

## Defending Boilerplate in Contracts

**BOILERPLATE CONTRACTUAL LANGUAGE** gets a bad rap. For the lay person, “boilerplate” brings to mind abstruse legalese that seemingly has no purpose. For courts and lawyers, boilerplate often suggests contractual provisions that parties with superior bargaining power impose. Neither of these understandings is correct. According to *Black’s Law Dictionary*, boilerplate is “[l]anguage which is used commonly in documents having a definite meaning in the same context without variation.” Boilerplate language dramatically reduces transaction costs by allowing parties to rely upon standard contractual language that they know will be interpreted uniformly regardless of the jurisdiction.

Litigators are often surprised by how many contracts lack critical boilerplate provisions. The failure to include these provisions can often mean the difference between winning and losing a contractual dispute. Three provisions serve as examples.

One of the most important boilerplate provisions is a time-is-of-the-essence clause. As Witkin explains: “Delay in performance is a material failure of consideration only if time is of the essence, i.e., if prompt performance is, by the express language of the contract or by its very nature, a vital matter.”<sup>1</sup> In other words, if one party to a contract delays its performance, the other party may discharge its obligations because of the delay only if the contract expressly states that time is of the essence or if the court determines that the nature of the contract requires that time is of the essence.

A party that fails to include an express time-is-of-the-essence clause does so at its own risk. This was learned the hard way by the town of Corte Madera in *City of Larkspur v. Marin Flood Control and Water Conservation District*. In that case, the town sought to escape its agreement to contribute toward the cost of a flood control project. The construction had been delayed for six years, and the town argued that the delay constituted a failure of consideration. The court of appeal rejected this argument, holding: “[T]here is nothing in the agreement to suggest that if the ‘current scheduled construction’ is not completed in keeping with the contemplated schedule...then the agreement will terminate.” The court specifically noted the lack of a provision stating that time was of the essence.<sup>2</sup> A time-is-of-the-essence clause is easy to draft. It can be as simple as “time is of the essence of every term of this agreement.”

Another provision that often proves significant in contractual disputes is an integration (or merger) clause, which provides that the written agreement contains all the agreements between the parties. The function of such a clause is to preclude the introduction of parol evidence that varies from or contradicts the terms of the written agreement. Recently, in *Everett v. State Farm General Insurance Company*, State Farm successfully relied upon an integration clause to prevent the plaintiff from contradicting the written terms of her policy by arguing that her insurance agent had orally promised her that State Farm would replace her home in the event of a total loss.<sup>3</sup>

An integration clause should make clear that the written agreement not only contains all the agreements between the parties but also supersedes all prior written and oral agreements. Further, any agreement that justifies the inclusion of an integration clause should contain a provision stating that any attempt to modify the written contract must be done in writing to be effective.

Third, perhaps no other boilerplate provision is more important than one requiring the losing party to reimburse the prevailing party’s litigation costs in the event of dispute. Under the American rule, attorney’s fees are not recoverable as costs unless expressly authorized

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by statute or contract. When the stakes are relatively small and the contract fails to include a provision authorizing fees, a party may feel there is little to no risk in breaching the contract. Attorney’s fee provisions are therefore essential when contracts involve low dollar values or when the client is particularly counting on the full and faithful performance of every provision.

### Other Provisions

Important boilerplate provisions go beyond these three examples, however. A lawyer drafting a contract should always consider whether to include clauses regarding 1) arbitration or dispute resolution, 2) assignment—whether there are limitations on a party’s ability to assign the contract, 3) choice of law, 4) execution of agreement in counterparts, 5) force majeure, 6) further assurances—obligating the parties to perform any future actions required to effectuate the contract, 7) antiwaiver—stating that a party’s unintended conduct cannot waive or modify the agreement, 8) indemnity, 9) jurisdiction, 10) no oral representations, 11) severability—if any provision is unenforceable, all others remain effective, and 12) successors and assigns—the agreement shall bind or inure to successors and assigns.

Although boilerplate may seem unnecessary or useless, it is neither. When an agreement becomes the subject of a dispute, boilerplate may prevent litigation and allow clients to obtain a desired result. ■

<sup>1</sup> Witkin, *SUMMARY OF CALIFORNIA LAW* (10TH), *Contracts* §815, at 907 (2005).

<sup>2</sup> *City of Larkspur v. Marin Flood Control & Water Conservation Dist.*, 168 Cal. App. 3d 947, 954 (1985).

<sup>3</sup> *Everett v. State Farm Gen. Ins. Co.*, 162 Cal. App. 4th 649, 662 (2008).

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