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## Good Company

### Beware the Boilerplate

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In today's fast-paced business environment, businesses are called upon to make snap decisions regarding agreements for the purchase or lease of products, equipment and services that are mission critical to the enterprise.

Far too often, these agreements are entered into without proper consideration being given to boilerplate provisions which can dramatically affect the leverage of the parties when disputes ensue. This article highlights some of the commonly encountered "problem" provisions.

**Forum Selection Clauses.** Agreements commonly designate the exclusive location where any disputes relating to a contract must be resolved. Like many states, New Hampshire routinely enforces these contractual choices where they bear a reasonable relationship to the parties' agreement. The resulting geographical choice can dramatically impact costs associated with and the ability to pursue litigation. Forum selection clauses are often accompanied by consent to jurisdiction clauses, increasing the likelihood that the forum selection clause will be enforced. You can rest assured that if you contract with a company in Hawaii that specifies that all disputes will be resolved in Honolulu, then if a dispute arises under the contract, you will be required to resolve it in Hawaii. The resulting logistical problems are obvious. Of course, if the opportunity exists to make New Hampshire the exclusive forum, you should obtain that advantage and avail yourself of that opportunity.

A common feature of forum selection clauses is venue selection clauses which require the resolution of a dispute in a particular court (state or federal) or in some form of Alternative Dispute Resolution ("ADR"), typically arbitration or mediation. Although popular when court dockets were backlogged, ADR is not necessarily the best venue for resolving disputes, and rarely offers the cost-savings commonly associated with it.

A few suggestions for dealing with forum selection clauses. If you are already party to a contract containing a forum selection clause, check the language, the choice may not be exclusive. Where forum selection clauses are not exclusive, suit may be brought wherever jurisdiction exists over the parties. In some instances, the chosen location may not bear a reasonable relationship to the parties or their agreement, and, therefore, the selection may be unenforceable. If you are unable to obtain the advantage of a New Hampshire forum selection clause, then at least try to avoid the disadvantage of being compelled to resolve disputes in the other party's jurisdiction by designating a neutral jurisdiction. The bottom line is that forum selection clauses are too often overlooked as parties concentrate on the "substantive" terms, yet these "procedural" terms have potentially far-reaching consequences when disputes arise.

**Governing Law Clauses.** Agreements often select the law of a particular

state or country to govern the interpretation of the parties' rights under an agreement. Too often, clients enter these agreements without giving due consideration to what rights and remedies are available to them under the governing law. Just as with forum selection clauses, governing law clauses can have far-reaching consequences on the parties' rights under an agreement, but are often treated as mere boilerplate and are overlooked.

**Attorneys' Fees Provisions.** Contracts also frequently provide for the right to recover attorneys' fees. These terms are often one-sided. Properly drafted attorneys' fees provisions can operate as a deterrent to litigation. At a minimum, make sure that any rights under these provisions are reciprocal.

**Limitations on Remedy.** Clauses limiting or eliminating warranties, damages or other remedies are found in many agreements. As a purchaser/lessee, these clauses are critically important to your rights in the event that the product or service fails to perform as advertised. As with attorneys' fees provisions, make sure that these limitations are not one-sided.

Particularly with form agreements, take the time to become familiar with the boilerplate. Beware of the boilerplate; it can have profound consequences for your business.

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