Choice of forum; (2) Choice of law; and (3) Notice.

“I’ll see you in court . . . in North Dakota.” A “choice of forum” provision is among the most widely used boilerplate that you’ll see in just about every agreement, especially if the parties are located in different states. Usually the side which provides the first draft will ensure that its home forum is chosen. There are many variations, but a typical clause reads something like this:

“Both parties hereby irrevocably agree to the jurisdiction and forum of the Commonwealth of Massachusetts, Suffolk County with respect to any cause-of-action, lawsuit, claim, or dispute initiated or arising hereunder.”

So why is this important? If a dispute arises and the other side is located across the country, you would have to file a lawsuit (or arbitrate) there regardless of any inconvenience or expense to you. That’s the point. Hiring a lawyer in your own state is expensive enough, but hiring one elsewhere is even more so—and very inconvenient. The other side knows that few people will ever do it. You almost always want to have the ability to sue someone on your “home turf.”

One of my clients had a dispute with a company in Florida. The company was clearly wrong and owed \$12,000. My client, however, entered into a contract whereby Florida was chosen as the forum state. So even though he had a strong case, he decided not to pursue his claim in Florida due to the expense and inconvenience. My client considered the loss to be the “cost of doing business.” So this boilerplate provision cost him \$12,000. It was an expensive lesson.

A Wolf in Sheep’s Clothing. Closely related to the forum issue is which state’s law applies if there’s a dispute. Most times this will be the law of the forum state, but not always. “Choice of law” provisions typically read as follows:

“This Agreement shall be governed by, construed, and interpreted in accordance with the laws of the Commonwealth of Massachusetts, excluding its rules governing conflicts-of-law.”

These provisions can present all types of hidden problems. If a company in Boston enters into a contract with one in California, and the parties agree that California law applies, then the Boston company will likely be bound by California law—even if suit can be brought in Boston. This may not sound like a big deal, but it can become one. Different states have much different laws on some issues.

For example, while Massachusetts (like many states) enforces non-competition provisions, California doesn’t. So if you entered into a contract expecting that you’d be able to keep the other party’s employees

from competing against you, you may be in for a surprise. If California law applies, a court in Massachusetts may refuse to enforce this provision, which can dramatically affect whether you would have even entered into the contract in the first place.

Another example: In the technology field, there's a law called the Uniform Computer Information Transactions Act ("UCITA"). UCITA was proposed in many states but was rejected in most as being too anti-consumer. Virginia and Maryland, however, passed it. So whenever I see a provision which applies Maryland or Virginia law and the transaction involves "computer information" (which is very broad), a red flag goes up. I typically need to renegotiate this clause or include other language to negate UCITA's impact.

If your state's law is favorable to you, choose it if possible. But you won't be able to "shop around" and use any state's law that you want. A court will only apply the chosen law as long as there's a reasonable relationship to the transaction. Of course without this provision, it's up to a judge to determine which law applies. Neither party may like this uncertainty. It may therefore be better to agree on a specific state's law, provided that it's beneficial to you. Or at the very least, not detrimental to you.

Notify Thyself. "Notice" provisions provide the manner and method of informing a party when certain things happen. For example, if a party fails to perform, or something goes wrong, or money is owed, the contract then provides how the other side will be notified. This provision generally reads as follows:

"Any notice required or permitted to be given under this Agreement shall be in writing and hand-delivered, or if sent by certified mail, to the last known office or principal place of business of either party."

After notice is given, the clock typically starts ticking. Towards what? Any number of things. Usually the party giving notice has certain rights after the time period expires. If the other party fails to respond, these rights can then be exercised. Some of the more common ones include terminating the contract, pursuing litigation, adding interest, or extinguishing certain rights of the other party. The options are endless, however. Don't underestimate the importance of notice.

I represented a developer who was very close to completing a large software project. A few days before it was due, the company pulled the plug. My client was understandably frustrated. The company, however, failed to give him the proper notice under the contract. We made them go back and give it properly, which in turn gave my client 10 more days to finish the software and make delivery. And he did. The company then had to pay him. Once again, a boilerplate provision can have a profound impact.

When you need to know, you need to know. Make sure that this provision is tailored to actually notify you. For example, more and more companies want to provide notice via e-mail. I tend to resist this unless my client really wants it. Given the daily deluge of e-mail, the ease at which it can be deleted or overlooked, and unpredictable spam filters, I opt for traditional methods of notice and prefer having a piece of paper delivered. It's harder to ignore. Again though, it depends upon what my client is comfortable with.

Getting to Yes. So is boilerplate negotiable? It depends. In consumer transactions it's usually not, but in business transactions most terms are open to discussion. While "deal killers" are often assumed to be disagreement over "essential" contract terms, I've had many negotiations where boilerplate has been the main obstacle to closing the deal. With a little creativity and persistence, however, this can usually be overcome. But awareness is always the first step. So be aware. And then beware!



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