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Further Assurances Clauses, Notice Provisions, Counterpart Language and Miscellaneous Interpretive Provisions: More About "Boilerplate"

The last edition of *Dispatches from the Trenches* addressed a few areas of boilerplate which are frequently overlooked-- namely amendment and waiver, merger and integration and severability provisions. This edition continues that theme by discussing further assurances clauses, notice provisions, counterpart language and miscellaneous interpretive provisions.

A. Further assurances

A further assurance provision is like an exclamation point on the parties' agreement. The agreement itself provides detailed provisions analyzing what rights and obligations the parties have against each other. However there is always a chance that something slips through the cracks or that additional efforts need to be made in order to effectuate the agreement of the parties.

Since leasing relationships often require lessors and funders to take various actions to protect their interests under the lease, all good lease agreements contain a further assurance provision in which the debtor/lessee agrees to cooperate and make additional



filings and take other actions that are necessary to evidence the rights of the lender/lessor in the collateral and otherwise under the lease.

Two common law concepts address the same issue: (1) the "covenant of good faith and fair dealing" and (2) the implied covenant requiring the parties to use their "best efforts" to fulfill the terms and objectives of the agreement. However, these common law concepts are not universally applied and even when they have been adopted and applied by courts, their parameters are poorly defined and subject to the vagrancies of future court decisions. In the event a client anticipates needing further action from the other party, a further assurance clause is an important part of boilerplate language.

A common clause may read "Lessee agrees to prepare, execute and deliver, at Lessee's expense, any additional documents, writings or records and take any other actions Lessor reasonably requests to evidence or effect Lessee's agreements and obligations hereunder and to protect Lessor's rights and interest hereunder."

There is substantial wiggle room in further assurance provisions as lessees and borrowers with more bargaining power may attempt to limit their obligations by agreeing only to take "reasonable best efforts" to take the additional actions desired by Lessor. The theoretically heightened standard of "best efforts" or a theoretically lower standard of "reasonable efforts" are other options.

Another example of where these clauses can be negotiated is whether the lessee is required to take actions which are "necessary or desirable" rather than merely "necessary." Qualifications can also be added with respect to how quickly the lessee must comply. For example, lessee could be required to take the actions "as soon as practicable," "promptly," or "as expeditiously as possible." It also helps to clarify that the lessee is the party who pays for the additional cost and expense of completing additional actions required under a further assurances clause.



It may further help to provide a list of the types of additional activities which may be required. Some examples include the filing of financing statements; the delivery of landlord or mortgagee waivers; the delivery of certificates of existence or formation, good standing certificates and evidence of Lessee's organizational identification number; compliance with certificate of title acts; adding plaques to equipment indicating lessor's; and endorsing insurance proceeds. Lastly, a good further assurances provision also includes a broad power of attorney which appoints the lessor as lessee's attorney in fact to take whatever actions, in lessee's name, that lessee should take under the further assurances clause.

It should also be noted that the further assurance clause authorizes the lessor under a true lease to file the precautionary UCC against the lessee. Without this clause, lessor could theoretically be liable under 9-509 of the UCC for filing a financing statement without proper authorization of the debtor. A security agreement constitutes authorization to file a financing statement as to the collateral described therein but a true lease is not a security agreement and therefore does not provide such authorization. The penalty for violation of 9-509 is an automatic \$500 per violation-- providing fertile ground for class action type suits.

B. Notice Provisions

Notice provisions set forth the manner in which the parties deliver information to each other during a contract's term. Whenever a party must send a notice of default, a claim for indemnification, or any other sort of election or communication, it is essential that the contract clearly specify where the notice should be sent. It is important to coordinate this provision with the location of addresses elsewhere in the agreement as some agreements contain addresses in the preamble or in the signature blocks.



In any event, good agreements contain a proper notice provision that addresses a variety of issues. Questions to consider are: (1) What form should the notice take? (2) What method of delivery is appropriate? (3) When is the notice effective? (4) Who must receive the notice? and (5) How are changes to the address to which notice should be sent going to be communicated?

Notices should usually be required to be in writing although some clients are engaged in transactions where a telephone, e-mail or other notice is sufficient. In that case, the agreement should still probably require a follow up writing confirming the notice so the parties maintain accurate records. Often the writing must be signed, maybe by a specific type of officer such as a Vice President. Notices could come through personal delivery, registered or certified mail, nationally or internationally recognized courier service such as FedEx, facsimile or email.

The timing of the notice and its effectiveness is also important. Depending upon who is likely to be sending and receiving notices, a drafter may negotiate for notice to be effective once received or to be effective once deposited with the courier or other overnight carrier. This sort of distinction not only effects the time when the notices become effective, but also dictates which party bears the risk of a notice which is lost in transit.

Notice provisions are also a good way of assuring proper oversight in large lenders which may be required by law to act quickly upon receipt of a notice. A great example is found in the Uniform Commercial Code, which requires that lenders respond within fifteen days of their receipt of a notice from a debtor or borrower that requests an accounting of the collateral secured by a particular loan. Large lender's should consider contractually requiring that a copy of any such notice be sent to a special address. This sort of oversight mechanism should be enforceable as a matter of contract law. It is also statutorily



approved in some circumstances. When Alabama adopted the revised version of Article 9, the Alabama legislature, fearing that banks would receive a request for an accounting at their branch and be unable to respond within the statutorily allotted time period, added a specific provision in the UCC that allows a lender to designate a specific address to receive any such notice. This assures the bank that the right person receives a notice so that it can respond promptly and not violate the statute.

C. Counterparts

Due to technological advances such as faxes and email, many closings today do not occur with the formality used in older closings where all parties sat around a table signing documents together. Instead, it is quite common for documents to be shipped or emailed across the United States for signatures by the various parties to the agreement. These transactions are often documented by having the parties execute duplicate originals of an agreement and then exchange counterpart versions so that each person has a signature of it and the other party to the agreement. Of course, those signatures may be on different pages.

Counterpart provisions are generally enforceable and are usually viewed as merely restating the common law rule that contract signatories may create more than one original of a written agreement. A standard counterpart provision is "The parties may execute this agreement in counterparts, each of which is deemed an original and all of which only constitute one original."

There are again a variety of details that can be addressed by the counterpart provisions and when closing a transaction that involves counterparts or enforcing a deal that was executed by way of counterparts, it is important to determine when the transaction is consummated. Is it consummated when each party signs a counterpart or is it



consummated when each party delivers the counterpart to the other party? Is a facsimile okay? Does each party need to have a counterpart of their own signature and the other party's signature or does a party only need the counterpart that contains the signature of the party against whom enforcement is sought?

D. Miscellaneous interpretative provisions

The miscellaneous section of many contracts contains various provisions that help courts to interpret the contract. These provisions are classic examples of what most lawyers consider to be boilerplate. However, as litigators can attest, these provisions can be very important when dealing with an ambiguous contract. Transactional lawyers need to be aware that no matter how strong and thorough a form is, litigators will be able to find ambiguities.

These interpretive provisions offer a way to help make sure documents are interpreted in a manner favorable to our clients and are particularly important when dealing with an agreement that is used in numerous transactions by a large client. For example:

(1) If the headings of provisions have not been thought through extremely thoroughly, they can be used to change the meaning of a provision and this risk can be reduced by adding a clause to the miscellaneous section which states that "The captions or headings in this agreement are made for convenience and general reference only and should not be construed to describe or limit the scope or the intent of the provisions of this agreement."

(2) The use of the word "including" is sometimes interpreted to limit a preceding description which is quite broad. Parties concerned about such interpretations could add a sentence in their miscellaneous section stating that "Whenever terms such as "include" or "including" are used in this agreement, they shall mean "include" or "including" as the



case may be, without limiting the generality of any description or word preceding such term.ö

(3) The terms "herein" or "hereunder" are sometimes used to limit such descriptions to particular sections rather than the entire agreement. Risks associated with the use of this language can be limited by a provision which states that "The terms "herein" or "hereunder" or like terms shall be deemed to be referred to this agreement as a whole and not to a particular section.ö

(4) Other issues that can be addressed in the interpretive section relate to the failure to draft in a gender-neutral manner or problems that can result in use of singular and plural terms.

(5) Any party drafting an agreement may wish to include a provision to avoid having the agreement construed against them as a result of such draftsmanship. An example of this type of provision reads "This agreement has been drafted by our counsel as a convenience to the parties only and shall not, by reason of such action, be construed against the party represented by the drafting counsel.ö

Of course, much mischief can also occur in this section. It is not uncommon to find a provision that states generally that whenever an agreement gives one party (think lender) the right to choose between alternatives to express its opinion, the choices and opinions are being made in that parties' sole discretion.

Indeed, the best way to "hide something" in an agreement is often to put it in the miscellaneous section. Ironically, the chance of it being read is further decreased by the use of all caps and bold-faced font.



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