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"All the Small Things" That Make or Break a Contract or Settlement

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"All The Small Things" That Make or Break a Contract or Settlement

When drafting and negotiating contracts, most of the focus is usually placed on the financial terms. But if you blink and overlook other important provisions from indemnity and insurance requirements, to limitation of damages and venue provisions, as well as assignment, merger, and severability clauses, those "small things" could "turn the lights off" on your company. The same goes for negotiating settlement contract terms at the end of a case. Overlooking critical non-financial settlement terms may tank your settlement and lead to even more litigation down the line. This panel will help you avoid "watching, waiting, commiserating" about the effectiveness of your contracts and settlement agreements.

Overview

Contracts

The beginning of a relationship, business, or otherwise, is exciting. The parties are looking forward to the future and focusing on all the possibilities and potential that exists. Everyone is on the same page and eager to work together to achieve a common goal. As a result, sometimes key terms are left out or the parties fail to consider important issues, such as how to solve a future dispute.

Settlement Agreements

Whether you were faced with a dispute for a few weeks or years, reaching the point of negotiating and drafting a settlement agreement is a true accomplishment. After some back and forth, the parties have agreed on certain financial terms – and likely even a few non-financial terms such as confidentiality. Now someone is putting pen to paper, drafting the entire agreement to send to the other side for review and comment.

Terms to Consider

If at all possible, you should offer to draft the contract or settlement agreement. It is inevitable that in drafting, additional terms and issues will arise – if you are drafting you get to provide the right conditions for what terms should be considered and what exactly those terms should be.

Amendment

Generally speaking, no amendment of a contract terms should be permitted without the written approval of the parties. When a contract explicitly states that any modification must be in writing, this requirement is generally enforceable, and claims based on alleged oral modifications are typically disposed of as a matter of law. If the written contract expressly requires that any modification be in writing, the party seeking to enforce an oral modification must plead and prove: (1) mutual assent to the oral modification; (2) performance consistent with the terms of the alleged oral modification; and (3) that the defendant received and accepted a benefit not entitled under the original contract, i.e., independent consideration.[1]

Assignment

Contracts, other than those for personal services, are typically assignable by a party absent an explicit prohibition against assignment.[2] Thus, if the contract explicitly prohibits assignment, it cannot be assigned without the consent of the other party. [3] However, it is insufficient to simply prohibit the assignment of a party's "rights" under a contract. Doing so does not preclude assignment of a party's chose in action for damages caused by the other party's breach of contract. [4] This is because the law draws a distinction between assignment of performance due under a contract and assignment of the right to receive contractual payments. [5] Therefore, it is advisable to draft the anti-assignment provision to preclude any assignment of whatever nature, including both actions for performance under the contract and actions for damages arising from any breach of the contract.

Attorneys' Fees and Costs

Typically, a settlement will include any claims for attorneys' fees and costs and all claims will be released. But if there is reason to except fees and costs, be sure to include that exception from the initial settlement discussion. In some cases, such as those where multiple law firms or attorneys are on the receiving end of the settlement or there is a lien of record by a prior counsel, it may be wise to include a provision that the party receiving the settlement amount is solely responsible for the payment of their fees and costs and the payor shall not be liable for any failure to make payment to the payee's attorneys.

Choice of Law, Venue, and Jurisdiction

Often the choice of law, venue, and jurisdiction will be glossed over as simply "boilerplate." However, the choice of law, venue, and jurisdiction can have a significant impact on contract interpretation or the outcome of a dispute and offer a substantial benefit to one party over the other. In addition, small errors in these clauses can cause significant confusion – for example, the United States has over 50 cities or towns named "Springfield."

The purpose of a choice of law clause in a contract is to clearly state for all parties what jurisdiction's laws will apply and where any disputes will be heard. When choosing the substantive laws that will govern the contract and the parties' relationship, parties often choose a state or country where at least one party has a significant connection – perhaps where headquarters are located, the main manufacturing facility, or where the contract is to be performed. Before agreeing to a specific jurisdiction, parties should determine how that jurisdiction interprets important provisions in the agreement or whether it has any significant differences from other jurisdictions and whether choice of law provisions are enforceable.

The venue or jurisdiction where disputes will be heard can be different from the jurisdiction whose laws will be applied. The jurisdiction chosen governs which state's or country's courts can hear the dispute while the venue designates a specific location where disputes must be resolved. In selecting the jurisdiction the parties should careful consider the operation of the courts in the jurisdiction. If the jurisdiction has both state and federal courts, the provisions should specify which courts have jurisdiction over the dispute. When the parties are separated geographically, the venue can confer a benefit upon the party that is able to adjudicate a dispute on their "home turf."

Confidentiality and Non-Disparagement

Of all non-material terms, the one with perhaps the most financial value that can be overlooked is the obligation to hold the settlement confidential and any non-disparagement terms sought by a party. Confidentiality, even if not overlooked, should be carefully addressed so that both parties are negotiating with a meeting of the minds of just how confidential the agreement will be. Is just the financial result confidential? Or is there a complete bar to any reference, implication, or indication of a suit. Notably, one of the moderators on this panel once negotiated a settlement for a large industrial manufacturer in a small town in Florida. Simply including a prohibition in the settlement barring the opponent from publishing the name of the manufacturer would have been woefully insufficient if the opposition (or, more in particular, the law firm) could advertise they won a significant settlement again a generically referred to "large XXX manufacturer in the town of XXX, Florida." Knowing this, we required at the outset of negotiation not only confidentiality, but the specific prohibition of certain words or phrases that, if used, would allow for the general public to readily identify the released party. Point being, sometimes attorneys must be creative when drafting confidentiality agreements for their clients that ensure confidentiality – specifically or generally – is maintained.

Other than the scope of the confidentiality agreement, consideration must be given on whether there are any exceptions to the provision. Large corporations often are required to disclose settlement amounts to their accountants. Of, perhaps, a company involved in the litigation has an obligation to make the settlement known to a parent company, which should be excepted from any confidentiality obligation. Or, if a party is a political body of some kind, or a homeowner's association, condominium association, or some other organization subject to broad "sunshine laws" or public records requests, due care must be made to determine how the confidentiality provision can harmonize with those applicable laws. Finally, consideration should be given whether the law firm(s) should be subject to the confidentiality provision. Oftentimes it is not the party seeking to publish the result, but the law firm(s). Due care should be made to ensure law firms – particularly voracious personal injury firms – are precluded from advertising your settlement.

As for non-disparagement, this provision, much like confidentiality, should be carefully negotiated and crafted to include what constitutes "non-disparagement," or whether there are any exceptions.

Damages/Liquidated Damages

A liquidated damages provision sets forth a predetermined amount of money one party must pay to the other if the terms of the contract are breached. Liquidated damages are often proposed when it is particularly difficult to calculate the exact amount of damages upfront. While there may be nuances in different jurisdictions, generally, liquidated damages clauses must contain three (3) essential elements to be valid and enforceable: (1) the clause must provide in clear and unambiguous terms for a certain sum; (2) the amount of liquidated damages must be reasonable compensation for the damages anticipated by the breach; and (3) the clause may not be altered to correspond to actual damages determined after the fact.[6] While liquidated damages clauses are often enforceable, contractual provisions providing for a penalty are not – "the distinction between a penalty provision and one for liquidated damages is that a penalty is imposed to secure performance of the contract and liquidated damages are to be paid in lieu of performance."[7]

If a contract does not include a liquidated damages provision, it should still address damages available in the event of a breach. In particular, the document should address the types of damages available, any limitation on damages, and in some circumstances, a method for calculating damages.

Dismissal of a Case

It is perhaps axiomatic that a standard term in a settlement agreement arising from litigation would end with a dismissal of the case. Beyond the obvious, however, negotiations of the settlement should contemplate whether the dismissal will be in the form of a unilateral notice to the Court, or by stipulation of the parties to be accompanied by an Order granting the dismissal. Also, the parties should confer and reach an agreement on whether the Court will retain any jurisdiction post-dismissal, such as to enforce the settlement, or adjudicate any unresolved fee claims.

In addition to the dismissal, the negotiation and agreement should also include, where applicable, terms and conditions for the dismissal or discharge of any liens or encumbrances on property, any lis pendens or other clouds on the title, or the terms for surrendering any property or chattel subject to the agreement.

Dispute Resolution

While it can be a difficult conversation, it is better to address what to do if something goes sideways in the beginning of the parties' relationship than after things are already off the rails. Every contract should include a dispute resolution provision. Do the parties want to resolve disputes in arbitration or court? Are the parties required to mediate the dispute before proceeding to litigation? Is there an initial period in which the parties must attempt to negotiate a resolution in good faith? All of these questions should be answered as part of contract negotiations – and the answers should be included in the contract. The dispute resolution process should clearly state the steps involved, the timeline, and the forum for dispute resolution.

In addition, the dispute resolution process should consider cultural differences that may exist between the parties.

Execution

With the advent of electronic signature, care should be given to what action constitutes execution and who has the authority to execute. In general, good practice in any settlement agreement is to include a clause stating that the signors have the authority to enter into and execute the agreement, and if they are doing so not on their behalf, but on the behalf of a company, trust, or other entity. Beyond authority, however, the agreement should consider whether electronic signatures are sufficient and, if so, whether the electronic signature must be verified, akin to a notary of a handwritten signature.

In addition to the manner in which the agreement should be signed, be sure to address at the outset of any negotiation what signatories are required. If personal guarantees are contemplated, then those signatures must be included. If a spouse, guardian, trustee, insurance carrier, or some other legal or corporate entity has some obligation under the agreement, they should be included among the signatories as well.

Force Majeure

Generally speaking, force majeure provisions are intended to relieve a party from its contractual obligations when sources beyond a party's control prevent performance or the purpose of the contract has been frustrated. Force majeure provisions can excuse performance, postpone performance, or limit damages from nonperformance. In the past, force majeure provisions were generally considered "boilerplate" and subject to little, if any, edits during negotiation. However, in recent years these clauses have become the focus of many articles, presentations, and of course, lawsuits.

When drafting a force majeure clause, parties should consider what triggering events to include – natural disasters, war, terrorist attacks, unexpected government regulations, pandemics, labor disruptions. The clause also should consider the impact of the event – did it cause delay, prevent performance, or have some other impact? Force majeure clauses further should address whether any mitigation is required – such as finding an alternative supply source for a product component. To be applicable, the force majeure event has to *cause* the impact – as opposed to another cause.[8]

Force majeure clauses are narrowly construed.[9]

Indemnity

Indemnity provisions are crucial because they allocate risk between parties, ensuring that one party compensates the other for any losses or damages that may arise from specific events or actions. These provisions are essential for protecting businesses from unforeseen liability, such as legal fees, financial damages, or third-party claims, that could result from the actions or negligence of another party.

Generic or form indemnity provisions often are inadvisable because many states have anti-indemnity statutes that can void indemnity provisions that fail to comply.[10] Rather, indemnity provisions should be specifically – but broadly – drafted to clearly outline the scope and limits of indemnification. The provision should be sufficiently broad to include protection for the indemnitee against all claims and losses that may arise from the contract, but narrow enough that the indemnitor does not become an insurer against all losses or claims.

When drafting, practitioners should take care to ensure that any amended term to the contract that may impact other terms is modified or otherwise addressed as well. For instance, in a construction contract, if the scope of work is modified to include an additional scope of work for an agreed upon price, the parties should consider whether an extension of time on the completion date is appropriate as well. Otherwise, one party may have bargained to perform additional work, but no additional time.

Notice

Contract documents should address under what circumstances a party needs to be provided notice of an event, the form of notice, and to whom notice should be given. Providing for notice prevents the element of "surprise" when a lawsuit is filed – particularly if the agreement contained a dispute resolution provision requiring notice of a dispute and attempts to resolve the dispute before resorting to litigation.

In addition, notice provisions can serve to provide parties updates with respect to important contract developments and keep the parties aware of the timeline for performance of each element of a contract as often one element builds off another.

Mutuality of Drafting

Many jurisdictions will construe any ambiguities in a contract against the drafter, this has been called the canon of *contra proferentem*.[11] However, this default rule of construction can be changed by including a clause explicitly stating both parties have been actively involved in the drafting process. When a contract specifically states both parties were involved in the drafting of the agreement, any ambiguity is interpreted more neutrally, as opposed to in favor of one party over the other.

Order of Precedence

Despite everyone's best efforts, contracts sometimes include contradictory or inconsistent terms. This is especially true if a contract is amended over time or contains multiple schedules or appendices. One way to solve for contradictory or inconsistent terms across multiple documents is to state explicitly that the main contract document controls and takes precedence over any attachments to the agreement. However, under no circumstances, should an order of precedence clause substitute for a thorough review of terms.

Payment Terms

Beyond the amount, a multitude of other payment-related terms should be considered. The timing of payment has been held to be a material term, if specified in the settlement agreement and not timely paid. If payment is to be made incrementally, or from different sources, those increments and payment sources should be specified in the negotiation and ultimate agreement. Likewise, if the settlement payment is contingent upon some other activity or event, those terms should be clearly, and explicitly, provided for in the agreement.

If a payment plan is contemplated, parties should consider a separate, promissory note attached to the settlement agreement providing the payment terms and, if applicable, penalties for non-payment. If the a settlement payment is due from multiple parties, the negotiation should consider whether the payments will be joint or several and, in the event of a breach of the payment obligation by one party, whether the entire settlement is breached, or only the obligations of that late payor. Finally, if another person or party – perhaps a parent company – are serving as a guarantor of the settlement payment, that guarantor should likely be a signing party to the agreement as well, leaving no doubt as to the binding nature of the guarantor's role.

Prevailing Party

In the event of a dispute, some agreements provide that the "prevailing party" is entitled to certain compensation – such as legal fees and costs related to the dispute. Prevailing party clauses typically apply only if a dispute is finally resolved through an arbitration or trial. If a prevailing party clause is included in a contract, it should define under what circumstances a party is considered the "prevailing party." For example, does the party need to prevail on *all* of its claims or can the claims be split such that one party is the "prevailing party" on "Claim A" and the other party is the "prevailing party" on

"Claim B?"

In theory, prevailing party clauses can reduce the number of frivolous claims filed because a party will need to consider that it may have to pay the opposing party's attorneys fees if, and when, it loses on its frivolous claim.

Rehire/References (employment)

A separation or settlement agreement following an employment dispute should address whether the now former employee is eligible for rehire and what, if any, information will be provided if a potential employer calls for a reference.

If a separation agreement is being drafted, it is often because something went wrong and the parties had a significant disagreement. In those circumstances, it is likely in the employer's best interest to attempt to negotiate for a "no-rehire" clause. In situations where an employer is undergoing a reduction in force, a no-rehire provision will not serve the same purpose.

With respect to what references will be provided, it is advisable, for the sake of clarity, to indicate what information will be provided to potential employers of the former employee. Generally speaking, the best practice is to simply confirm dates of employment and title. However, if those parameters are not set forth in the agreement, a former employee may have an unrealistic expectation of a positive reference or fear a negative one.

Release

In a settlement agreement, the release is the section where one or both parties give up their right to pursue further legal action against each other, often in exchange for certain payments or other considerations. While releases are often long and boring, special attention should be paid to who is releasing what. Generally, releases are ineffective against claims that arise after the date the release is given, which is often the effective date of the agreement. Releases can be broad, releasing "any and all claims whether known or unknown," or specific, releasing only a certain claim or claims the parties specifically agreed to resolve.

Tax Implications

The settlement of a dispute usually involves a payment by one party to the other. Those payments may have tax implications. To prevent any confusion, a contract should detail whether each party is responsible for its own taxes associated with the performance of the contract or the specifics of how any tax implications are to be handled. The contract should also indicate what, if any, tax documents must be provided by one party to the other with respect to any payments.

Timing

Some contracts are performed over a period of months or years and include several steps before the contract is complete; others require a single performance on a specific date. In both circumstances, the parties should consider whether time is of the essence and the implications if the time for compliance is not met.

The phrase "time is of the essence" is understood commonly to mean that failure to comply with the time requirement is a material breach of the agreement.[12]

For contracts that are to be performed in steps over time, the best practice is to detail the deadline for essential responsibilities or tasks to be completed. This approach will minimize potential delays and disputes and allow any potential issues to be resolved as expeditiously and effectively as possible.

Warranties

If appropriate for the subject matter, a contract should address whether any warranties are provided and how a warranty claim should be handled. With respect to warranties, a contract must state clearly which products or services, or components or functions of a product or service are covered and for how long. A well-written warranty clause will address how claims are handled, including without limitation what steps are to be taken, the required documentation, and the appropriate contact for a warranty claim. Warranty clauses also should address the remedy – whether it is repair, replacement, refund, or a combination of one or more remedies.

When drafting warranty clauses, consider whether you prefer the end user of the product or service to submit a warranty claim or the party with whom you have a business relationship. There is not a "right" way to handle warranty claims – rather a party must consider its existing business relationships and the best way to maintain those relationships. What is important is to at least consider what information should be included in an agreement.

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[1] *Okeechobee Resorts, L.L.C. v. E Z Cash Pawn, Inc.*, 145 So.3d 989 (2014).
[2] *Troup v. Meyer*, 116 So. 2d 467 (Fla. 3d DCA 1959).
[3] *Classic Concepts, Inc. v. Poland*, 570 So.2d 311 (Fla. 4th DCA 1990).
[4] *Cordis Corp. v. Sonics Intl, Inc.*, 427 So. 2d 782 (Fla. 3d DCA 1983).
[5] *Charles L. Bowman & Co. v. Erwin*, 468 F.2d 1293, 1297 (5th Cir. 1972).
[6] *See, Bd. Of Educ. of Talbot Cnty, v. Heister*, 392 Md. 140, 156 (2006).
[7] *Dean V. Kruse Found, Inc. v. Gates*, 973 N.E.2d 583, 591 (Ind. Ct. App. 2012).
[8] *See, VEREIT Real Est., LP v. Fitness Int'l, LLC*, 255 Ariz. 147, 152 (Ct. App. 2023), *review denied* (Aug. 25, 2023).
[9] *See, Kyocera Corp. v. Hemlock Semiconductor, LLC*, 313 Mich. App. 437, 447 (2015).
[10] See, e.g. *Fla. Stat.* §725.06 (2024); *CB Conts., LLC v. Allens Steel Prod., Inc.,* 261 So.3d 711 (Fla. 5th DCA 218).
[11] *See, Staffing Specifix, Inc. v. TempWorks Mgmt. Servs., Inc.*, 913 N.W.2d 687, 693 (Minn. 2018).
[12] *See, Banks Bldg. Co., LLC v. Malanga Fam. Real Estate Holding, LLC*, 102 Conn. App. 231, 238 (2007).