March 2024

Don't Skip the Boilerplate: Integration and Non-Reliance Clauses

This is the second installment in our series regarding boilerplate contract language. As noted in the first installment, the boilerplate language of an agreement may seem mundane, but it can either make or break a client's case, and having a better understanding of its meaning and importance is critical to clients and their counsel.

In today's column, we are taking a quick look at integration and non-reliance clauses. These provisions are quite common, but what do they mean and what is the significance of including (or omitting) them?

Let's start with the boilerplate integration clause, which usually reads something like this:

> "This Agreement constitutes the complete and entire agreement between the parties and supersedes any prior written or oral agreements or understandings with respect to the subject matter hereof."

Seems simple enough, right? The parties agree that any statements outside the four corners of the contract at hand must be disregarded. That is, any previously made representations regarding the contract's subject matter have no effect unless such representations are expressly repeated within the contract or are attached to it as an Exhibit. Once you consider what this really means, however, it's easy to see how this boilerplate could have serious unintended consequences.

Assume, for example, you learn that a client based a critical business decision on claims and promises made during contract

SUBSCRIBE

Complex business and financial deals frequently require expertise in multiple areas of law. With access to attorneys well-versed in corporate transactions, real estate, tax law and estate planning, Shook, Hardy & Bacon can help our clients stay nimble in a competitive marketplace while still protecting their assets and investments. To this end, we often find ourselves acting as transaction quarterbacks, assembling cost-effective teams from various other practice areas in the firm, including antitrust, employment and intellectual property.

To learn more about Shook's Business Transactions capabilities, please visit shb.com or contact:

Sandra Hawley
Co-Chair, Corporate Services Practice Group
816.559.2471
shawley@shb.com

negotiations. But also assume these claims and promises don't actually appear in the client's final agreement. Instead, this agreement contains a boilerplate integration clause. So if your client desires to enforce the omitted claims or promises (and assuming your client wasn't the victim of fraud), your client may find herself without recourse. Therefore, it's always a good practice to confirm with your client—before she signs an agreement—that materials containing critical representations are expressly incorporated by reference or, better yet, attached to the agreement. And if such representations were made orally, then they should be restated within the document.

Additionally, an integration clause can be problematic if it doesn't really reflect the parties' intent. For example, an executive might sign a series of agreements regarding her compensation and other benefits when hired by a new company. And, perhaps, each of these agreements contains its own integration clause that says all other agreements regarding the same subject matter are superseded. But in the example, all of the agreements pertained to the executive's employment! Did each of the agreements just supersede each of the other agreements? Such result would clearly be unintended if the agreements were all executed simultaneously, but what if they weren't? What if a bonus agreement containing an integration clause is executed a year after the original compensation agreement? What terms of the original agreement were superseded and what terms were not? Your client may have to sue in order to find out! Or, you could avoid this problem by being certain that the integration clause expressly references each of the other agreements and states that all of these agreements, taken as whole, constitute the complete and entire agreement of the parties.

A corollary to the integration clause is the non-reliance clause, which typically would read something like this:

> "Each party is acting without reliance on any representations or warranties made by the other parties, except representations or warranties expressly set forth herein."

The intent of the non-reliance clause is to reduce the likelihood that a party claims he was defrauded into executing an agreement by virtue of a statement made prior to such execution, regardless of whether the statement was included in or excluded from the final document. Presumably, non-reliance clause boilerplate is not included as frequently as integration clause boilerplate because the parties (or their counsel) believe the latter encompasses the former. It doesn't. But a non-reliance clause makes a fraudulent inducement claim harder to make and, therefore, should always be added to the integration clause.

Marty Behn
Of Counsel
312.704.7785
mbehn@shb.com

Once again, we see that easily overlooked boilerplate language may be just what is needed to avoid a costly and unfortunate conflict.