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How Contract Boilerplate Can Bite

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1. INTRODUCTION

In the modern economy of instantaneous information and communication, transactional lawyers and contract personnel face shorter and shorter deadlines to draft, review, negotiate, and prepare contracts for execution. On a daily or weekly basis the business expects the drafter to produce a first draft of the needed agreement on the same or immediately following day. Whether because of time pressures, habit, or carelessness, review and drafting of contract boilerplate often is relegated to untrained lawyers or contract personnel, performed at the wee hours of the night, or simply skipped altogether.

The term boilerplate has its origins around 1882 when the American Press Association was founded in the same building as a sheet-iron factory, referring to their noisy offices as a boilerplate factory. Later the term was used to describe the metal plates provided by syndicates to the newspapers that used identical articles to save time and money.1 Today lawyers often use the term to refer to standardized non-negotiable contracts that prey upon consumers. For more sophisticated contracts drafted and negotiated

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by transactional lawyers, however, the term refers to those common, usually short, and seemingly innocuous provisions at the end of the contract, often under a heading entitled “general” or “miscellaneous.” These neglected provisions are the subject of this paper.

While these provisions seem harmless enough, for those transactional lawyers unfortunate enough to see 50- or 100-page contracts the subject of litigation, experience shows that crafty litigators with ample time and will to research and argue the meaning of each word in the contract will claim that notices are defective, implied waivers have been granted, and anti-assignment clauses are invalid. Worse yet they may materialize a previously unknown claimant that sues on a theory of third party beneficiary rights.

This paper examines the legal ramifications of these beastly boilerplate provisions, how they might inflict a stinging and painful bite, and the means to tame the monsters. A number of sample form provisions are included, and a table of these provisions appears at the end of the paper.

2. ASSIGNMENT

2.1 Successors, Assigns, Heirs, Etc.

We begin with assignment. B Corp., which entered into a contract with A Corp., has assigned the contract to C Corp. Assume at this point that the contract is silent on assignment so we must sort out liability for performance under legal default rules. First, A Corp., which had nothing to do with the assignment and simply wanted to work with B Corp., remains bound to perform its obligations to an assignee such as C Corp., whether or not B Corp. actually agreed to the assignment. 2

Second, based on the inclination of courts to freely allow alienation and thus maximize the continuous movement of commerce, it can generally be said that rights are freely assignable and performance obligations are delegable, but that an assignor such as B Corp. remains liable to A Corp., the non-assigning party, much like a surety for C Corp. 3 Recognized exceptions to the right to freely delegate duties include delegations that are contrary to public policy or where the personal services of the assignor are required for satisfactory performance. 4

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2 RESTATEMENT (SECOND) OF CONTRACTS §§ 280 cmt. e, 323 cmt. a (1981)[hereinafter RESTATEMENT].

3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 49.1 (2012) [hereinafter CORBIN]. Contrast this with the early common law rule that an attempted assignment was ineffective. See Stanley J. Bailey, Assignments of Debts in England from the Twelfth to the Twentieth Century, 48 L.Q. REV. 248, 547 (1932).

4 CORBIN, supra note 3 (citing RESTATEMENT § 318, cmt. c).
This leads us to the most basic and yet most underappreciated aspect of assignment – the common law rule that an assignment transfers only the benefits of a contract, not the obligations of performance. The transfer of obligations technically is referred to as a delegation. That said, the common law is eroding in many ways. The Uniform Commercial Code (UCC) and the Restatement (Second) of Contracts (the Restatement) both take the more modern approach that an assignment in general terms can operate as both an assignment of rights and a delegation of duties, unless the language or the circumstances indicate the contrary.

Now although the assignor B Corp. remains liable after a delegation, absent an express assumption the same may not be true of the assignee C Corp. While the UCC and the Restatement take the approach that an assignment constitutes a promise to perform the assignor’s obligations absent an agreement to the contrary, the assumption of duties by the assignee may become a question of interpretation or intent in cases not involving the UCC or in jurisdictions that have not adopted the Restatement. Maybe A Corp. should demand a copy of an express assumption agreement.

With that background, we turn to the successors and assigns provision, a common and simple provision that may reduce at least some of the uncertainties for A Corp. The successors and assigns provision serves the purpose of restating the common law rule that an assignee is entitled to exercise the rights of its assignor under the contract. But it also may negate the common law requirement of an express assumption by an assignee in jurisdictions that may still require such an assumption.

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5 See Alan E. Farnsworth, Farnsworth on Contracts § 11.10 (3d ed. 2004) [hereinafter Farnsworth].
6 U.C.C. § 2-210(4); Restatement, supra note 2, § 328(1). Specifically the UCC provides that
   an assignment of ‘the contract’ or of ‘all my rights under the contract’ or an assignment in similar general terms is an assignment of rights and unless the language or the circumstances (as in an assignment for security) indicate the contrary, it is a delegation of performance of the duties of the assignor and its acceptance by the assignee constitutes a promise by him to perform those duties. U.C.C. § 2-210(4). Note the Restatement states that the promise runs to the assignor, not the non-assigning party, and the non-assigning party is an intended beneficiary of the promise. Restatement, supra note 2, § 328(2).
8 While some courts have held that a successors and assigns provision eliminates the need for an express assumption, others have held it evidences the intent of the parties that an assumption occur, and still others have held that it does not bind the assignee simply because the provision says that it does. See Tina L. Stark, Negotiating and Drafting Contract Boilerplate § 4.03[1] (Tina L. Stark ed. 2003) [hereinafter Stark].
Consider the following sample provision:

<table>
<thead>
<tr>
<th>Sample 2.1: Successors and Assigns Provision</th>
</tr>
</thead>
<tbody>
<tr>
<td>S2.1 Successors and Assigns. This Agreement binds and inures to the benefit of each Party and its [heirs, executors, administrators, legal representatives, and] [permitted] successors and [permitted] assigns.</td>
</tr>
</tbody>
</table>

**Drafting Considerations:**

- **If possible in boilerplate, use the present tense assuming the contract will be read at a future date when a problem arises.** At the time of drafting it makes sense to say “this Agreement will bind and inure to benefit of [etc.].” But read two years from now after an assignment, the provision should clearly “bind” the parties at that time.

- **A “successor” is not a transferee, but the resulting legal entity after a merger, consolidation, bankruptcy, or other legal transformation of a non-natural person.** For this reason, successors and assigns provisions address both assigns and successors.

- **Natural persons, on the other hand, do not have “successors,” but instead have heirs, executors, administrators, and legal representatives.** Best practices therefore dictate the inclusion of the laundry list of heirs, executors, administrators, and legal representatives, at least if a natural person is a party to the contract.

- **If the contract contains restrictions on assignment, the word “permitted” should be inserted before the word “assigns” to make clear the successors and assigns provision does not allow assignments that are not otherwise permitted.** Some courts have held that the presence of a successors and assigns provision indicates the parties’ intent for the contract to be assignable. In those jurisdictions, not including the word “permitted” in the successors and assigns provision could result in an unwanted conflict with a non-assignment provision and a misfortunate ambiguity.

### 2.2 Anti-Assignment Provisions

- **Although courts generally recognize the enforceability of anti-assignment clauses, most courts will narrowly construe them,** and some courts may construe prohibitions on assignment as merely prohibitions on the delegation of duties.

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10 See *Corbin*, *supra* note 3, § 49.9; *Restatement*, *supra* note 2, § 322 cmt. a.
11 Under *Restatement*, *supra* note 2, § 322(2)(a) a contract term prohibiting assignment does not forbid assignment of a right to damages for breach or a right arising out of the assignor’s due performance of his entire obligation (e.g., assignment of a right to payment).
goods, allows assignment and delegation as its default rule, but also expressly allows the parties to agree to forbid either assignment or delegation.\textsuperscript{12}

Consider the following sample provision:

\begin{Verbatim}
Sample 2.2: Basic Anti-Assignment/Delegation Provision

S2.2 Assignment and Delegation. Neither Party may assign this Agreement or any of its rights or interests under this Agreement, or delegate any of its obligations or liabilities under this Agreement, without the prior written consent of the other Party, [which consent may not be unreasonably withheld] [which consent may be withheld in each such Party’s sole and absolute discretion][and may be conditioned on the receipt of a written assumption of such obligations from the delegate]. Any such purported assignment or delegation is void.

\end{Verbatim}

Drafting Considerations:

\begin{itemize}
    \item Do not limit the anti-assignment provision to “this Agreement,” but also prohibit assignments of “rights or interests under” the agreement and the delegation of “obligations” under the agreement. Both the Restatement and the UCC agree that unless circumstances indicate the contrary, a promise not to assign “the contract” or “this Agreement” prohibits the delegation of duties but does not prohibit the assignment of rights.\textsuperscript{13}
    \item Specifically prohibit both assignments of rights and delegations of obligations to reduce the risk of an interpretation that the anti-assignment provision applies only to duties and not to rights.
    \item Notice the sample provision states that any purported assignment or delegation will be void. Although in some jurisdictions an attempt to void an assignment or delegation may be unenforceable, the failure to include this or similar language likely means that the non-assigning party has a cause of action against the assignor for damages, but that the assignment between the assignor and the assignee remains valid.\textsuperscript{14}
\end{itemize}

\textsuperscript{12} U.C.C. § 2-210(1), (2). \textit{But see} U.C.C. § 9-408, discussed \textit{infra} at Part 2.3.2. \textit{See also} \textbf{CORBIN}, supra note 3, § 49.10.

\textsuperscript{13} \textbf{RESTATEMENT}, supra note 2, § 322(1); U.C.C. § 2-210(3).

\textsuperscript{14} \textbf{RESTATEMENT}, supra note 2, § 322(2)(b) (“[a] contract term prohibiting assignment . . . gives the obligor a right to damages for breach of the terms forbidding assignment but does not render the assignment ineffective”). \textit{See also} Owen v. CNA Ins./Cont’l Cas. Co., 771 A.2d 1208, 1214 (N.J. 2001) (“the non-assignment provision generally must state that non-conforming assignments (i) shall be ‘void’ or ‘invalid,’ or (ii) that the assignee shall acquire
no rights or the non-assigning party shall not recognize any such assignment. In the absence of such language, the provision limiting or prohibiting assignments will be interpreted merely as a covenant not to assign. Breach of such a covenant may render the assigning party liable in damages to the non-assigning party, but the assignment, however, remains valid and enforceable against both the assignor and the assignee.” (internal citations omitted)).

15 See STARK, supra note 8, § 3.12[4].

16 See, e.g., TEX. BUS. ORGS. § 10.008(a)(2) (“[w]hen a merger takes effect . . . (2) all rights, title, and interests to all . . . property owned by each organization . . . is allocated to and vested . . . in one or more of the surviving or new organizations as provided in the plan of merger without . . . (C) any transfer or assignment having occurred”).

the drafter might desire to prohibit assignments to an estate in connection with bankruptcy, such prohibitions usually are ineffective under federal bankruptcy law. Thus, no restrictions on bankruptcy are included in the sample language.

2.3.2 Assignments as Security Interests

Suppose instead that B Corp. is building a large gathering system for A Corp. The contract between A Corp. and B Corp. contains an anti-assignment provision. While payments are due under the contract based on milestones, B Corp. does not have the capital to finance the first phase of its work. So B Corp. goes to X Bank for financing, and X Bank demands a security interest in B Corp.’s contract with A Corp. A Corp., however, does not want its contract pledged to X Bank without its consent.

In contrast to the general rule that anti-assignment restrictions are valid, to enable debtors to obtain credit, Section 9-408(a) of the UCC makes contractual restrictions on the assignment of general intangibles (including contract rights) completely ineffective to the extent such restrictions prohibit, restrict, or require consent for the creation, attachment, or perfection of a security interest. For this reason, A Corp. would be unable to prevent B Corp. from granting a security interest in the contract to X Bank. That said, if a restriction on assignment in the contract between A Corp. and B Corp. would be enforceable absent Section 9-408(a), then 9-408(d) provides that the security interest does not impose an obligation on A Corp. (the non-assigning party), is not enforceable against A Corp., and does not entitle X Bank to enforce the security interest against A Corp. The benefit then gained by X Bank is priority in bankruptcy, but not the ability to foreclose on the contract or enforce the contract against A Corp. in contravention of the anti-assignment provision.

2.3.3 Indirect Transfers – Changes of Control

This time suppose B Corp. determines to consummate its transaction with C Corp. by selling all of its stock to C Corp. rather than selling its assets to C Corp. or merging with C Corp. After the transaction with B Corp., C Corp. (again an unwanted counterparty of A Corp.) becomes the parent company of B Corp. and takes over control of the contract. An anti-assignment provision that prohibits the assignment of the contract or contract rights does not prohibit indirect transfers of the stock of the counterparty.

19 U.C.C. § 9-408(a), cmt. 2.
20 See U.C.C. § 9-408(d).
Consider the following sample provision with language that addresses mergers, distributions, other involuntary transfers, and changes in control:

Sample 2.3: Expanded Anti-Ass ignment/Delegation Provision

S2.3 Assignment and Delegation. Neither Party may assign this Agreement or any of its rights or interests under this Agreement, or delegate any of its obligations or liabilities under this Agreement, without the prior written consent of the other Party [which consent may not be unreasonably withheld] [which consent may be withheld in each such Party’s sole and absolute discretion] [and may be conditioned on the receipt of a written assumption of such duties from the delegate]. Any such purported assignment or delegation is void. For purposes of this Section [__], an “assignment” shall include: (a) a sale, assignment, transfer, conveyance, gift, exchange, distribution, contribution, or other disposition, whether voluntary or involuntary or by merger, exchange, consolidation, bankruptcy, or operation of Law, including a distribution in connection with dissolution, liquidation, winding up, or termination (other than a liquidation under a deemed termination solely for tax purposes); and (b) a sale, assignment, transfer, conveyance, gift, exchange or other disposition, whether voluntary or involuntary or by merger, exchange, consolidation or other operation of Law of any of the equity securities in a Party that results in a Change of Control of such Party (in one or a series of related transactions).

Drafting Considerations:

• To prohibit transfers of a contract by merger, share exchange, operation of law, etc., draft the anti-assignment provision with specificity to avoid ambiguity. Remember that prohibitions of assignments in connection with bankruptcy are generally prohibited by federal bankruptcy law.

• To avoid indirect transfers, specifically prohibit stock sales and similar transactions that result in a change of control. Define “Change of Control” in the definition section of the contract taking into account whether the counterparty is a private or public company.22

contains no language that prohibits, directly or by implication, a stock acquisition or change of ownership of any contracting party. Had the parties so intended, they could have included language having that effect”).

22 Definitions of “change of control” are beyond the scope of this paper. Sample definitions are contained in the Alternate Provisions of Form 5 LLC pending publication by the Rocky Mountain Mineral Law Foundation. A securities lawyer should be consulted to assist in defining “change of control” in the context of public companies as their securities are constantly bought and sold.
2.4 Liability of Assignors After Assignments – Unintended Novation

Assume again that our contract counterparty B Corp. intends to assign its contract with A Corp. to C Corp. B Corp. sends A Corp. a letter, indicating that it has assigned the contract to C Corp. and that it will no longer be liable or responsible to B Corp. under the contract. A Corp. does nothing and begins to accept performance from C Corp., when a problem occurs. A Corp. then turns to B Corp. to correct the problem.

Unfortunately, if an assignor makes it clear that it intends to be free from liability and the non-assigning party accepts performance from the assignee, then the stated intention of the assignor of no further liability may be deemed an offer of novation, and the acceptance of performance by the non-assigning party from the assignee may be deemed an acceptance of that offer resulting in a novation. 23 A novation in effect is an assignment coupled with a release from the non-assigning party that relieves the assignor from liability. 24

Consider the following sample provision:

| Sample 2.4: Anti-Assignment/Delegation Provision with Continued Liability |
| S2.4 Assignment and Delegation |
| (a) Except as provided in Section S2.4(b), neither Party may assign this Agreement or any of its rights or interests under this Agreement, or delegate any of its obligations or liabilities under this Agreement, without the prior written consent of the other Party [which consent may not be unreasonably withheld] [which consent may be withheld in each such Party’s sole and absolute discretion][and may be conditioned on the receipt of a written assumption of such duties from the delegate]. Any such purported assignment or delegation is void. |
| (b) Notwithstanding Section S2.4(a), either Party may, without the consent of the other Party, assign or delegate [all or any portion][all (but not less than all)] of this Agreement or its rights, interests, obligations, and liabilities under this Agreement, to one or more Affiliates of such Party; provided, that the assigning or delegating Party shall remain liable and responsible for all of its obligations and liabilities under this Agreement incurred or arising before, on, and after any such assignment or delegation. |

Drafting Considerations:
• Sample S2.4 allows assignments and delegations to Affiliates. The term “Affiliate” should be defined with care in the contract.

23 See WILLISTON, supra note 7, § 74:34.
24 See id.
Although it is common to permit affiliate transfers to allow for future corporate restructurings or in the context of major acquisitions, sometimes those transactions result in the contract being held by an affiliate that is a shell devoid of assets. Sample S2.4 is intended to remove the risk of such an assignment by keeping the assignor on the hook for future liabilities.

- Notice the language “before, on, and after” in the proviso. That language makes clear that the assignor not only retains liability for obligations arising before the date of the assignment, but also remains liable for obligations arising after the date of the assignment.
- Although the provision is illustrated in the context of affiliate transactions, it may be included in connection with any permitted assignments.

2.5 Permitted Assignments; Novation

As discussed above, a novation is an assignment and delegation coupled with a release from the non-assigning party. The parties may agree in advance that the delegating party should be released from future liability after a permitted delegation as long as the delegate assumes the delegated obligations.

Consider the following sample provision that provides a laundry list of possible assignments and delegations that might be appropriate for a complex or high dollar transaction. The sample provision also includes novation language.

Sample 2.5: Permitted Assignment/Delegation Provision with Novation

S2.5 Assignment and Delegation.

(a) Except as provided in Section S2.5(b), neither Party may assign this Agreement or any of its rights or interests under this Agreement, or delegate any of its obligations or liabilities under this Agreement, without the prior written consent of the other Party [which consent may not be unreasonably withheld] [which consent may be withheld in such Party’s sole and absolute discretion] [and may be conditioned on the receipt of a written assumption of such duties from the delegate]. Any such purported assignment or delegation is void.

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25 In the context of an acquisition, the parent company buyer often executes the purchase agreement and then forms a subsidiary before closing to acquire the assets. The subsidiary then takes an assignment of the purchase agreement and closes on the transaction. One method in this circumstance to protect the non-assigning party is to have the parent guarantee the continuing obligations under the purchase agreement, usually limited to post-closing indemnification obligations. Another method is to use the proviso in Sample S2.4, which makes the parent and the subsidiary jointly and severally liable for any obligations that survive the closing of the transaction.
(b) Notwithstanding Section S2.5(a), either Party may, without the consent of the other Party, assign or delegate [all or any portion] [all (but not less than all)] of this Agreement and its rights, interests, obligations, and liabilities under this Agreement to another Person in connection with any of the following: (i) in the case of a Party who is a natural person, a transfer upon death, whether by will, intestate succession, or otherwise; (ii) in the case of a Party that is not a natural person, a distribution in connection with the dissolution, liquidation, winding up, or termination of such Person; (iii) the sale by such Party of all or substantially all of its assets to another Person; and (iv) in the case of a Party that is not a natural person, the merger or consolidation of such Party with or into another Person; provided, however, that a delegation otherwise permitted under this Section S2.5(b) shall not be permitted or effective unless and until an assumption executed by the delegate of all of the delegated obligations and liabilities of the delegating Party is delivered to the other Party; provided, further, that no such written assumption need be delivered by the survivor in a merger under clause (iv) above if all of the obligations and liabilities of the Party to the merger become the obligations and liabilities of the surviving entity in the merger by operation of Law.

(c) Upon receipt by the non-delegating Party of a written assumption (or in the case of a merger, a notice of the assumption by operation of Law) from the delegate of any obligations and liabilities of the delegating Party that are delegated as permitted under Section S2.5(b), the delegating Party shall be deemed released from such obligations and liabilities.

Drafting Considerations:

- Although Sample S2.5 specifically describes those assignments and delegations that are permitted, consider that the more words contained in a provision, the greater the extent of negotiations, thereby increasing transaction costs. A provision that allows for specific types of assignments and delegations is appropriate for higher dollar transactions or for a client with specific needs. A client may be better off with a simple non-assignment/delegation provision if the cost of obtaining a consent in the future to an assignment or delegation (taking into account the risk that the client will desire to make such an assignment or delegation) is lower than the cost to negotiate a complex non-assignment provision.

- If the intent is to expressly allow certain assignments and delegations while all others are prohibited, then the recitation of the permitted assignments and delegations should be followed by a general prohibition (with or without consent). Express permission for certain assignments and delegations does not impliedly prohibit other
assignments or delegations. Accordingly, subsection (b) of Sample S2.5 is drafted as a carve-out to subsection (a).

- The sample language allows assignments or delegations by categories of transactions. As such, an assignee or delegate of rights or obligations may further assign or delegate those rights or obligations so long as the further assignment or delegation falls into one of the permitted categories. Provide specific language if the parties intend that only one assignment or delegation should be permitted and further assignments or delegations should require consent of the other party.  

- If delegations are permitted, at least for high dollar transactions, address whether the delegating party will be released from its obligations under the contract. Sample S2.5 provides for an automatic novation and release of the delegating party if the delegate has provided an assumption to the non-delegating party. Sample S2.4 above provides the opposite, that the delegating party remains liable under the contract notwithstanding the delegation. As a third alternative, the parties might agree that the delegating party is released from obligations arising after the date of the delegation, but remains liable for obligations arising on or before the date of the delegation.  

26 Consider the following language:

“This Section S2.5(b) only allows an assignment or delegation by a Person that is a Party as of the Effective Date of this Agreement. A Person to which this Agreement or any right or obligation under this Agreement is assigned or delegated under this Section S2.5(b) has no further right to assign this Agreement or any of its rights or interests under this Agreement, or to delegate any of its obligations under this Agreement, except with the prior written consent of the other Party as provided in Section S2.5(a).”

27 Consider the following language:

“(c) Upon receipt by the non-delegating Party of a written assumption (or in the case of a merger, a notice of the assumption by operation of Law) from the delegate of any obligations and liabilities of the delegating Party that are delegated as permitted under Section S2.5(b), the delegating Party shall be deemed released from such obligations and liabilities, but only to the extent arising after the date of the assumption. The delegating Party shall remain liable and responsible for all of its obligations under this Agreement incurred or arising on or before the date of the assumption.”
2.6 Pre-Agreed Permitted Assignees

As discussed, Sample S2.5 provides for categories of transactions or events that the parties may agree constitute a permitted assignment or delegation. Often, however, an anti-assignment provision may have as a primary purpose to prohibit without consent the delegation of obligations to a party that does not have sufficient financial resources to satisfy its funding or other obligations under the contract.

Consider the following sample provision that allows an assignment or delegation only to a creditworthy entity.

Sample 2.6: Assignment and Delegation Provision with Standards for Assignees

S2.6 Assignment and Delegation

(a) Except as provided in Section S2.6(b), neither Party may assign this Agreement or any of its rights or interests under this Agreement, or delegate any of its obligations under this Agreement, without the prior written consent of the other Party [which consent may not be unreasonably withheld] [which consent may be withheld in each such Party’s sole and absolute discretion] [and may be conditioned on the receipt of a written assumption of such duties from the delegate]. Any such purported assignment or delegation is void.

(b) Notwithstanding Section S2.6(a), either Party shall have the right, without the consent of the other Party, to assign and delegate all (but not less than all) of this Agreement and its rights, interests, obligations, and liabilities under this Agreement to a Creditworthy Entity; provided, that such an assignment or delegation shall not be effective unless and until an assumption executed by the Creditworthy Entity of all of the delegated obligations and liabilities of the delegating Party is delivered to the other Party. As used in this Agreement, “Creditworthy Entity” means a Person (other than a natural person) [Alternative 1: with a credit rating of not less than [___] from Moody’s Investors Service or [___] or higher from Standard & Poor’s Financial Services LLC, a subsidiary of The McGraw-Hill Companies][Alternative 2: with a net worth of at least $_________ as evidenced by audited financial statements of the Creditworthy Entity that are (i) prepared in accordance with United States generally accepted accounting principles, (ii) audited in accordance with United States generally accepted auditing standards, (iii) dated as of a date not earlier than 12 months before the effective date of the assumption, and (iv) delivered to the other Party on or before the date of the assumption.]
Drafting Considerations:

- Other standards than those in Sample S2.6 may be appropriate to define the financial stability of a delegate of obligations. Consider that if audited financial statements are used to determine financial stability, that the financial statements may be stale as of the date of the assumption. An alternative might be to allow the delegate to provide unaudited quarterly financial statements that are certified by an officer of the “Creditworthy Entity.”

3. SUBCONTRACTING

Subcontracting is an issue closely related to assignment and delegation (and in fact may be no different than a partial assignment and partial delegation), unless it is clear that the subcontractor owes its duties solely to the contractor and the owner or operator has no duties or liabilities to the subcontractor. At one end of the extreme, the owner may view the contractual relationship as personal to the contractor and may prohibit subcontracting altogether. In that case, the non-assignment clause might be revised to address subcontracting as prohibited along with assignment and delegation. At the other extreme, the owner or operator may freely allow subcontracting, or subcontracting may be anticipated by the parties at the outset of the contractual relationship.

Consider the following pro-owner sample provision that allows subcontracting, but clearly describes the relative liability of the parties and places several restrictions on the subcontracting relationship that can be further tailored by the contract drafter.

Sample 3.1: Detailed Pro-Owner Subcontractor Provision

S3.1 Subcontractors.

(a) Contractor may have Services performed by Subcontractors only in accordance with this Agreement. Contractor is solely responsible for engaging, managing, supervising, and paying all Subcontractors. Contractor shall require that all Services, equipment, and materials performed or provided by Subcontractors are received, inspected, and furnished in accordance with this Agreement. Owner assumes no obligation or liability of Contractor to any Subcontractor or to any employee or agent of any Subcontractor. Contractor is solely liable and responsible for all acts,

28 Consider the following sample language that might replace clauses (ii) or (iii):
“audited in accordance with United States generally accepted auditing standards or certified by the treasurer, chief financial officer, or chief accounting officer (or in the case of a limited liability company, a manager or managing member) of the delegate as fairly presenting the financial position and results of operations of the delegate in accordance with generally accepted accounting principles, (iii) dated as of a date not earlier than the most recent fiscal quarter then ended of the delegate . . . .”
omissions, liabilities, and Services (including any defects or deficiencies) of Subcontractors, and for any death, injuries, loss or damages of any employees or agents of Subcontractors. Nothing in any contract, subcontract, or purchase order with any Subcontractor diminishes or relieves Contractor from any duties or obligations under this Agreement. No Subcontractor is an intended or actual third party beneficiary of this Agreement.

(b) A list of approved Subcontractors as of the date of this Agreement, including a brief description of the Services to be performed, is attached as Exhibit [__]. Contractor may retain those Subcontractors that are listed on Exhibit [__] for the corresponding Services described on Exhibit [__] without further notice to or approval of Owner. If no Subcontractor listed on Exhibit [__] is available to perform the requested Services, then Contractor may request in writing that Owner approve additional Subcontractors. The written request must include such information as is necessary to enable Owner to fully evaluate the proposed Subcontractor and the Services proposed to be performed, including safety records and comparative cost information. Owner may approve or object to the proposed Subcontractor or request additional information within five business days after receipt of the written request from Contractor. If Owner objects to the proposed Subcontractor within five business days after receipt of the request of Contractor and any additional information requested by Owner, then Contractor shall not retain the proposed Subcontractor. If Owner approves or fails to object to a proposed Subcontractor within five business days after receipt of the request of Contractor and any additional information requested by Owner, then Contractor may retain the Subcontractor, but only for the Services approved or proposed and not objected to by Owner.

(c) Contractor shall ensure that all contracts, subcontracts, and purchase orders with Subcontractors: (i) allow the assignment of all rights of Contractor to Owner at Owner’s written request after the termination of this Agreement; (ii) include an express statement that Owner has no contractual obligation to or relationship with the Subcontractor (except to the extent created by an assignment executed by Owner); (iii) provide that Subcontractor shall comply with all of the provisions of this Agreement that apply to the Services performed by the Subcontractor, including confidentiality provisions; and (iv) include an express statement that Subcontractor will look solely to Contractor (and not to Owner) for payment and will not file any lien or notice or statement of lien against Owner or any property of Owner.

(d) Notwithstanding any provision in this Section S3.1, Owner may refuse or have removed any Subcontractor that, in the sole discretion of Owner, poses an unacceptable risk of damage, injury, or illness to any Person or property; and Owner is not responsible for any charges, price adjustments, or damages arising out of or as a result of such refusal or removal.

(e) Owner may contact any Subcontractor directly for any information that Owner deems necessary relating to the performance of this Agreement or the Services. Such direct contact shall not diminish or relieve Contractor of any of its duties or obligations under this Agreement.
Drafting Considerations:

• Subsection (a) of Sample S3.1 makes clear that the owner takes no responsibility for the work of subcontractors or for claims that may be made by employees of subcontractors. This language is intended to address in part liability for acts and omissions of subcontractors, and in part potential liability of the owner to subcontractor employees for wages, benefits, and other employment-related claims. In a related issue, although outside the scope of this article, the contract drafter should consider acts and omissions of subcontractors when drafting indemnification provisions. Further, while the general rule is that subcontractors are incidental beneficiaries (rather than intended third party beneficiaries) under a contract between the owner and contractor, subcontractors have claimed third party beneficiary status under prime contracts between owners and contractors. Subsection (a) expressly provides that subcontractors are not third party beneficiaries.

• Subsection (b) of Sample S3.1 provides a procedure for the pre-approval of contractors at the execution of the contract and for the proposal by the owner and the approval by the contractor of additional subcontractors.

• Subsection (c) of Sample S3.1 sets out requirements for contracts between the contractor and its subcontractors. Clause (i) in subsection (c) allows the owner at its election to take an assignment of a favorable subcontract if the contract between the owner and contractor is prematurely terminated before the work or services are complete.

• Unpaid subcontractors may bring suit against the owner based on theories of quantum meruit (whether under an unjust enrichment theory implied-in-law to prevent injustice, or based on manifestations of the parties implied-in-fact). Clause (ii) in subsection (c) is intended to minimize (to the extent possible) claims of an implied contract between the owner and subcontractor. Claims in equity, however, are difficult to avoid by contract provisions alone.

• Clause (iii) at least evidences the intent of the parties that subcontractors read and understand the agreement between the contractor and the owner and comply with the terms of the prime contract.

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29 See CORBIN, supra note 3, § 45.3.
31 See CORBIN, supra note 3, § 1.18 (discussing Commerce P’ship 8098 Ltd. P’ship v. Equity Contracting Co., 695 So. 2d 383 (Fla. Dist. Ct. App. 1997)).
• Clause (iv) is included in subsection (c) to prevent claims by the subcontractor against the owner for payment. Consider that subcontractors may file a materialman or similar statutory liens against the owner to collect payment. The owner might find itself making double payment, first to a contractor that absconds with the payment or declares bankruptcy without having paid its subcontractors, then to the subcontractors who demand payment in exchange for the release of their materialman’s liens.

• If the owner refuses or has removed a subcontractor, especially a subcontractor that has provided a low bid relied upon by the contractor in setting its contract price, the owner could be faced with claims by the contractor for loss or damage for breach of the duty of good faith and fair dealing implied in contracts in most states. Subsection (d) sets some contractual standards to allow the owner to refuse or have subcontractors removed. An owner, however, should be careful not to rely on this provision without some basis to remove a subcontractor. This provision attempts to restrict the right of subcontractors to perfect such liens by filing lien statements, although the provision likely will receive strong objections from subcontractors.

• Subsection (e) is inserted in part to avoid claims of interference by the owner with the contractual relations between the contractor and the subcontractor.

4. INTEGRATION; NO ORAL MODIFICATION; NO WAIVER

Integration clauses, anti-modification clauses, and anti-waiver clauses are all closely related. While an integration (or merger) clause represents an attempt to confine the present rights and obligations of the parties, anti-modification clauses and anti-waiver clauses attempt to prevent parties from giving up rights unbeknownst to counsel based on oral statements or conduct. But first we begin with a little background on the parol evidence rule and the admissibility of extrinsic evidence.

Under the common law parol evidence rule the introduction of extrinsic evidence usually requires a finding that the contract is ambiguous.


33 Another approach is to require a provision in the subcontract that payment to the subcontractor is not due and owing unless and until the contractor has been paid by the owner for the services or work. In that case, if payment is not made by the owner because of some objection to the work there is nothing on which to file a lien. It does not, however, prevent the filing of a lien if the contractor has been paid but has not paid its subcontractor. A subcontractor may object strongly to such a “no payment until paid” provision.
Nevertheless, a court may still allow extrinsic evidence to first determine whether the contract is ambiguous, such as evidence of local usage and custom. If a court then determines that a contract is ambiguous, it will then refer to extrinsic evidence to find the meaning of the contract.  

The parol evidence rule is credited largely to Professor Corbin: “When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing.” The parol evidence rule determines whether a contract can be supplemented by other terms that may have been agreed by the parties before or at the same time of the formation of the contract, but it does not necessarily define the meanings of the words actually used in the contract.

For example, the UCC provides that the parties’ agreement “may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement, but may be explained or supplemented . . . by course of dealing or usage of trade . . . or by course of performance.” Course of actual performance is not only admissible, but “considered the best indication of what [the parties] intended the writing to mean.” To define what we are talking about:

- **Course of performance** – is a sequence of conduct involving performance that is accepted without objection on repeated occasions.
- **Course of dealing** – is a sequence of conduct between the parties as to previous transactions that establishes a common basis of understanding.
- **Usage of trade** – is a practice or method of dealing that is common in a place, vocation, or trade.

Although express terms control over course of performance and course of performance controls over both course of dealing and usage of trade,
the UCC states there is no condition precedent for a court to find that a provision is ambiguous before introducing evidence of course of performance, course of dealing, or usage of trade. As to evidence of additional terms that are not inconsistent with the contract, the UCC states that such evidence is admissible “unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.”

4.1 Merger and Integration Clauses

A “merger” or “integration” clause is included in a contract to announce to the world that the parties intend that the contract be treated as an integrated agreement, precluding consideration of extrinsic evidence to ascertain the intent of the parties. A court might conclude that a merger clause is definitive and enforceable, thus limiting the court’s review to the “four corners” of the document. The drafter should be aware, however, of the inherent limitations of the clause, no matter how well the clause is drafted.

First, more recent courts have taken into account circumstances surrounding contract negotiations, such as bargaining power and sophistication, viewing merger clauses as creating a presumption of integration that is not necessarily dispositive. Next, an agreement may be completely integrated, adopted as a “complete and exclusive statement of the terms of the agreement,” or partially integrated. Even if a merger clause is included in an agreement, an agreement that clearly is not complete cannot be completely integrated. In that case, evidence may be introduced to ascertain the remaining agreement of the parties.

Next, notwithstanding an integration clause, the Restatement makes the point that “a writing cannot of itself prove its own completeness, and wide latitude must be allowed for inquiry into circumstances bearing on the intention of the parties.” Finally, notwithstanding a finding of complete integration, a court may introduce evidence to determine whether an ambiguity exists or to resolve an ambiguity.

Consider the following sample provision:

<table>
<thead>
<tr>
<th>Sample 4.1: Entire Agreement; Integration Provision</th>
</tr>
</thead>
<tbody>
<tr>
<td>S4.1 Entire Agreement; Integration. This Agreement, [and the other Transaction Documents] [and the Confidentiality Agreement]</td>
</tr>
</tbody>
</table>

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42 Id. § 2-208(2).
43 Id. § 2-202.
44 Id. § 202(b).
45 CORBIN, supra note 3, § 25.8.
46 RESTATEMENT, supra note 2, § 210 cmts. b, c.
Drafting Considerations:

• If other agreements, such as confidentiality agreements or other ancillary agreements form part of the entire agreement relating to the subject matter of the contract, then those agreements should be referenced in the integration clause. The bracketed language contemplates such other agreements.

• The second sentence of Sample S4.1 prohibits the introduction of evidence of trade usage, prior courses of dealing, and course of performance. Such a provision may be dangerous as the client might later find in a dispute that this type of evidence benefits the client’s position. Further, a court applying the UCC likely would find the course of performance prohibition unenforceable; but, the prohibition on the introduction of trade usage and prior courses of dealing may be enforceable.47

• The bracketed language in the last sentence should be considered when there is a risk that information presented during due diligence, statements made during negotiations, or marketing or other materials could be construed as representations, warranties, or covenants.

• If a party could argue that the contract, even though signed, was not intended to be effective until the satisfaction of some condition (such as obtaining financing), then a statement that there are no conditions to effectiveness should be added.48

47 U.C.C. § 2-202 cmt. 2 (stating that course of prior dealings and usages of trade (but not course of performance) become an element of the meaning of the words used “[u]nless carefully negated,” implying that they might be carefully negated).

48 See STARK, supra note 8, § 18.05.
4.2 No Oral Amendments, Modifications, Etc.

No matter how well an “amendment in writing” or “no oral modification” provision is drafted, under the common law courts may enforce oral amendments and modifications, and amendments and modifications based on the conduct of the parties, on the premise that “contracting parties cannot today restrict their power to contract with each other tomorrow.” 49

Under the common law, “parties to a written agreement may not only enter into separate, subsequent agreements, but they also may modify a written agreement through verbal negotiations subsequent to entering into the initial written agreement, even if the agreement being modified unambiguously indicates that any modifications must be in writing.” 50 The Restatement of Contracts also has been cited for the rule that contracts may be amended orally notwithstanding a no oral modification provision. 51

Section 2-209 of the UCC has modified the common law rule in the case of contracts for the sale of goods (if the contract as modified is within the UCC version of the statute of frauds). Under section 2-209, a signed written agreement that requires modifications or rescissions to be in writing must actually be in writing, although an oral attempt at a modification or rescission can operate as a waiver. 52 A few other states, including New York and California, have attempted to change the no oral modification rule, but courts have routinely allowed oral modifications notwithstanding the statutes. 53

Why then include a no oral modification provision? At the very least such a provision sets the expectations and intentions of the parties at the outset of the contract relationship. And who knows? A court might actually enforce the parties’ agreement.

Consider the following sample provision:

Sample 4.2: Amendments and Modifications Provision

S4.2 Amendments, Etc. This Agreement may not be amended, modified, or supplemented except by a written agreement of the Parties [that is identified as an amendment to this Agreement][and that is executed by an officer of each such Party]. [As a condition precedent to the

50 R.T. Nielson Co. v. Cook, 40 P.3d 1119, 1124 n.4 (Utah 2002).
51 See RESTATEMENT, supra note 2, § 283 cmt. b (stating that “[e]ven a provision of the earlier contract to the effect that it can be rescinded only in writing does not impair the effectiveness of an oral agreement of rescission. In the absence of statute, such a self-imposed limitation does not limit the power of the parties subsequently to contract”).
52 U.C.C. § 2-209(2), (4).
53 See STARK, supra note 8, § 16.09[2] and accompanying footnotes.
Drafting Considerations:

• Although many no-oral modification provisions simply include the word “amend,” consider including modifications and supplements to avoid any ambiguity in the event of a dispute. The drafter may also want to include termination and rescission if those matters are not already addressed in separate termination provisions.

• To prevent letters, emails, and other correspondence from amending the contract, the provision specifies that an amendment actually must be identified as an amendment. This is especially important in the context of a joint venture or other joint undertaking where every signed AFE, board resolution or consent, or other jointly executed document may be considered an amendment to the joint venture agreement. This sample provision also has a requirement that an amendment be executed by an officer of each party to prevent other agents from binding the parties unbeknownst to management. Although an officer signature may be unrealistic depending on the size or importance of the contract, consider including at least some parameters.

• The last sentence in brackets requires a board resolution. Again, this might be unrealistic except in the case of bet-the-company contracts. For extremely important contracts, a board resolution for an amendment may be critical, especially if the contract (and the amendment) might be pledged to a lender who requires a legal opinion as to the enforceability of the entire contract (including amendments).

4.3 No Oral Waiver or Discharge

Waivers technically only relate to conditions, not covenants. For example, if a purchaser proceeds to closing notwithstanding that all conditions to closing have not been satisfied, then the purchaser can be viewed as having waived the closing conditions. Although lawyers typically think of the relinquishment of a right, such as timely payment or a certain method of performance, as a waiver, such a relinquishment more properly should be thought of as a discharge rather than a waiver. Such a discharge can also be viewed as a voluntary unilateral gift of a right to

54 Note this requirement could come back to bite the client if the drafter is not careful to specify that a modification is an amendment.

55 See CORBIN, supra note 3, § 40.1.
damages and other remedies for breach. The Restatement (Second) of Contracts provides that the discharge can be oral for a partial breach if the injured party accepts some performance under the contract. The discharge must be in writing for a total breach of contract.

Commentators argue that theoretically the obligee should not be held to have discharged the obligor absent some manifestation or expression of its intent to discharge the obligor, but significant authority exists to the contrary, especially in construction cases, where acceptance of defective performance may operate as a discharge.

In any case, the general rule is that “[a] provision that an express condition of a promise or promises in the contract cannot be eliminated by waiver, or by conduct constituting an estoppel, is wholly ineffective. The promisor still has the power to waive the condition, or to be estopped by conduct from insisting upon it, to the same extent that he would have had this power without that provision.” Even under the UCC, when the contract provides that modifications are required to be in writing, oral modifications might be treated as waivers. Although the UCC does not address no oral waiver provisions, presumably the parties can orally waive a no oral waiver provision as they might waive any other provision.

Why then include a no oral waiver provision? For much the same reasons parties include a no oral modification provision – to set the expectations of the parties and to inform the court as to the intent of the parties. More important, some courts actually have enforced no oral waiver provisions.

Consider the following sample provision:

Sample 4.3: No Oral Waiver or Discharge Provision

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[56] See id. § 67.12.
[57] See RESTATEMENT, supra note 2, § 277 cmts. a, b, c. Illustration 5 in the Official Comments to Restatement (Second) of Contracts, § 277 provides:

A and B make a contract under which A promises to employ B and B promises to work for A for six months. After B has begun work, he commits a breach of the contract giving A a claim for damages for partial breach. A says, ‘Never mind, I excuse that failure in view of your generally excellent performance,’ and B continues to work for A. A’s claim for damages for partial breach is discharged. The result would be different if A’s renunciation occurred after B had finished working for A.

[58] See CORBIN, supra note 3, § 67.12.
[59] See id. § 40.13.
S4.3 No Oral Waiver or Discharge. No Party shall be deemed to have waived or discharged any claim arising out of this Agreement, or any power, right, privilege, remedy, or condition under this Agreement, unless the waiver or discharge of such claim, power, right, privilege, remedy, or condition is expressly set forth in a written instrument duly executed and delivered by or on behalf of the Party against whom the waiver or discharge is sought to be enforced. A waiver or discharge made on one occasion or a partial waiver or discharge of any power, right, privilege, remedy, or condition shall not preclude any other or further exercise or enforcement of such power, right, privilege, or remedy or requirement to satisfy such condition. No failure or delay on the part of any Party to exercise or enforce any power, right, privilege, or remedy under this Agreement or to require the satisfaction of any condition under this Agreement [and no course of dealing between the Parties] shall operate as a waiver, discharge, or estoppel of any such power, right, privilege, remedy, or condition.

Drafting Considerations:

• Presuming the drafter intends the provision to apply to the discharge of claims and contractual performance as well as conditions, the provision should be drafted broadly.

• As a discharge or waiver is a unilateral action, Sample S4.3 requires that written evidence of the discharge need only be executed by the party sought to be charged with the discharge or waiver.

• The second sentence in Sample S4.3 is intended to limit the scope of a waiver or discharge to be as narrow as possible.

• The third sentence in Sample S4.3 is intended to prevent the argument that when the business folks accept a certain substandard performance that establishes a course of performance or dealing between the parties, the substandard performance cannot thereafter be challenged.

• The difficulties discussed above in enforcing no oral waiver or discharge provisions raise an important point. If a problem arises under a contract, never avoid the problem or it may become the norm. Even if the client does not wish to demand damages for what may seem like a rather immaterial breach, the breach should be acknowledged in writing with a clear statement that reserves rights to damages and demands performance in the future in compliance with the contract. Otherwise a small problem now might grow into a bigger problem later as repeated occurrences over the course of performance multiply.
5. Severability; Reformation

Severability and reformation provisions address unenforceable contract provisions, usually because of a violation of public policy. The traditional common law rule is that a bargain that violates public policy is unenforceable. Practitioners generally do not differentiate between concepts of divisibility and severability, but there is a difference. “Divisibility” refers to separating promises or performances into pairs and then cutting away the pair that violates public policy; while “severability” refers to cutting out the promise or performance that violates public policy and leaving the remainder so long as the remainder is still supported by consideration (assuming promises and performances that violate public policy do not constitute consideration).

The Blue Pencil Rule (created as early as 1843) provides that if a restrictive covenant (such as a covenant not to compete) is drafted too broadly as to duration or scope and the offending portion can be deleted leaving intact a sentence that is both grammatically correct and enforceable, then the remaining sentence will be enforced. Assume, for example, an area of mutual interest agreement that applies to “the Permian Basin and the remainder of Texas and New Mexico” that a court determines is overly broad. The court could strike “the remainder of Texas and New Mexico” leaving an enforceable provision. If the provision applies just to “Texas and New Mexico” and the court considers that overly broad it may strike the entire area of mutual interest.

Today courts are more likely to reform or rewrite an unenforceable provision to make it enforceable or reasonable. The Restatement basically provides for a two-step process, beginning with a divisibility approach (if possible) with respect to essential promises, and then applying a reasonableness approach with respect to non-essential promises.

Under the first step of the Restatement approach, four requirements must be met: (1) first, it must be possible to apportion the parties’ performance into corresponding pairs of part performance (essentially a calculation), (2) the corresponding pairs must be regarded as agreed equivalents, (3) at least one of the pairs of performances must not be offensive to public policy, and (4) the party seeking enforcement must not have engaged in serious misconduct. If so, then the remaining pairs that do

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62 CORBIN, supra note 3, § 89.1. Under the Restatement (Second) of Contracts, “[a] promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.” RESTATEMENT, supra note 2, § 178(1).

63 CORBIN, supra note 3, § 89.4.

not violate public policy may be enforced by the party that did not engage in misconduct.  

Under the second step of the Restatement approach, even if the divisibility requirements are not met the court may enforce the portions of the agreement that do not violate public policy by severing the unenforceable performance if it is “not an essential part of the agreed exchange.” The Restatement states that this is not a power of reformation, but the Official Illustrations make clear that the court can rewrite an unenforceable provision, at least in the case of a restrictive covenant, by reducing the obligations under the restrictive covenant to be enforceable or reasonable.

Regardless whether a term is considered essential or non-essential, the Restatement makes clear that a party that bargains for an unenforceable covenant and who knows the covenant is not enforceable or otherwise acts in bad faith (such as taking advantage of a dominant bargaining power) will not be entitled to a re-write of the provision to make it enforceable. While transactional counsel may feel a sense of accomplishment in either duping or extracting favorable terms from opposing counsel, the client will not share in his delight when the restrictive covenant, indemnity, release, remedies provision, etc., is struck altogether on the grounds of overreaching or bad faith.

Consider the following sample provision:

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Sample 5.1: Basic Invalid, Illegal, or Unenforceable Savings Provision

S5.1 Invalid, Illegal, or Unenforceable Provision. If any provision of this Agreement (or any portion thereof) or the application of any such provision (or any portion thereof) to any Person or circumstance shall be held invalid, illegal, or unenforceable in any jurisdiction, such invalidity, illegality, or unenforceability shall not affect the validity, legality, or enforceability of the remaining provisions of this Agreement or the validity, legality or enforceability of the offending provision as to any other Person or circumstance or in any other jurisdiction if both the economic and legal

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65 RESTATEMENT, supra note 2, § 183 cmt. b.
66 Id. § 184.
67 Id. § 184 cmt. b.
68 See id. § 184 illus. 5 (illustrating an example wherein “A lends B $10,000, taking a promissory note for that sum plus interest. In calculating the rate of interest, the parties make an error so that the amount of interest exceeds the highest permissible legal rate. Although part of B’s promise to pay the stipulated interest is unenforceable on grounds of public policy, it is enforceable up to the highest permissible rate”).
69 Illustration 5 continues: “If A knew when he made the loan that the amount exceeded the highest permissible legal rate, B’s promise to pay interest would be unenforceable in its entirety.” Id.
Drafting Considerations:

- Note this sample provision is not entitled “severability” and does not mandate a blue-pencil approach. It does not include common language such as “the offending provision shall be severed from this Agreement.” Instead, the provision simply invites the court to save provisions of the agreement that are enforceable. The court could sever an enforceable provision, but could also use a divisibility and reasonableness approach as provided in the Restatement.

- It is not advisable to include a provision without any reference to the essential terms of the Agreement. If the offending provision is essential to the bargained-for exchange, surely neither party would want a court to strike the offending provision and leave the remainder of the agreement intact. Instead, this sample provision provides that the non-offending provisions remain enforceable only if the essential bargained for exchange remains, defined with reference to the economic and legal substance of the transactions contemplated by the Agreement. Keep in mind, however, that a court may not necessarily agree with the client as to what constitutes an essential term. While a non-compete covenant in a purchase agreement may seem essential to the purchaser of assets, a court might determine to strike the provision as non-essential. See Sample S5.2 to address this issue.

- Sample S5.1 attempts to restrict the discretion of a court as much as possible by providing that the invalidity, illegality, or unenforceability of a provision as to one person, circumstance, or jurisdiction shall not be affected because of the invalidity, illegality, or unenforceability of the provision as to another person, circumstance, or jurisdiction that might be valid.

- Finally, regardless of the boilerplate language, a suspect clause where the applicable law (as determined under the choice of law provision or because of significant contacts) is a state that continues to follow the blue-pencil approach should still be drafted so that offending provisions can be deleted, leaving the grammatical structure of the sentence intact. For example, one approach to a non-compete might be to list each county so the geographic scope might be limited by simply deleting counties from the list. Most courts will
equitably reform an offending covenant, but a few states may still follow the blue-pencil approach.\textsuperscript{70}

Consider the following sample severability provision which expands on Sample S5.1 by allowing the parties to define the essential provisions in the Agreement.

Sample 5.2: Invalid, Illegal, or Unenforceable Savings Provision; Essential Terms Defined

\textbf{S5.2 Severability.} If any provision of this Agreement (or any portion thereof) or the application of any such provision (or any portion thereof) to any Person or circumstance shall be held invalid, illegal or unenforceable in any jurisdiction, such invalidity, illegality, or unenforceability shall not affect the validity, legality, or enforceability of the remaining provisions of this Agreement or the validity, legality, or enforceability of the offending provision as to any other Person or circumstance or in any other jurisdiction if the essential terms and conditions of this Agreement for each Party remain valid, legal, and enforceable. Without limiting the previous sentence, the provisions of Sections ____, ____ and ____ constitute essential elements of the agreed exchange that is the subject matter of this Agreement. Accordingly, if any of these provisions is determined to be invalid, illegal, or unenforceable in any \textit{material} respect, the remainder of this Agreement shall be unenforceable.

Drafting Considerations:

• Sample S5.2 allows the parties to define the essential provisions in the Agreement. If any of the essential provisions is determined to be invalid, rather than allow the court to strike (or revise) that provision, the remainder of the agreement also is considered unenforceable.

Also consider the following sample provision that invites the court to actually go-ahead and reform the contract to arrive at the parties’ intent.

Sample 5.3: Basic Reformation Provision

\textbf{S5.3 Invalid, Illegal, or Unenforceable Provision.} If any provision of this Agreement (or any portion thereof) or the application of any such provision (or any portion thereof) to any Person or circumstance shall

\textsuperscript{70} One commentator reports that the remaining blue-pencil states are Arizona, Indiana, North Carolina, Oklahoma, and South Carolina. See Kenneth J. Vanko, \textit{A Quick State-By-State Guide on the Blue-Pencil Rule}, NON-COMPETES (Jan. 8, 2009, 12:09 PM), http://www.non-competes.com/2009/01/quick-state-by-state-guide-on-blue.html. See also Coates v. Heat Wagons, Inc., 942 N.E.2d 905, 915 (Ind. Ct. App. 2011) (“where a provision of a restriction is unreasonable, the blue pencil doctrine permits courts to strike that provision from those which are reasonable if the unreasonable restrictions are divisible from the rest”).
be held invalid, illegal, or unenforceable by any court [or arbitrator], the
court [or arbitrator] shall have the power to fashion and enforce a provision
that modifies the invalid, illegal, or unenforceable provision to the minimum
extent required to render such provision valid, legal, and enforceable and in a
manner so as to preserve the economic and legal substance of the
transactions contemplated by this Agreement.

Drafting Considerations:

• Bear in mind a few considerations before using a reformation
  provision. First, a court will only reform a contract if it decides that
  it has the power to do so. Second, assuming the court determines it
  has that power, then the provision leaves much discretion to the court
to fashion a new provision, discretion that the parties may not wish
the court to have. The court may be constrained somewhat by the
requirement to preserve the economic and legal substance of the
transactions, but that is very little guidance.

• Note this provision is not called “reformation” for the simple reason
  that the Restatement takes the view that it does not reform offending
  provisions, but merely applies a reasonableness standard to modify a
  provision. There is no need here to call it a duck, even if it walks like
  one.

• Consider that a reformation clause should only be used in a
  jurisdiction that has abandoned a blue-pencil approach. 71

Finally, consider the following sample reformation provision, which
expands upon Sample S5.3 to require negotiation between the parties.

Sample 5.4: Reformation with Negotiation Provision

S5.4 Invalid, Illegal, or Unenforceable Provision. If any
provision of this Agreement (or any portion thereof) or the application of any
such provision (or any portion thereof) to any Person or circumstance shall
be held invalid, illegal, or unenforceable by any court [or arbitrator], (a) the
Parties shall negotiate in good faith to attempt to modify this Agreement so
as to effect, to the maximum extent legally possible, the original intent of the
Parties, and (b) if the Parties are unable to agree as to any such modification
within __ days after such provision is held invalid, illegal, or unenforceable,
the court [or arbitrator] shall have the power to fashion and enforce a
provision that modifies the invalid, illegal, or unenforceable provision to the
minimum extent required to render such provision valid, legal, and
enforceable and in a manner so as to preserve the economic and legal
substance of the transactions contemplated by this Agreement.

71 See supra Drafting Considerations to Sample S5.1.
Drafting Considerations:

- Sample S5.4 simply modifies Sample S5.3 by first requiring that the parties negotiate to try to fix an invalid, illegal, or unenforceable provision before allowing the court to rewrite the provision.
- The obligation of the parties should be drafted as an agreement to negotiate, rather than an unenforceable agreement to agree.\(^{72}\)

6. REMEDIES

6.1 Cumulative Remedies

A cumulative remedies provision is included in a contract to avoid the common law election of remedies doctrine. The issue confronted under the doctrine is whether the election of one remedy might extinguish the right to pursue other remedies.\(^{73}\) As Corbin puts it, the election of remedies doctrine “is an entirely unnecessary doctrine” and is “frequently confused with such doctrines as res judicata, satisfaction, estoppel, waiver, and ratification.”\(^{74}\)

The modern rule, as set forth in the Restatement, is that by manifesting a selection of one remedy, a party is not foreclosed from shifting to another remedy, unless the shift “would be unjust because of the other party’s reliance on the earlier selection.”\(^{75}\) The UCC adopts a similar rule rejecting the election of remedies doctrine, providing that “remedies are essentially cumulative in nature and include all of the available remedies for breach.”\(^{76}\)

Consider the following sample provision:

<table>
<thead>
<tr>
<th>Sample 6.1.1: Basic Cumulative Remedies Provision</th>
</tr>
</thead>
<tbody>
<tr>
<td>S6.1.1 Cumulative Remedies. The rights and remedies of the Parties under this Agreement and otherwise now or subsequently available at law or in equity are cumulative and not exclusive of any other rights and remedies under this Agreement or otherwise now or subsequently available at law or in equity.</td>
</tr>
</tbody>
</table>


\(^{73}\) See Bank One Wisconsin v. Kahl, 655 N.W.2d 525 (Wis. Ct. App. 2002).

\(^{74}\) CORBIN, supra note 3, § 66.1.

\(^{75}\) RESTATEMENT, supra note 2, § 378 cmt. a. The Introductory Note to Chapter 16 of the Restatement states that the rules governing election of remedies “reflect the trend against preclusion by election that has resulted from the merger of law and equity and the reform of rules of procedure.”

\(^{76}\) U.C.C. § 2-703 cmt. 1.
Drafting Considerations:

- Under most circumstances, a cumulative remedy provision need not be included because of the modern rule; or, it might be included as something to give up during negotiations. Cumulative remedies provisions may be important, however, if the contract contains a number of different remedies provisions and a party needs the ability to exercise multiple remedies to make it whole. The quintessential example of such a circumstance is the lender under a credit agreement or other financing vehicle. 77

- Before including such a provision, first determine whether the client truly desires remedies to be cumulative. In many cases the client might be better off without a cumulative remedies provision. 78

- If a provision in the contract specifies the remedies for a certain breach of performance, then a cumulative remedies provision might still be included, but to avoid an ambiguity the drafter should carve out the exclusive remedy relating to the specific breach of performance.

Also consider the following expanded cumulative remedies provision:

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Sample 6.1.2: Expanded Cumulative Remedies Provision

S6.1.2 Cumulative Remedies. The rights and remedies of the Parties under this Agreement are not exclusive of, but are cumulative to, any rights or remedies now or subsequently available at law or in equity. No single or partial exercise of any right or remedy under this Agreement precludes the simultaneous or subsequent exercise of any other right or remedy, all of which are cumulative. Failure or delay of a Party to exercise any right or remedy shall not constitute a failure to mitigate damages and shall not constitute a discharge, waiver, or estoppel of any future rights or remedies under this Agreement. To the extent any course of dealing, act, omission, failure, or delay in exercising any right or remedy under this Agreement constitutes the election of an inconsistent right or remedy, that election does not constitute a discharge, waiver, or estoppel of any right or remedy, or limit or prevent the subsequent enforcement of any provision of this Agreement.

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77 See STARK, supra note 8, § 9.02[4].

78 Consider an example discussed in the Stark treatise where a party exercised a termination right set forth in the termination section of the contract for the failure to purchase a specified quantity of product. The party also claimed that it was entitled to lost profits and damages based on the cumulative remedies provision and the court agreed. See STARK, supra note 8, § 9.02[5] (citing G.T. Labs. v. Cooper Cos., No. 92 C 6647, 1993 U.S. Dist. LEXIS 12750 (N.D. Ill. Sept. 13, 1993)).
Drafting Considerations:

- Sample S6.1.2 basically expands on the basic cumulative remedies provision to add a no waiver provision (more appropriately titled a no discharge or no estoppel provision). Again, although the no waiver, discharge or estoppel provision might be extremely desirable for the purchaser of goods or services, such provisions might be included without a cumulative remedies provision that could come back to haunt the client.

6.2 Limited and Exclusive Remedies

In contrast to election of remedies, the traditional notion of limitation of remedies is that a party should be limited to the actual loss caused by the breach.\(^79\) The transactional lawyer, however, usually views a limitation of remedies as a provision in a contract that limits liability for breach or provides that remedies shall be limited to those specified.

Although limitation of remedies provisions in services contracts routinely are enforced, there are limitations.\(^80\) For example: “Damage limitation or waiver clauses, as a prime example of such provisions, are routinely enforced against parties who have consented to their inclusion in an agreement. Such a clause may not be invoked, however, to insulate a party from liability for the consequences of willful misconduct in performing its obligations under the contract.”\(^81\) Another example is the commission of a tort, which may involve both public policy issues and questions of contract interpretation as to whether the limitation of remedies provision actually covers torts.\(^82\)

Matters are a little trickier with respect to the sale of goods under the UCC. The UCC allows parties to specify remedies different than or in addition to the remedies set out in the UCC, for example, “as by limiting the buyer’s remedies to return of the goods and repayment of the price to repair and replacement of non-conforming goods or parts ….”\(^83\) But unless the agreement specifies that the enumerated remedy is the sole and exclusive remedy, then the remedy is nothing more than an optional additional remedy, making the limitations of remedy provision effectively inoperable.\(^84\)

Further, even though a remedy might be specified as exclusive, a court applying the UCC might determine that the remedy fails of its essential purpose (as unreasonably depriving the other party of the benefit of his or

\(^59\) Stark, supra note 8, § 9.02[1]. See Restatement, supra note 2, § 347 cmt. e.
\(^80\) See Corbin, supra note 3, § 58.16.
\(^82\) See Corbin, supra note 3, § 58.16.
\(^83\) U.C.C. § 2-719(1)(a).
\(^84\) Id. § 2-719(1)(b).
her bargain), in which case the limitations of remedy provision may again be inoperable.\textsuperscript{85} And although consequential damages may be limited under the UCC, that limitation will fail if the court determines that the limitation is unconscionable.\textsuperscript{86} Limitations of consequential damages for personal injury in the case of consumer goods is \textit{prima facie} unconscionable, while commercial loss is not.\textsuperscript{87} Finally, while not specifically required under the UCC, many courts have required limitations of remedies provisions to be conspicuous similar to disclaimers of the implied warranty of merchantability.\textsuperscript{88}

Consider the following sample provision:

Sample 6.2: Exclusive Remedies Provision

\begin{quote}
S6.2  \textbf{Exclusive Remedies}. [Except in the case of fraud,] [T]he remedies in [Sections ___, ___, and ___] are the Parties’ exclusive remedies arising out of or relating to this Agreement, and, except as otherwise expressly provided in this Agreement, neither Party has, or will have in the future, any other remedies arising out of or relating to this Agreement. [Without limiting the foregoing, in no event shall either Party be liable for consequential, incidental, punitive, or exemplary damages, however caused.]
\end{quote}

Drafting Considerations:

- An exclusive remedies provision such as Sample S6.2 may be extremely risky unless the attorney is confident that the indemnification provision in the contract effectively covers the damages to which the client expects to be entitled in the event of a breach. Under the common law limitations of remedies doctrine, a court will limit recovery to one remedy measured by the loss of the non-breaching party. There may be less risk to the client to simply rely on the common law.

- The drafter who desires to include a provision similar to Sample S6.2 should carefully examine the termination provisions to ensure that remedies are not inadvertently lost upon a termination of the contract. In other words, if a party retains the right to sue after the termination of a contract, then that right should be expressly stated in the termination provision.

- If consequential or incidental damages are to be excluded, then the contract should explicitly exclude those damages. The same for

\textsuperscript{85} Id. § 2-719(2).
\textsuperscript{86} Id. § 2-719(3).
\textsuperscript{87} Id.
\textsuperscript{88} WILLISTON, supra note 7, § 40.40.
punitive (or exemplary) damages. Conversely, if a party wants to be entitled to consequential, incidental, or punitive damages, the drafter is advised to specifically call out those types of damages. One approach is to define the term “Damages” or “Loss” to include these types of damages and use the defined term in a detailed indemnification provision.

6.3 Specific Performance

Specific performance is a remedy granted in equity when the remedies at law for damages and restitution are determined to be inadequate. The inadequacy of money damages often is a prerequisite to the award of specific performance.\(^\text{89}\)

Consider the following sample provision.

**Sample 6.3: Specific Performance Provision**

S6.3 **Specific Performance.** The Parties expressly agree that the remedies available at law for the breach of any of the obligations of the Parties under [this Agreement] [ Specify Section ] are inadequate in view of the complexities and uncertainties in measuring the actual damages that would be sustained by reason of the failure of a Party to comply fully with such obligations and the uniqueness of the business arrangement between the Parties. Accordingly, each of the obligations under [this Agreement] [Section ___ ] shall be and expressly is made enforceable by specific performance.

**Drafting Considerations:**

- Contracts that contemplate specific performance often provide in a provision such as Sample S6.3 that the remedy at law will be inadequate. Such a statement is sometimes taken into account by courts, but is not conclusive, and may not be effective.\(^\text{90}\) The drafter should consider explaining in the provision why actual damages are inadequate and uncertain to further bolster the provision.

- More important are factors such as the actual difficulty in calculating money damages, “either because the subject matter of the contract is unique or rare and cannot easily be duplicated or because the obtaining of a substantial equivalent involves difficulty, delay, and inconvenience.”\(^\text{91}\) Sample S6.3 provides that the business arrangement is unique. This language (and the entire specific performance provision) would usually be inappropriate for a commodities contract or for goods or services that may easily be

\(^{89}\) *See* RESTATEMENT, *supra* note 2, § 359(1).

\(^{90}\) *See* CORBIN, *supra* note 3, § 63.7.

\(^{91}\) *Id.*
obtained from others. The sale of a business, a non-compete arrangement, or a contract for services employing unique technology are examples of arrangements that would be more appropriate for such a provision.

- Other factors that might be taken into account by the court in enforcing a request for specific performance include the bad faith, breach, or inequitable conduct of the party making the request, the public interest, whether the contract is oppressive or unconscionable, and the degree of hardship associated with enforcement. A contract provision such as Sample S6.3 cannot overcome a difficult set of facts.

- If a party terminates a contract, then the remedy of specific performance generally is not available.

6.4 Liquidated Damages

A liquidated damages provision is another form of limitation of remedies provision because it limits the damages to those specified. While courts often enforce liquidated damages provisions, generally courts require that actual damages in the event of a breach must be difficult to calculate and the liquidated damages provided in the contract must be a reasonable estimate of what the damages might be in the event of a breach. Readers interested in a further discussion and analysis of the proper way to draft a liquidated damages provision (specifically in the context of a farm-out agreement) should review the recent work of Professor Pierce.

7. CHOICE OF LAW AND CHOICE OF FORUM

7.1 Choice of Law

In the absence of an effective agreement as to the choice of law in a contract, rights and duties under the contract generally are determined by the local law of the state that has the most significant relationship to the transaction and the parties, taking into account matters such as the place of contracting; the place of negotiation; the place of performance; the location of the subject matter of the contract; and the residence or place of incorporation of the parties. A few jurisdictions may apply the doctrine of *lex loci contractus*, which requires courts to apply the law of the

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92 See *id.* § 63.1.
94 See generally *id.*
95 See *RESTATEMENT (SECOND) OF CONFLICTS OF LAWS* § 188 (1971).
jurisdiction where the contract was made to determine questions of contract validity and construction. 96

When the parties to a contract choose the law of a state to govern their contractual rights and duties, courts usually respect their choice. 97 The parties may also elect to have different issues governed by the law of different states. 98 The law chosen, however, may not govern issues outside the contractual relationship (such as capacity to contract, violation of usury laws, and whether the contract is illegal), either where the chosen state does not have a substantial relationship to the parties or the transaction and there is not another reasonable basis for the choice, or the action is brought in a proper forum state and application of the law chosen by the parties would be contrary to a fundamental policy of the forum state. 99

Some areas of law, such as areas of law governed by the UCC, have specific provisions that mandate the choice of law regardless of the law selected by the parties. An example is the rule in Article 9 of the UCC that perfection, the effect of perfection or nonperfection, and priority of security interests are governed by the law of the location of the debtor or the collateral, depending on the circumstances. 100 Specifically, under the UCC the local law of the jurisdiction where the wellhead is located governs these issues as to security interests in a contract party’s as-extracted oil and gas and accounts arising out of the sale at the wellhead of such oil and gas. 101

Consider the following sample choice of law provision:

Sample 7.1: Choice of Law Provision

S7.1 Governing Law. This Agreement and all matters arising under [or relating to] this Agreement, the transactions contemplated by this Agreement, [or the relationship of the Parties], whether in law or equity, or sounding in contract or tort, or otherwise, shall be governed, construed, and enforced in accordance with the laws of the State of [_____________], without regard to any conflicts of law provision or rule (whether of the State of [_____________] or any other jurisdiction) that would cause the application of the laws of any jurisdiction other than the State of

98 Id. § 187 cmt. i.
99 Id. § 187(2) cmt. d.
100 U.C.C. § 9-301 cmt. 2. If the contract provides for a security interest, the choice of law provision should include a carve out such as “except as to the perfection, the effect of perfection or nonperfection, and the priority of security interests, which shall be governed by the law of the state determined under UCC § 9-301 as adopted in the State of [______].”
101 U.C.C. § 9-301. See also U.C.C. § 9-102(6) (stating the definition of “as-extracted collateral”).
Drafting Considerations:

- The drafter should be careful to broadly draft the choice of law provision if the drafter intends for the chosen law to address more than contract claims and apply more broadly to the entire relationship of the parties.  

  For example, if the drafter desires for the choice-of-law provision to govern tort claims or other causes of action, the drafter should use broad language such as “arising under or related to” and may also specifically enumerate issues arising “in law or equity” or “sounding in contract or tort.”

- Notice the familiar language “without regard to any conflicts of law provision or rule.” This language is included to address the possibility of renvoi. The renvoi doctrine provides that “when the forum court’s choice-of-law rules would apply the substantive law of a foreign jurisdiction to the case before the forum court, the forum court may apply the whole body of the foreign jurisdiction’s substantive law including the foreign jurisdiction’s choice-of-law rules.” This of course, could lead to an endless circle, where, for example, a court in New Mexico applies all of Colorado law, and the Colorado choice-of-law rules in turn provide for the application of New Mexico law. Under a “limited renvoi exception,” Maryland courts “avoid the irony of applying the law of a foreign jurisdiction when that jurisdiction’s conflict of law rules would apply Maryland law.”

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102 See, e.g., Caton v. Leach Corp., 896 F.2d 939, 943 (5th Cir. 1990) (“[Plaintiff’s] other claims for relief involve the tort duty of good faith and fair dealing and a claim for restitution under quantum meruit, and, as such, do not arise out of the contract. Because the choice of law clause does not address the general rights and liabilities of the parties, we must return to Texas choice of law rules to determine which law applies.”). The court compares the narrow clause at issue with a broad clause drafted to “govern, construe and enforce all of the rights and duties of the parties arising from or relating in any way to the subject matter of this contract . . . .” Id. at n.3. See also, e.g., Thompson & Wallace of Memphis, Inc. v. Falconwood Corp., 100 F.3d 429, 432–33 (5th Cir. 1996) (plaintiff’s tort claims were not governed by choice-of-law provision that provided that the chosen law applied to the “agreement and its enforcement”); Krock v. Lipsay, 97 F.3d 640, 645 (2d Cir. 1996) (provision stating that parties’ agreement would be “governed by and construed in accordance with” Massachusetts law was too narrowly-drawn to apply to claim for fraudulent misrepresentation).


104 Id. at 1304.
• If a transaction involves a sale of goods between parties whose places of business are in different countries, and those countries are parties to the United Nations Convention on the International Sale of Goods (the Convention), the transaction will be governed by the Convention unless the Convention is expressly disclaimed.\textsuperscript{105} Include the bracketed language in the last sentence of Sample S7.1 if either (1) any portion of the transaction does not occur in the United States, (2) the other party is a foreign company, or (3) the other party has a principal place of business in a foreign country.

7.2 Choice of Forum

Although the parties cannot by contract oust a court of jurisdiction, generally, an agreement between the parties to a contract as to the place of an action will be given effect unless a court determines it is unfair or unreasonable.\textsuperscript{106} The burden of establishing unfairness or unreasonableness is on the party who seeks to avoid the choice-of-forum provision.\textsuperscript{107}

A choice of forum provision will not be effective where the provision is invalidated by statute.\textsuperscript{108} Other situations where a choice of forum clause may not be recognized include: (1) when the court finds that the provision was obtained by fraud, duress, abuse of economic power or other unconscionable means (which may involve an adhesion or take-it-or-leave-it contract); (2) where the court determines that the plaintiff would likely be treated unfairly in the chosen state; or (3) where the chosen forum is such a seriously inconvenient forum that requiring the plaintiff to bring suit in that forum would be unjust.\textsuperscript{109}

Idaho, Montana, North Dakota, and Oklahoma, refuse to enforce forum selection clauses altogether.\textsuperscript{110} In contrast, choice of forum provisions are


\textsuperscript{106} See \textit{RESTATEMENT (SECOND) OF CONFLICT OF LAWS} § 80 (1971).

\textsuperscript{107} See \textit{M/S Bremen v. Zapata Off-Shore Co.}, 407 U.S. 1 (1972). Although subject to criticism, the Supreme Court refined its analysis in \textit{Bremen} in \textit{Carnival Cruise Lines v. Shute}, 499 U.S. 585, 593–97 (1991), holding that while forum-selection clauses in form contracts are subject to judicial scrutiny for fundamental fairness, a non-negotiated forum-selection clause in a form contract may be enforceable even though it is not the subject of bargaining. Factors considered by the court in enforcing a clause referenced in a cruise ticket included (1) the interest of the cruise line in limiting the fora in which it could be sued, (2) the benefits of dispelling confusion about where suits might be brought and defended, and (3) the benefit of reduced fares by limiting litigation costs. \textit{Id.}

\textsuperscript{108} See \textit{RESTATEMENT (SECOND) OF CONFLICT OF LAWS} § 80 cmt. b (1971).

\textsuperscript{109} See \textit{id.} at cmt. c.

\textsuperscript{110} See \textbf{N.D. CENT. CODE} § 9-08-05; \textbf{OKLA. STAT.} tit. 15, § 216; \textbf{MONT. CODE ANN.} § 18-1-403 (1955) (as amended 2009) (“Every stipulation or condition in a contract by which any party is restricted from enforcing the party’s rights under the provisions of this part is void.”); \textbf{IDAHO CODE ANN.} § 29-110(1) (“Every stipulation or condition in a contract, by
expressly enforceable in New York by statute where New York law is the chosen law of the contract, the contract relates to a transaction of not less than one million dollars, and the contract includes a provision for the submission to the jurisdiction of the New York courts.\footnote{111} Delaware also provides that an action may be maintained in Delaware arising out of a contract where a Delaware choice of law provision has been included in the contract and the contract involves at least $100,000.\footnote{112}

Further, the parties should understand that a choice of forum provision is in effect an agreement to submit to personal jurisdiction of the court, but that a federal court must still find subject matter jurisdiction based on either a federal question or diversity jurisdiction in cases between citizens of separate states.\footnote{113} Further, process must be served correctly even though the parties have agreed to submit to the jurisdiction of a particular court.

Consider the following sample provision.

Sample 7.2: Choice of Forum Provision

\begin{verbatim}
S7.2 FORUM; PERSONAL JURISDICTION. ANY LEGAL ACTION OR PROCEEDING [(WHETHER IN CONTRACT, TORT, EQUITY, OR OTHERWISE)] ARISING UNDER [OR RELATING TO] THIS AGREEMENT, THE TRANSACTIONS CONTEMPLATED BY THIS AGREEMENT, [OR THE RELATIONSHIP OF THE PARTIES], [SHALL][MAY] BE BROUGHT OR OTHERWISE COMMENCED IN ANY STATE OR FEDERAL COURT LOCATED IN [CITY OR COUNTY, STATE]. EACH PARTY (A) EXPRESSLY AND IRREVOCABLY CONSENTS AND SUBMITS TO THE [EXCLUSIVE][NON-EXCLUSIVE] JURISDICTION OF EACH STATE AND FEDERAL COURT LOCATED IN [CITY OR COUNTY, STATE] (AND EACH APPELLATE COURT THEREOF) IN CONNECTION WITH ANY SUCH LEGAL ACTION OR PROCEEDING, (B) AGREES THAT EACH STATE AND FEDERAL COURT LOCATED IN [CITY OR COUNTY, STATE] IS A CONVENIENT FORUM; AND (C) HEREBY WAIVES, TO THE EXTENT PERMITTED BY LAW, AND AGREES NOT TO ASSERT (BY WAY OF MOTION, AS A DEFENSE OR OTHERWISE), IN ANY SUCH LEGAL ACTION OR PROCEEDING, ANY CLAIM OR OBJECTION THAT (I) SUCH PARTY IS NOT SUBJECT PERSONALLY TO THE JURISDICTION OF SUCH COURT; (II) SUCH ACTION OR PROCEEDING HAS BEEN BROUGHT IN AN INCONVENIENT FORUM; OR (III) VENUE OF SUCH ACTION OR PROCEEDING IS
\end{verbatim}

which any party thereto is restricted from enforcing his rights under the contract in Idaho tribunals … is void as it is against the public policy of Idaho.”).

\footnote{111} N.Y. GEN. OBLIG. LAW § 5-1402 (Consol. 1984).
\footnote{112} DEL. CODE ANN. tit. 6, § 2708 (current through 2013).
\footnote{113} U.S. CONST. art. III, § 2.
IMPROPER. [EACH PARTY AGREES THAT THE EXCLUSIVE
CHOICE OF FORUM SET FORTH IN THIS SECTION DOES NOT
PROHIBIT THE ENFORCEMENT OF ANY JUDGMENT OBTAINED IN
THAT FORUM IN ANY APPROPRIATE FORUM.] [EACH PARTY
IRREVOCABLY CONSENTS TO SERVICE OF PROCESS BY
DELIVERY OF A COPY OF THE PROCESS BY [NATIONALLY]
[INTERNATIONALLY] RECOGNIZED OVERNIGHT COURIER OR BY
REGISTERED OR CERTIFIED MAIL (RETURN-RECEIPT
REQUESTED), POSTAGE PREPAID, PURSUANT TO THE NOTICE
PROVISIONS IN SECTION ___.]

Drafting Considerations:

- The text of Sample S7.2 is presented in all caps because courts often
  view the forum selection clause as subject to fundamental fairness,
  unconscionability, and similar arguments.

- The first sentence of Sample S7.2 specifies where an action or
  proceeding may (or shall) be brought by a party in its capacity as a
  plaintiff. In contrast, the second sentence addresses a party in its
  capacity as a defendant, whereby the party consents and submits to
  the personal jurisdiction of the selected courts. If the client desires to
  avoid federal court, then an exclusive jurisdiction provision limited
  to state courts should be used coupled with a promise not to attempt
  to remove a case to federal court.

- Similar to the choice of law provision, the choice of forum provision
  is broadly drafted to address torts and other disputes that may arise
  out of the relationship of the parties. In any case, the choice of forum
  provision should be consistent with the governing law provision.

- Sample S7.2 provides alternative language for both exclusive and
  non-exclusive jurisdiction. Exclusive jurisdiction may be more
  favorable to the party that is more likely to be a defendant or that
  requires certainty. Non-exclusive jurisdiction may be more favorable
  to a party that desires alternatives in the event of a dispute, especially
  as it may be difficult to determine in advance the advantages of a
  particular jurisdiction over another.

- In designating the specific courts in the provision, the drafter may
  wish to provide for more specificity (e.g., “the United States District
  Court for the District of New Mexico”) rather than designating
  federal and state courts in a particular location. Before selecting a
  particular jurisdiction, at least ensure your client is registered to do
  business in that jurisdiction; otherwise, it may be denied the right to
  bring or defend a suit in that jurisdiction.

- For contracts that may involve large dollar amounts, extensive risk,
  or high potential liability, consult with trial counsel as to the
favorability of the selected forum (and the provision as a whole) to understand the costs and benefits of litigating in the selected forum, which may include a home-court advantage for a party; the speed at which certain courts process their case-loads; the temperament of the courts; popular and political views of the client or industry in the location of the courts; and the qualification of the parties to do business in the selected forum to ensure access to the courts.

- Given the requirements for federal subject matter jurisdiction, the forum selection clause should never provide for the selection of only federal courts.
- Because some courts may still refuse to enforce a choice of forum provision if the forum is inconvenient to a party, Sample S7.2 contains both an agreement that the forum is convenient and a waiver by the parties of any claim that the forum is inconvenient.
- The language in the first set of brackets is to address a potential argument that a judgment in the selected jurisdiction is not enforceable in another jurisdiction.
- The language in the second set of brackets is to avoid an argument that process is not served correctly. Although the parties may specify that process may be given pursuant to the general notice provision, a simple reference to the notice provision without reference to the type of notice may allow notice by email or fax. Assuming counsel would rather not have process delivered by email or fax, Sample S7.2 specifies process must be given by certified or registered mail or by overnight courier.

8. WAIVER OF JURY TRIAL

The right to a jury trial in civil actions brought in the federal courts arises under the Seventh Amendment to the U.S. Constitution. Although the Seventh Amendment does not apply to the states, most state constitutions also guarantee the right to jury trial in civil cases.

Some reasons a client may prefer to waive a jury trial include (a) the sense that juries tend to disfavor large companies or certain industries, (b) concerns over the ability of jurors to comprehend complex technical issues to come to just result, (c) a sense that jury trials are more unpredictable, (d) that jury trials may cost more to litigate and take more time. A client might prefer a jury trial if it believes a jury will view it more favorably than the other party.

There is a presumption against waiving the constitutional right to a jury trial unless the waiver is made knowingly, voluntarily, and intelligently.114

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In most states, however, a jury trial may be validly waived by contract.\textsuperscript{115} Georgia is an exception, where the Georgia Supreme Court has held that pre-litigation contractual jury trial waivers are not provided by the state constitution or code, and therefore are not enforceable.\textsuperscript{116} Other circumstances where jury trial waivers have been found to be unenforceable include unconscionability, fraud, or vagueness.\textsuperscript{117} In these circumstances the relative strength of the parties’ bargaining power may be examined by the court.

Consider the following sample jury trial waiver provision.

Sample 8.1: Waiver of Jury Trial Provision

S8.1 WAIVER OF RIGHT TO JURY TRIAL. EACH PARTY, TO THE EXTENT PERMITTED BY LAW, KNOWINGLY, VOLUNTARILY, AND INTENTIONALLY WAIVES ITS RIGHT TO A JURY TRIAL IN ANY ACTION OR PROCEEDING [(WHETHER IN CONTRACT, TORT, EQUITY, OR OTHERWISE)] ARISING UNDER [OR RELATING TO] THIS AGREEMENT, THE TRANSACTIONS CONTEMPLATED BY THIS AGREEMENT, [OR THE RELATIONSHIP OF THE PARTIES].

Drafting Considerations:

- Sample S8.1 focuses on the knowing, voluntary, and intentional waiver that is a prerequisite to overcoming the presumption against a waiver. For the same reason, the provision is included in all caps so that it is conspicuous and stands out from other provisions in the contract.
- The provision includes the qualification “to the extent permitted by law” to save the clause in the event that it is held to be unenforceable as to certain types of claims but enforceable as to others.
- Similar to the sample forum selection provision, Sample S8.1 broadly applies to actions or proceedings “arising under or relating to” not only the contract, but the transactions contemplated by the contract and the relationship of the parties to include tort or other types of claims that may not strictly be contract claims but that arise because of the contractual relationship.
- If the relative strength of bargaining power of the parties is an issue but the other side has been represented by counsel, consider


\textsuperscript{116} See Bank S., N.A. v. Howard, 444 S.E.2d 799, 800 (Ga. 1994).

\textsuperscript{117} See Zitter, \textit{supra} note 115.
including a sentence to the effect that “each Party makes this waiver after discussion and consideration of this waiver with its attorney.” Also consider placing the jury trial waiver on the signature page or having the other party initial the waiver.\textsuperscript{118}

9. \textbf{TIME IS OF THE ESSENCE}

Time is of the essence means that performance by A Corp. is essential to enable A Corp. to require performance from B Corp. It does not mean that there is no action for breach absent such a provision.\textsuperscript{119} When a time is of the essence provision is specifically negotiated, essential to the bargain, and clearly relates to performance obligations that actually were contemplated as being covered by the provision, then the provision should be enforced.\textsuperscript{120} In some states, statutes provide that time is not of the essence unless expressly provided in the contract that it is.\textsuperscript{121} That said, “equity will refuse to enforce such a provision when to do so would be unconscionable or would give one party an unfair advantage over the other.”\textsuperscript{122}

Unfortunately, parties often include a time is of the essence provision without thinking about its meaning or which payment or performance obligations actually should be of the essence so as to give rise to a right to repudiate the contract. Thus a court may find that certain provisions are of the essence and other provisions are not. For example, if an agreement provides for a specific penalty for late payment, then a court likely will find that time is not of the essence as to the payment; otherwise, there is no reason for the penalty. Further, time is not of the essence with respect to performance obligations where no date is provided for performance. For example, in \textit{Williams v. Shamrock Oil \& Gas Co.}, the Texas Supreme Court held that the time is of essence provision applied to defendant’s obligation to drill and complete a well by a certain date but did not apply to plaintiff’s obligation to clear title, in part because no date was provided in the contract by which title was required to be cleared.\textsuperscript{123}

Consider the following sample provision:

\begin{center}
\textbf{Sample 9.1: Time is of the Essence Provision}
\end{center}

\textsuperscript{118} See \textit{STARK, supra} note 8, § 7.05[5].
\textsuperscript{119} See \textit{WILLISTON, supra} note 7, § 46.2.
\textsuperscript{120} See \textit{CORBIN, supra} note 3, § 37.3.
\textsuperscript{121} See, e.g., OKLA. STAT. ANN. tit. 15, § 174 (West 1910).
\textsuperscript{122} Elda Arnhold \& Byzantio, L.L.C. v. Ocean Atl. Woodland Corp., 284 F.3d 693, 700 (7th Cir. 2002) (quoting Sahadi v. Cont’l Ill. Nat. Bank \& Trust Co. of Chi., 706 F.2d 193, 197 (7th Cir. 1983)).
\textsuperscript{123} 95 S.W.2d 1292, 1295 (Tex. 1936).
Drafting Considerations:
• As discussed above, to have appropriate meaning, the time is of the essence provision should apply to specific obligations that have a time deadline. If possible the sections of the agreement where time actually is of the essence should be identified in the boilerplate provision.
• A more precise alternative to a time is of the essence provision in the “General” or “Miscellaneous” article of the contract is to include time is of the essence language in specific provisions of the contract where the parties actually have agreed that time is of the essence.

10. NOTICE

A contract often provides for numerous instances throughout the agreement where a party may be required to give a notice, make a demand, declare a default, or make another communication. While notice requirements may be sprinkled throughout the contract, the requirements for an effective notice usually are contained in a general notice provision that sets out the time, method, and address for the giving and receipt of notice. Such a notice provision may become critical under the contract should a dispute arise as to whether notice was proper and received.

For example, consider the case where A Corp. delivers a notice to B Corp. of breach, believing that it has triggered a cure period. B Corp. fails to cure the breach within the time required by the contract after notice. A Corp. then proceeds to terminate the contract, but B Corp. claims it never received the notice. While A Corp. argues that the giving of notice was sufficient, B Corp. claims that the cure period was never triggered because actual receipt is required.

The general rule is that notice given in accordance with a contract is sufficient regardless whether it results in actual notice.124 But where notice is required by the contract but nothing is said as to the manner of notice, then oral notice or another reasonable method likely will be sufficient.125 Some courts hold that actual notice is effective notice even though not in accordance with the strict terms of the contract.126

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124 See 58 AM. JUR. 2D Notice § 11.
Much like the mailbox rule (applicable to the formation of contracts), a notice provision is a risk-allocation mechanism. Under the mailbox rule, an acceptance is effective when the acceptance is dispatched in the mail (if the offer was made by mail and the offer does not prohibit acceptance by mail), even if the acceptance has not actually been received by the offeror and the offeror is unaware of the acceptance.127 Similarly, a notice may be deemed both given and received at a time specified in the notice provision, providing the sender with certainty and putting the risk on the recipient that a notice may not actually be received. Alternatively, the risk is on the sender where the notice provision specifies that notice is not considered received until actually received.

Consider the following sample provision.

Sample 10.1: Notice Provision

S10.1 Notice

(a) Any notice, demand, request, or other communication (a “Notice”) made or given by a Party under this Agreement must be made in writing and delivered either personally, by facsimile transmission, by electronic mail as an attachment in portable document format (.pdf) with read receipt requested, by nationally recognized overnight courier, or by registered or certified mail (return-receipt requested), postage prepaid, to the other Party at its address as follows:

If to [Party A]:

[Address]

Attention: [Party A]

Facsimile: [Facsimile]

Email: [Email]

With a copy to: [Counsel for Party A]

[Address]

Attention: [Counsel for Party A]

Facsimile: [Facsimile]

Email: [Email]

127 See RESTATEMENT, supra note 2, § 63 cmt. a.
If to [Party B]:

____________________
____________________
Attention: _______________
Facsimile: _______________
[Email: __________________]

With a copy to: [Counsel for Party B]

____________________
____________________
Attention: _______________
Facsimile: _______________
[Email: __________________]

(b) A Notice is effective only if it complies with Section S10.1(a) and is deemed to have been delivered and received. A Notice is deemed to have been delivered and received: (i) in the case of personal delivery, on the date of delivery; (ii) in the case of facsimile transmission, on the date electronic confirmation of receipt has been received by the transmitting Party (as evidenced by the transmitting Party’s facsimile machine) if the confirmation is received before 5:00 p.m. ([City] time) on a Business Day (otherwise on the next Business Day after the confirmation is received); (iii) in the case of transmission by electronic mail as an attachment in portable document format (.pdf), on the date electronic confirmation of receipt is received by the transmitting Party (as evidenced by the transmitting Party’s electronic mail server or system), if sent before 5:00 p.m. ([City] time) on a Business Day (otherwise on the next Business Day after the confirmation is received); (iv) in the case of a [nationally][internationally] recognized overnight courier in circumstances under which the courier guarantees next Business Day delivery, on the next Business Day after the date sent; and (v) in the case of mailing by registered or certified mail (return-receipt requested), on the third Business Day following the date posted with postage prepaid.

(c) [In the case of facsimile transmission [or transmission by electronic mail], the sending Party shall promptly deliver a copy of the Notice by [nationally][internationally] recognized overnight courier or by registered or certified mail (return-receipt requested), postage prepaid; provided, however, that the delivery or failure to deliver such a copy shall not affect the effectiveness or the time of delivery or receipt of the Notice.]

(d) A Party may change its address for Notices by providing Notice to the other Party in accordance with this Section. A Party’s counsel may provide Notice on behalf of such Party in accordance with this Section. The rejection or refusal of a Notice shall not affect the effectiveness or the time of delivery or receipt of the Notice.
Drafting Considerations:

• Note that Sample S10.1 is not drafted as a covenant that might give rise to damages for breach. If drafted as a covenant, it would start with language such as the following: “A party shall make or give any notice.” Rather, the requirements in the provision are drafted as conditions to the effectiveness of a notice.

• So as to avoid any ambiguity, Sample S10.1 defines “Notice” broadly to include demands, requests, and other communications. If such an approach is taken, the capitalized term “Notice” should be used, as appropriate, throughout the contract.

• As is customary, the first requirement in subsection (a) of Sample S10.1 is that the notice be in writing. If the contract provides for oral notice in a particular provision, then that provision should be carved out of the general notice provision.

• To provide for authentication, consider adding a provision that the notice must be signed. See Part 12 of this paper for a discussion of electronic signatures and the “best evidence rule.”

• The second requirement in subsection (a) provides for an exclusive list of acceptable means to deliver a notice. Compare this with the following provision which does not provide for an exclusive method:

> All notices and other communications under this Agreement shall be in writing and shall be deemed given if (a) delivered personally or (b) sent by . . . .

• Out of concern for the recipient, practitioners still disagree as to whether email should be a permissible method for notice because a party can quickly and easily shoot off an email that goes unnoticed among the sometimes hundreds of other emails received by clients and lawyers on a daily basis. Sample S10.1 allows for email delivery and attempts to address the concern for uncertainty by requiring both a read receipt and that the notice be delivered as an attachment in .pdf.

• In the address line for a recipient, an “attention” line should be added to avoid the notice being shuffled around an office. Consider specifying a title, such as “Vice President, Land” rather than a specific person in case the person moves on to another job.

• Email and fax allow for instant delivery, but raise the question of whether a notice delivered by email or fax just before midnight is effective. Sample S10.1 addresses this concern by requiring that fax and email be delivered by 5:00 p.m. on a business day or not be deemed delivered and received until the next business day. Note also

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128 See id. § 134 (“[t]he signature to a memorandum may be any symbol made or adopted with an intention, actual or apparent, to authenticate the writing as that of the signer”).

129 STARK, supra note 8, § 15.11[3].
that while the sample provision requires a read receipt, the effectiveness of the delivery is not based on a read receipt but on confirmation of receipt from the server to avoid the situation where a recipient refuses to open an email for fear of what it might say.

- Subsection (b) provides that a notice is only effective if it complies with subsection (a) and is deemed delivered and received as specified under subsection (b). Sample S10.1 makes the deemed date of delivery and the deemed date of receipt the same to avoid problems that may pop up in other provisions of the contract that require notice. For example, consider a provision in a contract that requires a non-defaulting party to “give notice of a default” and may allow the non-defaulting party to cure the default “within 30 days after the date of the notice.” This provision does not specify whether the giving or receiving of the notice triggers the 30-day cure period.

- Counsel may insist that a notice by fax or email be followed by a confirmation copy by some other method, raising the questions of (1) whether the fax or email notice was effective without the confirmation copy and (2) whether the date of receipt is the date that the fax or email is received or the date that the confirmation copy is received. Subsection (c) provides for the delivery of confirmation copies but that the delivery or failure to deliver a confirmation copy does not affect the effectiveness or time of delivery of the notice.

- Although most lawyers assume they have the right to provide notice on behalf of their client, to avoid a dispute, you may specifically authorize counsel to provide notice as set forth in subsection (d).

- Subsection (d) also specifies that the rejection or refusal of a notice does not affect its effectiveness to avoid the problem of the unwilling recipient.

11. THIRD PARTY BENEFICIARIES

If X Corp. makes a contract with Y Corp. and in the contract X Corp. agrees to render performance for the benefit of Z Corp., can Z Corp. sue X Corp. to enforce the performance obligation? The answer likely depends on whether the beneficiary is an intended or incidental beneficiary of the promise. A promise in a contract to an intended beneficiary creates a duty in the promisor and allows the intended beneficiary to enforce the duty.

“Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (a) the performance of the promise will satisfy an

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130 See CORBIN, supra note 3, § 41.1.
131 RESTATEMENT, supra note 2, § 304.
obligation of the promisee to pay money to the beneficiary; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.” An incidental beneficiary is simply a beneficiary who is not an intended beneficiary.

Intended beneficiaries are subject to contract provisions and defenses, such as the unenforceability of the contract, impracticability, public policy, conditions to performance, and other terms of the contract, but the beneficiary is not subject to other claims and defenses of the promisor against the promisee unless the contract so provides. For example, an Illustration in the Restatement provides:

B and his surety S contract with A, a city, to grade streets and to pay all laborers and materialmen on the job. The contract provides that any laborer working under the contract shall be entitled to sue and recover from S. A extends B’s time for performance without S’s consent. In a suit by C, a laborer, against S, the extension of time is not a defense.

Similarly, a duty to an intended beneficiary may be varied by amendment, modification, or release by the parties to the contract, but not if the beneficiary has materially changed its position in reliance on the promises or assented to the promise before the change.

Third party beneficiaries receive special treatment under the UCC as to warranties relating to the sale of goods. In fact, the drafters of the UCC offer three alternatives for state legislatures that produce different outcomes. Under each alternative, the UCC exempts certain third parties from any requirement of privity as follows: (1) Alternative A allows family members, household members, and house guests to recover for personal injury without privity; (2) Alternative B allows anyone reasonably expected to use, consume, or be affected by the product to recover for personal injury without privity; and (3) Alternative C allows anyone reasonably expected to use, consume, or be affected by the product to recover for both personal injury and property damage. The seller can only limit claims for property damage under Alternative C but may not limit claims for injury under any of the alternatives.

132 Id. § 302(1).
133 Id. § 302(2).
134 See id. § 309.
135 Id. § 309 ill. 8.
136 See id. § 311(3).
137 U.C.C. § 2-318. A majority of states have adopted Alternative A, six states have adopted Alternative B; eight states have adopted Alternative C; and eight states have not enacted any of the alternatives, three of which, California, Louisiana, and Texas, have not adopted any statute regarding privity, and the remaining five of which have adopted provisions similar to Alternative C. See Jennifer Camero, Two Too Many: Third Party Beneficiaries of Warranties Under the Uniform Commercial Code, 86 ST. JOHN’S L. REV. 1, 10–11 (2012).
11.1 No Third Party Beneficiaries

As the Restatement provides that the parties may negate by agreement the rules as to who constitutes an intended beneficiary, the best method to avoid surprise third party beneficiaries is to specifically state there are none.

Consider the following sample provision:

Sample 11.1: No Third Party Beneficiaries Provision

S11.1 No Third Party Beneficiaries. No Person other than the Parties and their respective [permitted] successors and permitted assigns has any rights or remedies under this Agreement or is an intended beneficiary of this Agreement.

Drafting Considerations:

• As discussed above, the Restatement allows the parties to a contract to agree that there are no intended third party beneficiaries. Such a provision should be effective.

11.2 When There Are Third Party Beneficiaries

Drafting for intended beneficiaries is more difficult. Consider the following provision:

Sample 11.2: Third Party Beneficiaries Provision

S11.2 Third Party Beneficiaries. [This Agreement confers rights and remedies upon [______________] as set forth in Section ____, each of which is an express and intended third-party beneficiary of this Agreement.] No other Person other than the Parties [and ______________] and their respective [permitted] successors and permitted assigns has any rights or remedies under this Agreement or is an intended beneficiary of this Agreement. Notwithstanding the foregoing, the Parties reserve the right to amend, modify, terminate, supplement, or waive any provision of this Agreement or this entire Agreement without the consent or approval of __________. In exercising any rights under this Agreement, each third party beneficiary shall be bound by the provisions of this Agreement, including the provisions of Article [__].
Drafting Considerations:

- Third party beneficiaries should be identified by name or specific category (and preferably by use of a defined term such as “Indemnitee”). A sentence should then be added that there are no other intended third party beneficiaries.

- When intended third party beneficiaries have been identified, carefully include a provision that excludes the right of any third party beneficiary to consent or approve any amendment, modification, termination, supplement, or waiver of any provision of the consent.138

12. COUNTERPARTS

Counterparts are used today by lawyers in commercial transactions to facilitate the ease of execution in multiple locations. A contract can be signed by one party in Colorado and another party in Texas. That was not always the rationale. At one time, counterparts were used to prevent fraud so that each party had a copy of a bi-lateral deed referred to as an indenture.139

The Federal Rules of Evidence define “‘original’ of a writing or recording [as] the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it...”140 and require “[a]n original writing ... in order to prove its content unless these rules or a federal statute provides otherwise.”141 Known as the “best evidence rule,” based on the accuracy of modern reproduction techniques the requirement to produce an original is now subject to a number of broad exceptions if the original is unavailable.142

The Uniform Electronic Transactions Act (UETA) has been adopted by all states other than Illinois, New York, and Washington, and each of these

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138 Consider the possibility that your client (the seller) and the buyer under a purchase and sale agreement settle millions of dollars in indemnification claims. A member of the class of indemnified persons then claims that the settlement agreement releasing all indemnification claims is an amendment and waiver of rights under the purchase agreement without the required consent of that person as an intended third party beneficiary who had justifiably relied on the indemnification provision. Fortunately for your client, the purchase agreement you drafted contains a robust third party beneficiaries provision that eliminates any requirement for the consent.

139 2 WILLIAM BLACKSTONE, COMMENTARIES *295295 (“[i]f a deed be made by more parties than one, there ought to be regularly as many copies of it as there are parties, and each should be cut or indented (formerly in acute angles instar dentium (like teeth), like the teeth of a saw, but at present in a waving line) on the tope or side, to tally or correspond with the other; which so deed so made, is called an indenture”).

140 FED. R. EVID. 1001(d).

141 Id. at 1002.

142 See MARTIN M. MICHAEL, STEPHEN A. SALTZBURG & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL § 1002.02 (10th ed. 2011).
states have statutes pertaining to electronic transactions. UETA applies to transactions related to business, commercial, and governmental matters, including real property conveyances (such as an oil and gas lease), at least as between the parties to the transaction. It provides that signatures in electronic form may not be denied legal effect and contracts may not be denied legal effect or enforceability solely because an electronic record was used in its formation. If UETA does not apply, electronic contracts and signatures expressly are made valid under the federal Electronic Signatures in Global and National Commerce Act (E-SIGN) unless E-SIGN is superseded by state law. E-SIGN is superseded by state law for consumer transactions under the UCC.

Consider the following sample provision:

Sample 12.1: Counterparts; Effectiveness of Agreement Provision

S12.1 Counterparts; Effectiveness of Agreement. This Agreement may be executed in one or more counterparts, each of which when executed and delivered shall be an original, and all of which when executed and delivered shall constitute one and the same instrument. This Agreement must be manually executed, but the exchange of copies of this Agreement and of manually executed signature pages by facsimile or by electronic mail as an attachment in portable document format (.pdf) to the addresses provided in Section __ [Notice provision] shall constitute effective delivery of this Agreement as to the Parties and may be used in lieu of the original Agreement for all purposes. [Each Party that delivers an executed counterpart signature page by facsimile or by electronic mail shall promptly thereafter deliver an original executed counterpart signature page to the other Party; provided, however, that the failure to do so shall not affect the validity, enforceability, or binding effect of this Agreement.] This Agreement


144 UNIFORM ELECTRONIC TRANSACTIONS ACT § 3 cmts. 1, 3 (1999). Effectiveness as to third parties would still be governed by state recording statutes. Id. cmt. 3.

145 Id. § 7.

146 See Electronic Signatures in Global and National Commerce Act (E-SIGN), Pub. L. No. 106-229, § 101(a) (codified at 15 U.S.C. § 7001a (2000)) (“Notwithstanding any statute, regulation, or other rule of law . . . , with respect to any transaction in or affecting interstate or foreign commerce – (1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and (2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.”).

147 See id. § 102(a) (codified at 15 U.S.C. 7002a).

148 U.C.C. § 1-108.
shall not be effective until both Parties have executed and delivered a counterpart of this Agreement.

Drafting Considerations:

• This first sentence is nothing more than a restatement of the Federal Rules of Evidence that define an original to include any counterpart to satisfy the Best Evidence Rule. Note the word “counterpart” is not defined, and could constitute either a duplicate of the entire agreement or the signature page only.

• The second sentence allows electronic delivery but requires manual execution in light of UETA. If the parties wish to use electronic signatures, then consider specifying the method of electronic signature to avoid the imprecise intent standard under UETA.

• Regarding electronic delivery, Sample S12.1 specifies either facsimile or portable document format and also specifies the recipient address based on the notice provision. UETA provides that if the parties have adopted a procedure to detect changes or errors in an electronic document and one party has conformed to the procedure but the other party has not, then the conforming party may avoid the effect of the changed or erroneous electronic record. Providing specifics as to delivery methods may satisfy the UETA requirement for a procedure and is more certain in any event.

• The third sentence of Sample S12.1 requires the parties to deliver original signature pages if the parties desire to have originals. The provision carefully specifies that the receipt of an original does not affect the enforceability of the agreement as a court could read the requirement as a condition to effectiveness rather than a covenant.

• The last sentence of Sample S12.1 provides when the contract actually is effective: upon both execution and delivery. The parties could agree that the contract is effective when executed, but the absence of a delivery requirement invites a dispute when a party is mistaken as to the correct version of the document. Absent a condition as to the effectiveness of a contract, a court examines the factual circumstances under law related to offer and acceptance.

13. INTERPRETATION PROVISIONS

13.1 Negation of Contra Proferentem - Rule of Interpretation Against Drafter

A court often will adopt a meaning of a contract provision that favors the non-drafting party in a technique known as contra proferentem. The

149 UNIFORM ELECTRONIC TRANSACTIONS ACT § 10(1).
rule only applies after all other interpretation guides have been applied and
the court is left with two reasonable conflicting meanings. Courts
generally will not strain to apply the rule to find an unreasonable meaning,
and may not apply the rule when both parties are sophisticated. If it is
difficult to determine the drafter of the specific words of the contract, the
rule will not apply. Such is the case when the parties exchange and rewrite
numerous drafts. Corbin explains that the rule is not really one of
interpretation, but more appropriately thought of as a policy rule to favor
the underdog. Accordingly, it may not apply when the parties have equal
bargaining power or both parties are sophisticated. It is not clear whether an anti-\textit{contra proferentem} clause, a clause that
attempts to negate the rule, makes much difference. In a recent case,
\textit{McMullin v. McMullin}, the defendant argued that the \textit{contra proferentem}
doctrine should not be applied against him because the contract contained a
provision that “no provision [of this agreement] shall be interpreted against
any party because that party or their legal representative drafted the
provisions hereof.” A case involving the division of property in
settlement of a divorce, the court held that the ambiguity in question was
intentionally introduced into the agreement by the defendant’s counsel to
defraud the unrepresented plaintiff. The court states: “One must assume
that the purpose of such a clause is to address unintentional ambiguities
present in a contract. However, to allow this type of clause to effectively
control the Court’s interpretation of a contract in situations where a party
has intentionally introduced an ambiguity into a contract would be
unconscionable and/or run counter to public policy.”

Although \textit{McMullin} involved an intentional ambiguity, even when the
only reasonable meaning is the meaning advanced by the drafting party (so
that the rule is inapplicable), the court may refuse to adopt the meaning
advanced by the drafting party if the court determines it to be
unconscionable.

Consider the following sample provision.

\begin{center}
\textbf{Sample 13.1: Construction Provision}
\end{center}

\footnote{150} See U.S. Naval Institute v. Charter Commc’ns, Inc., 875 F.2d 1044 (2d Cir. 1989) (“if, after all of the other guides to interpretation have been exhausted and the court concludes that there remain two reasonable interpretations of the contract, … the court should as a policy matter, assuming it is clear that the parties have indeed attempted to enter into a contract, choose the interpretation that is adverse to the party that drafted the contract”).

\footnote{151} See CORBIN, supra note 3, § 24.27.

\footnote{152} 338 S.W.3d 315, 322 (Ky. Ct. App. 2011).

\footnote{153} Id.

\footnote{154} See U.C.C. § 2-302; RESTATEMENT, supra note 2, § 208.
S13.1 Construction. The Parties have participated jointly in the negotiation and drafting of this Agreement. In the event an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by the Parties and no presumption or burden of proof shall arise favoring or disfavoring any Party by virtue of the authorship of any of the provisions of this Agreement.

Drafting Considerations:

• As discussed above, contra proferentem does not apply when the parties jointly draft an agreement. A provision such as Sample S13.1 is interesting, because if the statement in the first sentence (that the parties participated jointly in the negotiation and drafting of the agreement) is true, then the boilerplate provision probably is not needed. On the other hand, if one party drafts the entire contract, then the statement is not true and a provision that ultimately is determined to be ambiguous may be construed against the drafter regardless of the provision.

• A provision such as Sample S13.1 still is wise to include for the party responsible for the majority of the drafting because it at least reflects an intention not to apply the rule and may be upheld, at least in the case of unintentional ambiguities.

13.2 Import of Headings

Sample 13.2: Headings Provision

S13.2 Headings. Article, Section, and other subdivision headings contained in this Agreement are inserted for convenience only and shall not affect in any way the meaning or interpretation of this Agreement.

Drafting Considerations:

• Although courts usually do not give effect to a heading that conflicts with the actual language of the contract, courts may give weight to a heading to determine the intent of the parties in the event of an ambiguity.155 While arguments can be made that headings and captions should form part of the agreement, the author believes that because headings do not adequately summarize the text of

155 See, e.g., Neece v. A.A.A. Realty Co., 322 S.W.2d 597, 600 (Tex. 1959) (“[w]hile in certain cases, one must consider captions in order to ascertain the meaning and nature of a written instrument, it has been held that the greater weight must be given to the operative contractual clauses of the agreement …”). Notwithstanding this declaration, the court in Neece went on to admit parol evidence to attempt to resolve the ambiguity between the title of the contract, “Exclusive Listing Agreement,” and the contract provisions that did not appear to provide for an exclusive listing arrangement. Id. at 601–02.
contractual provisions, particularly long provisions, headings should not form a part of the contract.

**13.3 Other Common Interpretation Provisions**

Sample S13.3 below is the introductory language to an interpretation provision that ideally should be included in a contract after defined terms and before the remainder of the contract. Samples of clauses that may be included as part of Sample S13.3 are provided below.

Interpretation provisions are common in European contracts but less so in U.S. contracts. The author finds that using catch-all interpretation provisions in a contract greatly reduces the incidence and need for awkwardly-worded, legalese-laced language throughout the contract.

**Sample 13.3: Interpretation Provision**

S13.3 Interpretation. As used in this Agreement, except as otherwise expressly indicated in this Agreement or as the context may otherwise require:

**13.3.1 Including, Without Limitation**

**Sample 13.3.1: “Including, Without Limitation”**

( ) The words “include,” “includes” and “including” are deemed to be followed by “without limitation” whether or not they are in fact followed by such words or words of similar import.

**Drafting Considerations:**

- Lawyers often draft entire contracts using the words “including without limitation” to enumerate examples over and over until the document is almost unreadable. The “without limitation” language is added out of concern for the *ejusdem generis* doctrine, meaning that when general and specific provisions conflict, the specific governs over the general.\(^{156}\) Consider simply adding an interpretation provision such as Sample 13.3.1 that defines “including” as “including without limitation” once toward the beginning of the contract. Not only will the contract be more readable, but anxiety should be reduced that the words “without limitation” was inadvertently omitted in the twentieth use of the word “including.”

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\(^{156}\) Williston, *supra* note 7, § 32:10.
13.3.2 And and Or

Sample 13.3.2: “And” and “Or”

(_) The word “or” is not exclusive.

Drafting Considerations:

• Professor Tina Stark has commented: “Grade school grammatical rules often state as axioms that and is conjunctive and inclusive, meaning that it joins two or more things, and that or is disjunctive or exclusive, meaning that it establishes alternatives between two or more things. . . . But contract drafting is rarely so simple. Both and and or can be used in ways that your sixth-grade English teacher never mentioned.”157 Consider Sample S13.3.2 to avoid a conclusion that the following language allows only employees or contractors (but not both) to drill a well: “The Contractor may use its employees or subcontractors to drill the well.”

13.3.3 Internal Cross References

Sample 13.3.3: Internal Cross References

(_) References to an “Article,” “Section,” “preamble,” “recital,” or any other subdivision, or to an “Appendix,” “Annex,” “Exhibit” or “Schedule” are to an article, section, preamble, recital, or subdivision of this Agreement, or to an appendix, annex, exhibit, or schedule to this Agreement.

Drafting Considerations:

• Although the provisions of Sample S13.3.3 may seem obvious, confusion often arises in complex contracts that incorporate by reference or refer to multiple other contracts or documents to define the rights and obligations of the parties. For example, assume a Purchase and Sale Agreement that makes reference to a separate Assignment and Assumption Agreement. Without this provision every internal reference to “Section 14” should be followed by “of this Agreement” to avoid a conflict with Section 14 of the Assignment and Assumption Agreement.

13.3.4 Internal References to the Agreement

Sample 13.4.3: Internal Reference to the Agreement

(_ ) The words “this Agreement,” “hereby,” “hereof,” “herein,” “hereunder” and comparable words refer to all of this Agreement, including the Appendices, Annexes, Exhibits and Schedules to this Agreement, and not to any particular Article, Section, preamble, recital or other subdivision of this Agreement or Appendix, Exhibit or Schedule to this Agreement.

Drafting Considerations:

• Modern legal drafters should attempt to avoid legal jargon such as “herein” and “hereunder” as much as possible. But sometimes it is simply easier to draft using such common legal shorthand to avoid having the words “this Agreement” repeated hundreds of times in a document.

• Use of a word such as “herein” is dangerous, however. It may be unclear whether the “herein” reference applies to the particular section where the word appears or to the entire agreement, creating an ambiguity. Consider for example a provision contained in Section 2.1 of a purchase and sale agreement that states: “Except as otherwise provided herein, Seller shall sell the Assets to Purchaser.” Section 2.1 then goes on to list a number of qualifications to the requirement for the Seller to sell the assets. Other provisions of the contract, however, also contain provisions that qualify Seller’s requirement to sell the Assets. Does the drafter intend the use of the word “herein” to refer just to Section 2.1 or to the entire Agreement? Does the context matter? To avoid these ambiguities, consider including an interpretation provision similar to Sample S13.3.4.

13.3.5 Gender Pronouns Are Neutral

Sample 13.3.5: Gender Neutral Provision

(_ ) Any pronoun in masculine, feminine, or neuter form includes any other gender or the neuter form.

Drafting Considerations:

• Boilerplate guru Professor Stark advises to avoid using a gender boilerplate clause because it encourages lazy drafting. Her approach would be to use gender neutral drafting, and revise a sentence such as “Employee acknowledges during the course of his employment” to “Employee acknowledges during the course of Employee’s
employment.” 158 While the author agrees with her suggested best practice, it ignores that transactional lawyers often must start with another lawyer’s draft or may not have the luxury to use billable hours to completely revise a form at the last minute to incorporate gender neutral drafting.

13.3.6 Singular and Plural Words

Sample 13.3.6: Singular and Plural Provision

( ) Any word in the singular form includes the plural and vice versa.

Drafting Considerations:
• Professor Stark has similar concerns with a singular/plural provision as she has with a gender neutral provision, that it encourages sloppy drafting. More important, she also points out that a “singular includes the plural” boilerplate provision can create unintended ambiguities. For example, consider a provision that provides for the purchase of 10 identical machines and allows the buyer to return a machine if the buyer finds a defect. 159 If the singular “machine” includes the plural is the buyer allowed to return all of the machines if it finds a defect in one machine or only the machine with the defect? Although an incredibly common provision, in most cases, careful drafting should eliminate the need for a provision such as Sample S13.3.6.

13.3.7 References to Agreements

Sample 13.3.7: References to Agreements

( ) References to any agreement or other document are to such agreement or document as amended, modified, supplemented, and restated now or from time to time after the date of this Agreement with the written consent or approval of both Parties.

Drafting Considerations:
• Often a contract defines the “Agreement” in the introductory paragraph with language such as, “This Consulting Services Agreement (this “Agreement”).” Section 1.1 of this hypothetical consulting agreement might then begin, “Except as otherwise

158 See STARK, supra note 8, § 20.02.
159 See id. § 20.03.
provided in this Agreement . . . .” Now assume that shortly after the client enters into “this Agreement,” it is amended in a manner that changes Section 1.1. Does the reference in Section 1.1 to “this Agreement” refer to the original agreement as amended? Not according to the defined term in the introductory paragraph. Consider a provision such as Sample S13.3.7 to fix this problem.

• Sample S13.3.7 is drafted broadly to refer to other documents as including amendments and other modifications. This makes sense for documents that are under the control of the parties and amended by mutual agreement. The written consent requirement has been added to avoid a surprise when a document that is incorporated by reference is modified without the approval of the other party.

13.3.8 References to Laws

Sample 13.3.8: References to Laws

( ) References to any Law are to it as amended, modified, supplemented, and restated now or from time to time after the date of this Agreement, and to any corresponding provisions of successor Laws; and, unless the context requires otherwise, any reference to any statute shall be deemed also to refer to all rules and regulations promulgated under the statute.

Drafting Considerations:

• This provision is designed to avoid an argument that a covenant that requires compliance with one or more laws only requires compliance with that law as in effect on the effective date of the contract. You should only include this provision if you are comfortable with the references in the contract to laws and if the other party has the burden of compliance obligations.

• This provision should also raise a concern for a client that has to remake representations as of a future date. The client may find itself having to represent it is compliance with a law that it never contemplated as of the date of the contract.

• The last provision states that a reference to a statute includes regulations promulgated under the statute which should generally reflect the intent of the parties. Again, be careful to consider each statute actually referenced in the contract before including this provision.
13.3.9 References to a Person

Sample 13.3.9: References to a Person

(_) References to any Person include such Person’s respective [permitted] successors and permitted assigns [and in the case of a natural person, such person’s heirs, estate, and personal representatives].

Drafting Considerations:

• A provision such as Sample S13.3.9 probably is unnecessary if the anti-assignment and successors and assigns provisions are properly drafted. It is included to avoid the annoying practice of defining a party in the introductory paragraph such as “XCorp., and its respective successors and permitted assigns (“Owner”).”

13.3.10 References to Days

Sample 13.3.10: References to Days

(_) References to a “day” or number of “days” (without the explicit qualification of “Business”) refer to a calendar day or number of calendar days. If any action or notice is to be taken or given on or by a particular calendar day, and the calendar day is not a Business Day, then the action or notice may be taken or given on the next succeeding Business Day.

Drafting Considerations:

• Sample S13.3.10 first assumes that the term “Business Day” is defined in the contract. It is included to clarify the counting of days, which may become the issue of a dispute for breach of a performance obligation or for the effectiveness of a notice. The second sentence clarifies consistent with common practice that the expiration of time periods for the completion of performance obligations or the providing of notice may be completed on the next Business Day if the expiration of the period falls on a day that is not a Business Day.

13.3.11 Accounting Terms

Sample 13.3.11: Accounting Terms

(_) Any financial or accounting term that is not otherwise defined in this Agreement shall have the meaning given such term under United States generally accepted accounting principles.
Drafting Considerations:

- Although sometimes the parties desire to define accounting terms, Sample S13.3.11 provides for a default of United States generally accepted accounting principles (GAAP) when accounting terms are not defined. For example, assume a contract that provides for payments based on a percentage of certain revenues. If the intention of the parties is to use a generally accepted accounting principles definition of revenue, then revenue will be recorded and counted when it is earned and a receivable is recorded rather than when the revenue is collected. Attorneys should verify with their clients whether accounting terms should be defined based on US GAAP or another measure such as International Financing Reporting Standards.

14. A FEW WORDS ON FORCE MAJEURE

In general, some of the issues to consider when drafting a force majeure clause include (a) the strict construction and narrow reading by courts of force majeure provisions, (b) the requirement of unforeseeability to excuse performance for force majeure, (c) the burden of proof on the claiming party to show force majeure, (d) whether a force majeure clause is applicable to covenants, conditions, limitations, or all of the above (and the related issue of whether force majeure acts to save a contract or lease from termination or only excuses the performance under a covenant), (e) the provision for payment during the continuance of force majeure, and whether the failure to make such payment operates as the breach of a condition giving rise to a right of termination or the breach only of a covenant giving rise to contract damages, (f) the giving of notice upon the occurrence of a force majeure and after the cessation of the force majeure and the effect of the failure to give such a notice, (g) time for the resumption of performance after the cessation of the force majeure and the effect of the failure to timely resume performance, (h) whether to include language that the force majeure event must be beyond the control of the claiming party, and (i) whether to include language that a list of force majeure events is not to be considered exclusive to avoid application of the expressio unius est exclusio alterius doctrine (i.e., the expression of one thing is the exclusion of another).

While a detailed discussion of force majeure clauses would occupy an entire paper of its own, and is therefore beyond the scope of this paper, the topic has been addressed in a number of other articles and treatises, including a number of papers published by the Rocky Mountain Mineral Law Foundation.160

160 See, e.g., PATRICK H. MARTIN & BRUCE M. KRAMER, WILLIAMS & MEYERS, OIL AND GAS LAW § 683 (LexisNexis 2012); Salvatore V. Spalitta, “The Legal Aftermath of a
15. CLOSING THOUGHTS

The term “boilerplate” unfortunately leaves the impression that the various types of provisions discussed throughout this paper should not be negotiated or are somehow unimportant. How far such an impression is from the truth. This is not to say that a drafter should not start from form provisions. Form provisions may be helpful and timesaving, and may shed light on important legal issues and unexpected possibilities that should be carefully considered by the drafter. Attorneys should not wait, however, until the wee hours of the night before the execution date to consider these gotcha provisions, but should thoughtfully work through each provision toward minimizing risks to their client in the context of the particular transaction.

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