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Miscellaneous Provisions: Least Important or Most Important

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Taken for granted, overlooked and generally not read very carefully are provisions ensconced with the moniker "miscellaneous." I would argue that while they are viewed as the "second fiddle" of legal provisions contained in many documents, they are actually the "first string" in terms of importance. While many provisions in legal documents can trace their lineage to case law and decisions of note, the miscellaneous provisions in documents are all derived from years and years of case law and precedent and should be afforded the care and precision they deserve.

So, what provisions fall into this cauldron of miscellany? Let's discuss a few of them as this piece is not intended to be the War and Peace of legal prose. No waiver, entire agreement or integration provision and no modification unless in writing provisions shall be the topic of this article.

A no waiver provision states that no failure or delay in acting, and no course of dealing with respect to any right, power or privilege afforded a party within documentation, at law or in equity shall constitute a waiver of same. No partial exercise or single exercise of such right, power or privilege shall constitute a waiver of any future exercise of same and that all remedies are cumulative and not exclusive. The words seem innocuous enough but serve to deflect and defend against various and specious defenses a party may raise. Generally speaking, the provision is an agreement amongst the parties that regardless of the facts, no one is waiving their rights (unless set forth in a writing-which we will discuss below). There are many defenses and claims in common law which are based on the concept of a party waiving their rights by a course of action, a statement, a delay in exercise, a misunderstanding, etc. This particular provision is intended by the parties to dispense with the need to defend against such claims. No doubt that in a dispute, such claims will be raised, but a clear and definitive provision in the agreement should prove to be quite helpful in dispensing with such allegations. I would also argue that such a provision is non-controversial as it serves to benefit all parties to any documentation.

An integration or entire agreement provision is another "standard" provision which is seemingly innocuous but rather important. The provision states that the four

corners of the relevant agreement amongst the parties constitutes the “entire” agreement amongst the parties and that all other prior or contemporaneous agreements, whether written or oral, are superseded or “merged” into the relevant final documentation. This is designed to protect against parties pointing to term sheets, emails, or any other writings or oral statements or discussions to supplement or contradict the express terms contained in the relevant document. When parties have spent the time to draft, negotiate, execute and deliver a written document, they are clearly intending to be bound by the terms of such agreement. This provision merely reinforces that understanding and states that whatever was discussed along the way, whatever prior understandings of “what the deal was”, are superseded by the final documentation. No doubt when a dispute arises at a later date, a parties memory of what was agreed to may become clouded by current events at issue in the relevant dispute. This provision is intended to preclude the introduction of extraneous documentation or conversations which are not codified in the final document. One additional thought on this issue is what is known as the parole evidence rule. Notwithstanding the express terms of this provision and the express terms of a relevant document, to the extent that a provision in a document is fraudulent, unclear or ambiguous, the parole evidence rule in certain circumstances would allow the contracting parties in a dispute to present oral or other extraneous evidence to aid in the interpretation of the provision at issue.

A no modification provision states that the relevant agreement cannot be modified, amended, extended, restated, terminated, etc. or any provision waived unless in a writing signed by all parties or at a minimum by the party to be charged or against whom enforcement would be sought. Again it seems pretty innocuous, but is quite an important provision. Over the course of the term of a relevant document the parties will undoubtedly engage in conversations, correspondence, notices, emails, etc. This provision is designed to codify the proposition that all of those conversations and correspondence do not and will not modify the express terms of the relevant contract unless and until it is reduced to a writing and signed by the relevant party. When a dispute arises, again undoubtedly parties will allege that the original document was modified due to these intervening conversations which inure to their benefit with respect to their allegations. While there can be no certainty in a litigated matter, this provision is designed to protect against such allegations.

These are but a few of the miscellaneous provisions which address numerous defenses, allegations and other matters which should not otherwise be in dispute when parties have reduced their agreement to a fully negotiated, legally binding document. It has been said that the “devil is in the details,” but with carefully crafted miscellaneous provisions, many of the details parties should not be haggling over should be off the table.