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Debunking the Efficacy of Standard Contract Boilerplate – Part IV

In early June, my 15-year-old son was unexpectedly diagnosed with Type 1 diabetes. As part of an annual physical, he had a blood test; when his doctor received the results, she immediately called and told us to head straight to the emergency room to be evaluated and ultimately admitted to the hospital. All newly diagnosed Type 1 diabetes patients and their parents are treated to a one- to two-day hospital stay, which allows monitoring, but basically acts as an intensive, educational bootcamp on how to treat, understand, and accept a new way of eating, exercise, and everyday life.

And learn we did. This experience was a master class and entry to a “club” that we never sought to join. As part of this club, we had to evaluate what, when, and how many carbs our son ate, how and when he should exercise, and take comprehensive stock of our family’s health and well-being. Although we had been trying to eat well and stay active during the pandemic, we were forced to change much of what we *thought* had been working for us.

Enough said; “said” should only be used as a synonym for “stated.”

In the last three installments of this column, I asked you to take comprehensive stock of your contract boilerplate, and now we continue this journey of self-exploration. Just because you might *think* that your boilerplate has “worked” for years does not mean it is the best for you or your clients. Pretend that you have been diagnosed with outdated boilerplate, a disease that seems to invite many legal writers to its club. Together, we will move forward to make changes that will allow you to live a healthier and more fulfilling life as a contract drafter.

Below is a standard provision that appears in many contracts:

TIME IS OF THE ESSENCE

Time is of the essence in the performance of all obligations set forth in this Agreement.

In terms of writing, this provision looks pretty good. However, simply including this provision in a contract does not mean that a court will automatically find that one party breached the contract by not timely performing his obligation. If time truly is “of the essence,” build language into the provision itself that the obligations in that provision must be timely performed, such as penalties for late payment. Also consider adding a statement that says, “Failure to timely perform the obligation set forth in this paragraph is a material breach of contract.” Does the inclusion of such a statement mean that a court will find a material breach? Of course not, but the statement more strongly suggests that timeliness in the performance of the obligation was part of the negotiated bargain.

Here is another common boilerplate provision:

MODIFICATION OR WAIVER

It is understood that no modification of the terms of this Agreement shall be valid unless such modification is in writing and signed by both parties with the same formalities as said Agreement. No waiver of any default of said Agreement shall constitute a waiver of any other or subsequent default.

This paragraph states the law correctly; two parties cannot modify an existing contract without entering a new contract with respect to any modified provisions. Therefore, to have the “same formalities” as the existing contract, a contract modification requires offer, acceptance, and consideration. Not every contract must be in writing (only those contracts that fall within the Statute of Frauds must be in writing); however, this provision requires the modification to be in writing, which is a good idea, because it makes enforcement easier and prevents either party from denying the existence of the modification. As an aside, how many of you just felt a little nauseated reading the term “Statute of Frauds” and flashed back to law school?

The paragraph itself is not particularly well-written. First, the phrase “[i]t is understood that” can be deleted from this and all other provisions in a contract. Every provision represents the parties’ understanding – that is the whole point of entering into a contract: a mutual meeting of the minds. Including this kind of throat-clearing phrase in each provision is superfluous and distracts the reader.

Second, the phrase “said Agreement” appears twice in this provision. Do not use the word “said” as a synonym for “the.” Those who use “said” in this manner are trying too hard to sound lawyerly, and it stands out to those of us unafraid to use plain language. You are not in a bad television legal drama where the actors all attempt to sound highly educated and fail miserably. No one speaks that way. If you encountered me at a conference and were looking for the restroom, you would not approach me and state, “Where is said restroom?” So, why would you write that way? Enough said; “said” should only be used as a synonym for “stated.”

And here is one more standard provision:

GOVERNING LAW

This Agreement shall be construed under and governed by the laws of the Commonwealth of Virginia existing at the time of the execution of said Agreement, irrespective of the fact that one or more of the parties now is, or may become, a resident of a different state.

We have belabored the archaic and prohibited use of “said” as a synonym for “the.” But this paragraph needs more work. First, the phrase “irrespective of the fact that” is wordy and could be replaced with the plain language alternative of “even though.” Second, “one or more of the parties now is, or may become, a resident of a different state” also could be streamlined. The phrase is easy enough to understand but cut to the chase. Replacing this phrase with “either party now or later resides in a different state” does the trick. ■

Now that we have fully embraced healthy living *and* contract drafting, send any low-carb comments to dspratt@wcl.american.edu.

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