Having trouble reading this email? View it in your browser.

March 2024

CORPORATE TRANSACTIONS CLIENT ALERT

SHOOK HARDY & BACON

Don't Skip the Boilerplate: Settlement Agreements

This is the first in a series of brief columns regarding boilerplate contract language that often gets clients into and out of trouble. But before we get started, let's take a look at what "boilerplate" means.

Generally, boilerplate terms appear toward the end of an agreement, often in a section blandly titled "Miscellaneous." This format seems to suggest such terms are unimportant and can be skimmed without consequence. In fact, the Merriam-Webster dictionary defines boilerplate as "formulaic or hackneyed language," a definition that seems to support the notion that boilerplate provisions can be ignored. And if you're a litigator who, from time to time, has had to read through what seem like needlessly long, boring and repetitive contract terms, your desire to skim or ignore the boilerplate is understandable.

Well, we're here to tell you that boilerplate terms can, in fact, be very impactful in contract dispute negotiations and litigation, and an evaluation of the merits of a case should often begin with a review of the contract's boilerplate language.

Let's start by looking at an issue that can arise during settlement. Assume that following negotiations with opposing counsel, you receive a signed letter titled "term sheet" listing settlement terms that opposing counsel claims you agreed to. The letter expressly states the parties contemplate a more formal agreement will be drafted, but it also contains an acknowledgement line for your client to sign. You are concerned because the letter appears incomplete, and you don't believe it accurately summarized each position taken during negotiation. Nevertheless, in the interest of

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

moving settlement along, your client signs because, after all, it's merely a letter of understanding and the final, formal agreement will be the governing settlement document.

However, the parties' attempt to negotiate a final agreement is unsuccessful, and your client tells you she now desires to continue pursuing litigation. You notify opposing counsel, but she responds by saying she intends to sue your client to enforce settlement on the terms set forth in her letter and for failing to negotiate in good faith. You're stunned because you believed the letter was not an enforceable agreement, but rather an informal term sheet that imposed no obligations on your client. Was that belief justified? Or did you just make a serious mistake? Turns out the answer is, not surprisingly, "It depends."

Without getting into the merits of a "duty to negotiate in good faith" claim (discussed by numerous sources, including the *National Law Review*), the issue could easily have been avoided with boilerplate language we regularly advise be included in a term sheet, letter of intent or letter of understanding, assuming it reflects the client's intent:

> "The parties agree that this is a letter of understanding only and that this letter is not a legally binding contract nor an agreement to negotiate. No party intends that the preliminary understandings contained herein represent a final agreement between the parties, and no such final agreement shall be deemed to have been reached unless and until the parties have executed the written final and definitive agreement pertaining thereto."

In other words, why leave the parties' intent to guesswork when you could very easily address common negotiation issues with boilerplate language? Adding two sentences that expressly state the parties' agreement regarding the enforceability of the document being signed and the parties' obligation to negotiate are a great example of how boilerplate may be extremely useful and all that's needed to save both you and your client from unintended grief and litigation.

Marty Behn
Of Counsel
312.704.7785
mbehn@shb.com

The choice of a lawyer is an important decision and should not be based solely upon advertisements.

© Shook, Hardy & Bacon L.L.P. All rights reserved.

Unsubscribe | Forward to a Colleague | Privacy Notice