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Traps for the Unwary: Understanding the Unintended Consequences of Boilerplate Provisions in M&A Agreements

Saturday, August 11, 2007

10:30-12:30

Presented by the Negotiated Acquisitions Committee

Panelists:

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The Committee on Negotiated Acquisitions

The Committee on Negotiated Acquisitions is part of the American Bar Association Section of Business Law. Founded in the late 1980s, the Committee has over 2100 members, including practitioners from 47 states, five Canadian provinces and more than 39 different countries on five continents. The Committee's primary focus is negotiated mergers and acquisitions (M&A) and related transactions. The Committee's work addresses not only the legal substance of negotiated M&A transactions, but also the process of negotiating and documenting them. The Committee's principal activities are: (i) discussing and debating issues of current relevance and interest to practitioners in the M&A area; (ii) sponsoring and presenting educational programs on M&A-related topics; and (iii) preparing and publishing model agreements (with extensive commentary and ancillary documents), practice manuals and other reference works and resource materials relating to M&A transactions. Most Committee activities are conducted through various Subcommittees and Task Forces.

The Revised Model Stock Purchase Agreement

This presentation has been suggested by the current process of revising the Model Stock Purchase Agreement. The provisions shown in these materials are from the current draft (as of June __, 2007) of the revised Model Stock Purchase Agreement. The Negotiated Acquisitions Committee of the Business Law Section expects that the revised Model Stock Purchase Agreement with Commentary will be published in the year _____.

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INTRODUCTION

The Model Stock Purchase Agreement was published in 1995 as a project of the Committee on Negotiated Acquisitions. It was followed in 2001 by the Model Asset Purchase Agreement. The Model Stock Purchase Agreement is now in the process of revision, and the text included in these materials represents the current draft. Some explanation of the perspective of these two publications is appropriate. Because it is more current, we include an explanation from MAPA:

Preliminary Note. The Model Asset Purchase Agreement with Commentary ("Model Agreement") is derived from the MODEL STOCK PURCHASE AGREEMENT WITH COMMENTARY (1995), which was prepared by the Committee on Negotiated Acquisitions and is intended for use as a reference in acquisitions structured as a stock purchase. The form of the Model Agreement and accompanying commentary differ considerably from the Model Stock Purchase Agreement, however, due to the difference in structure between a stock and an asset purchase, the specific fact pattern applied to the transaction, and ongoing developments in the negotiation and documentation of acquisitions.

Perspective. The Model Agreement has been prepared by the Committee on Negotiated Acquisitions as a resource for a buyer's first draft of an asset acquisition agreement. In a buyer's first draft, the provisions generally favor the buyer and are not necessarily typical of the final language in a fully negotiated and consummated transaction. A buyer ordinarily would not include all of the provisions of the Model Agreement in a first draft but would instead tailor the document to the size and nature of the business to be acquired. The seller usually will not agree to all of the proposed provisions, and the seller's counsel can be expected to negotiate for language less burdensome. The commentary notes some sections of the Model Agreement that are likely to prompt objections by the seller.

The buyer's counsel usually prepares the first draft unless the seller is conducting an auction with more than one potential buyer. The buyer's counsel generally will have rather superficial information regarding the seller at the time the acquisition agreement is drafted. The inclusion of extensive representations and warranties in the first draft forces the seller to disclose significant information about itself. This will aid the buyer in assessing the benefits and risks of the acquisition and in pricing the transaction. In this respect, the buyer's first draft is a request for information and a disclosure device.

The first draft will also deal with the allocation of risks among the parties from such contingencies as environmental, pension, and tort liability. The buyer typically will ask the seller and its shareholders to bear most of the risk associated with discoveries that directly or indirectly relate to the seller's business prior to the closing—issues that may be material to pricing the acquisition. The seller may counter that unknown contingencies are inherent in operating any business and should be borne by the owner of the business at the time they arise.

No form of acquisition agreement is suitable for all transactions, and every provision in the Model Agreement is subject to change reflecting the facts and circumstances of the particular transaction. The Fact Pattern was developed by the Committee on Negotiated Acquisitions so that a number of issues could be covered by the Model Agreement and discussed in the accompanying commentary. Because it is unlikely that all of these issues would be presented in any single acquisition, the Model Agreement is more comprehensive than most asset acquisition agreements. Factors that may influence the scope and content of an acquisition agreement include the following:

If the transaction is of a relatively small size, the acquisition agreement will likely be shorter and far less comprehensive. If the seller is a large company, the representations and warranties are typically broader in scope because it may be impractical for the seller to provide as much detail as is required by the Model Agreement.

The relative negotiating positions of the parties will affect the acquisition agreement. Where the seller is highly sought-after and there are competing offers, it may view some of the provisions of the Model Agreement as too aggressive or otherwise inappropriate. If the buyer anticipates delicate negotiations with the seller, the buyer's counsel may not want to use some of these stronger provisions or may want to temper them with qualifying language, even in the first draft. On the other hand, if the seller is financially distressed or otherwise in a weak bargaining position, the buyer might be even more demanding in the draft it presents to the seller.

The structure of the seller and the nature of its business and assets will have an impact on the acquisition agreement. For example, a complicated corporate structure that involves the sale of subsidiaries or other entities or of some of the assets of these entities would require extensive changes in the agreement. Foreign operations would also expand the scope of the representations and warranties and possibly the covenants.

Because of the numerous variations in the facts and circumstances involved in any acquisition, the Model Agreement should not be considered as establishing any standards of general practice. The Model Agreement is not a substitute for a lawyer's careful exercise of judgment in a specific transaction nor does it purport to measure the reasonableness of a lawyer's judgment in any situation.

The Explanations

The provisions in bold face type below are from the current draft (as of June __, 2007) of the revised Model Stock Purchase Agreement. In each case, the text is followed by a general explanation of the common practices represented by that text. These explanations have not been particularized to the draft text. The drafting of commentary for RMSPA is now in process. Instead, there has been included and explanation from one of the following:

- Materials developed by Professors Stephen L. Sepinuck and Tina L. Stark for a program sponsored by the Committee on Business Law Education as part of the Institute for the Young Business Lawyer: Contract Drafting Program at the Spring 2007 Meeting of the BLS entitled, "The Big Deal about the Fine Print: Negotiating & Drafting Contractual Boilerplate" ("Sepinuck and Stark")

- Commentary to corresponding sections of the Model Asset Purchase Agreement ("MAPA"). Note that the current draft of the revised Model Stock Purchase Agreement is not identical to MAPA, but this commentary addresses some of the issues raised.

- Materials from Deal Points, a publication of the Negotiated Acquisitions Committee ("Deal Points")

We wish to thank Professors Sepinuck and Stark, the Committee on Business Law Education, the Business Law Section and the American Bar Association for permission to reprint portions of Sepinuck and Stark.

We wish to thank the American Bar Association for permission to reprint portions of MAPA.

We wish to thank the Negotiated Acquisitions Committee for permission to reprint portions of Deal Points.

The Bible

For a fuller explanation of boilerplate, reference is made to Tina L. Stark (ed), *Negotiating and Drafting Contract Boilerplate* (ALM Publishing, New York, New York, 2003) (“Stark”).

1.2. USAGE

(a) In this Agreement, unless expressly stated otherwise:

(i) the singular number includes the plural number and vice versa;

(ii) reference to any Person includes such Person's successors and assigns, if applicable, but only if such successors and assigns are permitted by this Agreement, and reference to a Person in a particular capacity excludes such Person in any other capacity;

(iii) reference to a gender includes the other gender;

(iv) reference to any agreement, document, or instrument means such agreement, document, or instrument as amended or modified and in effect from time to time in accordance with its terms;

(v) reference to any section or other provision of any Legal Requirement means that provision of such Legal Requirement from time to time in effect and constituting the substantive amendment, modification, codification, replacement, or reenactment of such section or other provision;

(vi) "hereunder," "hereof," "hereto," and words of similar import refer to this Agreement as a whole and not to any particular Article, Section or other provision of this Agreement;

(vii) "including" (and with correlative meaning "include") means including without limiting the generality of any description preceding such term;

(viii) "or" is used in the inclusive sense of "and/or";

(ix) "any" means "any and all";

(x) with respect to the determination of any period of time, "from" means "from and including" and "to" means "to but excluding";

(xi) a reference to a document, instrument, or agreement also refers to all addenda, exhibits, or schedules thereto;

(xii) a reference to a "copy" or "copies" of any document, instrument, or agreement means a copy or copies that are complete and correct and currently in effect; and

(xiii) reference to a list, or any like compilation (whether in the Disclosure Letter or elsewhere), means that the item referred to is complete and correct.

(b) Unless otherwise specified in this Agreement, all accounting terms used in this Agreement will be interpreted and all accounting determinations under this Agreement will be made in accordance with GAAP.

(c) This Agreement was negotiated by the parties with the benefit of legal representation, and any rule of construction or interpretation otherwise requiring this Agreement to be construed or interpreted against any party will not apply to any construction or interpretation of this Agreement.

EXPLANATION

The explanation on the following page is from Section 1.2 of MAPA.

COMMENT

Clauses (v), (vii), (viii), and (x) of Section 1.2(a) are designed to eliminate the need for repetitive and cumbersome use of (a) the phrase "as amended" after numerous references to statutes and rules, (b) the phrase "including, but not limited to," or "including, without limitation," in every instance in which a broad term is followed by a list of items encompassed by that term, (c) "and/or" where the alternative and conjunctive are intended, and (d) a list of all possible attachments or agreements relating to each document referenced in the Model Agreement. The Revised Model Business Corporation Act, Section 1.40(12), contains a similar definition: "'Includes' denotes a partial definition." In certain jurisdictions, however, the rule of ejusdem generis has been applied to construe the meaning of a broad phrase to include only matters that are of a similar nature to those specifically described. *See, e.g.*, Forward Indus., Inc. v. Rolm of N.Y. Corp., 506 N.Y.S.2d 453, 455 (App. Div. 1986) (requiring the phrase "other cause beyond the control" to be limited to events of the same kind as those events specifically enumerated); *see also* Buono Sales, Inc. v. Chrysler Motors Corp., 363 F.2d 43 (3d Cir.), cert. denied, 385 U.S. 971 (1966); Thaddeus Davids Co. v. Hoffman-LaRoche Chem. Works, 166 N.Y.S. 179 (App. Div. 1917).

12.1 EXPENSES

Except as otherwise provided in this Agreement, each party shall bear its respective fees and expenses incurred in connection with the preparation, negotiation, execution, and performance of this Agreement and the consummation and performance of the Contemplated Transactions, including all fees and expenses of its Representatives. Buyer shall pay one-half and Sellers shall pay one-half of (a) the HSR Act filing fee and (b) the fees and expenses of the Escrow Agent under the Escrow Agreement. No Acquired Company has incurred, and Sellers shall cause the Acquired Companies not to incur, any fees or expenses in connection with this Agreement and the Contemplated Transactions. The obligation of each party to bear its own fees and expenses will be subject to any rights of such party arising from a Breach of this Agreement by another party.

EXPLANATION

The explanation on the following page is from Section 13.1 of MAPA.

COMMENT

The buyer and the seller often agree that fees and expenses will be paid by the party incurring the same. The Model Agreement adopts this view.

Sections 3.30 and 4.4 contain representations of Seller and Buyer to the effect that neither has incurred any obligation to any broker or finder in respect of the Contemplated Transactions. If either party had retained a broker or finder, the first sentence of Section 13.1 would require the party incurring the obligation to satisfy it unless a specific provision were added as to the responsibility for the obligation.

Although the second sentence of Section 13.1 provides that Seller will pay for the title insurance required by the Model Agreement, local custom may dictate a different result, in which case Section 13.1 should be appropriately modified. The last sentence of Section 13.1 is intended to avoid a conflict between a judgment for damages due to a Breach of the acquisition agreement and any obligation to pay expenses by providing that a judgment for a Breach will supersede obligations under Section 13.1.

12.2 PUBLIC ANNOUNCEMENTS

Any public announcement, including a press release, communication to employees, customers, suppliers, or others having dealings with the Acquired Companies, or similar publicity with respect to this Agreement or any Contemplated Transaction, will be issued, at such time, in such manner, and containing such content as Buyer determines.

EXPLANATION

The explanation on the following page is from Section 13.2 of MAPA.

COMMENT

The Model Agreement provides that Buyer will control the timing and content of public announcements. The seller may suggest that control of public announcements be at least mutual. The seller may want to have the covenant to maintain the confidentiality of the acquisition agreement be mutual as well. Because the buyer's and the seller's interests in confidentiality and controlling public announcements are nearly equal in most cases, the buyer may want to provide in the initial draft that these covenants are mutual. If the seller has a few key suppliers or customers, the buyer may want to have the right to approve communications with those suppliers or customers or even to be present during discussions with them.

The buyer sometimes will negotiate for the additional right to visit with key customers or suppliers to obtain information concerning their relationship with the seller or to gain assurances that their relationship with the seller will continue. The buyer may also want to add provisions to Section 5.4 permitting it to be present or take an active role in obtaining consents of certain key suppliers or customers to assignments.

For publicly traded companies, the timing of a public announcement regarding the acquisition may be affected by federal securities laws.

12.3 NOTICES

All notices, Consents, and other communications required or permitted by this Agreement will be in writing and will be effective, and any applicable time period shall commence when (a) delivered to the following address by hand or by nationally recognized overnight courier service (costs prepaid) or (b) transmitted electronically to the following facsimile numbers or e-mail addresses with confirmation of receipt of transmission, in each case marked to the attention of the Person (by name or title) designated below (or to such other address, facsimile number, e-mail address, or Person as a party may designate by notice to the other parties):

Sellers:

[Name of the Sellers' Representative]
Attention:
[Street]
[City, state, and zip code]
Fax no.:
E-mail address:

with a copy to:

____
Attention:
[Street]
[City, state, and zip code]
Fax no.:
E- mail address:

Buyer:

____
Attention:
[Street]
[City, state, and zip code]
Fax no.:
E-mail address:

with a copy to:

____
Attention:
[Street]
[City, state, and zip code]
Fax no.:
E-mail address:

EXPLANATION

The explanation on the following page is from Section 13.3 of MAPA.

COMMENT

There are many varieties of notice provisions in use. The Model Agreement provides five alternative means for giving notice and sending other communications: by hand, overnight courier, facsimile, e-mail, or U.S. mail.

The traditional means of giving notice has been U.S. mail, but this is no longer as common as it once was because of increasing reliance upon other more expeditious means of communication, such as facsimile and e-mail. Although use of facsimile and e-mail has become more widespread, there is a concern that these technologies are still unreliable and are susceptible to interception by other parties. This concern about reliability to some extent can be alleviated by requiring confirmation of transmission by the transmitting equipment or confirmation by telephone of receipt of a facsimile or e-mail transmission. Most facsimile equipment will print a transmission report that confirms successful transmission and identifies the facsimile number and, in some cases, the party to which the notice has been sent. Some electronic mail systems provide confirmation that the message has been delivered to the recipient's machine but, like the facsimile machines, do not indicate that the recipient has actually received the message. Third-party e-mail services exist that can provide additional message security against interception and return-receipt verification. When notice is permitted to be given by facsimile or e-mail, a requirement is sometimes added that a copy of the notice also be sent by certified or registered mail, return receipt requested.

These provisions normally specify when notice is deemed to have been given. Under the Model Agreement, notice is deemed given when sent by facsimile or e-mail, when delivered by hand or courier service, and when received or rejected if sent by certified mail. A buyer will ordinarily prefer that notice be deemed given when sent because it is more likely that it will be giving notices under the acquisition agreement. On the other hand, a seller will want to be sure that a notice is received so that it can be acted upon in a timely manner. If receipt is required, however, a party wishing to forestall or avoid notice might have the opportunity to do so. In some cases, notice may be deemed given after a specified number of days or hours have elapsed from the time it is sent. This approach is often used when notice can be given by U.S. mail because of concern over possible delays.

If notice is deemed given when sent or a specified period after being sent, the party giving the notice must be prepared to prove, if required, that the notice was actually sent. If a notice is time sensitive or especially critical, a party usually will take steps to ensure that it is personally delivered, with a signed receipt, or is sent by multiple methods so that adequate proof of the giving of notice can be presented if a dispute arises.

Most notice provisions designate for a corporation or other entity a particular person by name or title to whose attention the notice is to be directed. It may be better to use an attention line than to designate a person at the beginning of the address to avoid the argument that the notice has to be given to or received by that person. The Model Agreement also contemplates that copies of notices are to be sent to counsel or others. The notice provision specifies that these copies are mandatory, meaning that notice will not be deemed effective as to a party unless the copy is also given as required. Individual shareholders often will require this if, for example, it may be difficult to contact them for extended periods of time. In some cases, the notice provision will state that sending or delivering the copy of the notice will not constitute the giving of notice to the party itself.

12.4 JURISDICTION; SERVICE OF PROCESS

Except as otherwise provided in this Agreement, any Proceeding arising out of or relating to this Agreement or any Contemplated Transaction shall be brought in the courts of the State of __________, County of __________, or, if it has or can acquire jurisdiction, in the United States District Court for the __________ District of __________, and each of the parties irrevocably submits to the exclusive jurisdiction of each such court in any such Proceeding, waives any objection it may now or hereafter have to venue or to convenience of forum, agrees that all claims in respect of such Proceeding shall be heard and determined only in any such court, and agrees not to bring any Proceeding arising out of or relating to this Agreement or any Contemplated Transaction in any other court. Each party acknowledges and agrees that this Section 12.4 constitutes a voluntary and bargained for agreement between the parties. Process in any Proceeding referred to in the first sentence of this Section or in Section 11.8(d) may be served on any party anywhere in the world. Any party may make service on any other party by sending or delivering a copy of the process to the party to be served at the address and in the manner provided for the giving of notices in Section 12.3. Nothing in this Section 12.4 will affect the right of any party to serve legal process in any other manner permitted by law or at equity.

EXPLANATION

The explanation on the following page is from Supincuk and Stark, and includes a discussion of the governing law provision, which is Section 12.14 of RMSPA contained below.

CHOICE OF LAW & CHOICE OF FORUM

Choice of Law

There are a variety of reasons parties may wish to choose which state's law governs their contractual relationship. Doing so may remove uncertainty and eliminate a subject on which briefing is necessary in the event of litigation. More significant, it allows parties, particularly those engaged in many multi-state or international transactions, to focus on compliance with one set of rules, rather than dozens. Most important, it can permit a party to seek refuge under the laws of the jurisdiction that are particularly favorable for its type of business. For example, a business with valuable trade secrets might want its agreements governed by the law of a jurisdiction which offers strong protection for them. A buyer of businesses might want its purchase agreements governed by the law of a jurisdiction that does not readily invalidate covenants not to compete. A merchant that deals with consumers may want its contracts governed by a jurisdiction that interprets the obligation of good faith in a narrow and predicable manner and which does not permit punitive damages for most contract-related torts.

In general, contracting parties are free to select which jurisdiction's law will govern their relationship. The major limitation on this freedom, as expressed in the Restatement (Second) of Conflict of Laws, is that the jurisdiction selected must bear a "substantial relationship" to either the transaction or to the parties, or there must be some other reasonable basis for the parties' choice.[23] A second limitation arises whenever application of the chosen jurisdiction's law would violate a fundamental policy of the jurisdiction whose law would govern but for the parties' selection. In such cases the parties' selection will not be respected.[24]

The rules for transactions governed by the Uniform Commercial Code are similar. Generally, parties are free to choose the law of any state or nation that bears a "reasonable relationship" to the transaction.[25] This phrasing differs to two respects from the Restatement formulation First, it requires a "reasonable relationship," rather than a "substantial relationship." Second, the relationship must be to the transaction, rather than to either the transaction or the parties. However, neither of these differences appears material. The general UCC rule contains one additional – and seemingly significant – departure from the Restatement rule. It has no exception if the chosen jurisdiction's law would violate the public policy of the jurisdiction whose law would otherwise apply.[26] In all

[23] *See* Restatement (Second) of Conflict of Laws § 187(a)(a).

[24] *Id.* at § 187(2)(b).

[25] U.C.C. § 1-105(1). Note, the citation is to the pre-revision version of Article 1. None of the states that have thus far enacted revised Article 1 have adopted its substantially different rules on choice of law. *See* U.C.C. revised § 1-301.

[26] *Cf.* U.C.C. revised § 1-301(f) & comment (adding such a rule and noting that it represents "an important safeguard not present under former § 1-105").

likelihood, however, the fundamental policy exception exists even though not expressed in the Code itself.[27]

There are, of course, other more specific limitations on choice of law in UCC transactions. In particular, parties are not free to select the law that governs perfection or the effect of perfection.[28] If they could, their choice might alter the proper place to file a financing statement, thereby leaving later searchers with no ability to restrict their search to one or two jurisdictions.

State Statutory Variations on Choice of Law. Some states allow contracting parties to choose their respective bodies of law regardless whether the state bears a substantial relationship to the parties or the transaction, provided the contract involves a set minimum amount of money. The most notable of these are New York and Delaware.[29] On the other hand, some have specific rules restricting contractual choice of law in certain types of contracts, such as franchise agreements or insurance policies.[30] Lawyers should check for such restrictions before drafting a choice-of-law provision.

Drafting Considerations. As in all contract drafting, the wording of a clause can affect its scope. Wording is particularly important in choosing a governing law because some jurisdictions continue to interpret choice-of-law clauses narrowly.[31] Parties wishing to designate a governing law generally want that law to govern all aspects of their relationship. Consider, though, the following.

Discussion Problem

Lender is providing capital financing to Borrower. The Loan Agreement includes the following provision:

> This Agreement shall be governed by and construed in accordance with the laws of the State of New York.

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[27] *See, e.g., Aerospatiale Helicopter Corp. v. Universal Health Services, Inc.*, 778 S.W.2d 492 (Tex. Ct. App. 1989) (indicating in dicta that the parties' choice of law would be respected unless it violates fundamental policy of the forum state). *See also* § 1-103 (providing that principles of law survive enactment of the Code unless displaced by particular provisions).

[28] *See* U.C.C. §§ 1-105(2), 9-301, 9-302, 9-303, 9-304, 9-305, 9-306.

[29] *See* N.Y. Gen. Oblig. L. 5-1401(1) ($250,000); Del. Stat. tit. 6, § 2708 ($100,000).

[30] *See* TINA L. STARK, ED., NEGOTIATING AND DRAFTING CONTRACT BOILERPLATE § 6.02[c] (2003)

[31] *E.g., Thompson and Wallace of Memphis, Inc. v. Falconwood Corp.*, 100 F.3d 429, 433 (5th Cir. 1996).

> What issues or claims might not be covered by this clause? How should the clause be drafted to make sure such issues and claims will be governed by New York law?[32]

Another drafting issue is whether the choice-of-law clause must exclude the choice-of-law rules of the chosen jurisdiction. Consider the following two alternatives:

> ". . . governed by the laws of the State of New York."
>
> ". . . governed by the laws of the State of New York (other than its choice-of-law rules)."

The latter formulation is thought to be safer because it avoids the argument and the possibility that a court would then look to New York choice-of-law principles and apply some other state's law. However, this "safer" phrasing is not necessary. The Restatement makes clear that when parties by contract select a governing law, absent some expression to the contrary they are selecting its "local law," not its conflict-of-law rules.[33] Courts almost universally agree.[34]

Choice of Forum

A choice-of-forum provision in a contract does far more than provide where litigation must be pursued. It also helps give efficacy to the parties' choice of law. Indeed, a choice-of-law provision unaccompanied by a choice-of-forum clause is almost useless. Consider the following:

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[32] *See, e.g., Thompson and Wallace of Memphis, Inc. v. Falconwood Corp.*, 100 F.3d 429 (5th Cir. 1996) (loan contract providing that the "agreement and its enforcement" were to be governed by New York law did not preclude application of Texas Deceptive Trade Practices Act and tort claims arising thereunder); *Northeast Data Systems, Inc. v. McDonnell Douglas Computer Systems Co.*, 986 F.2d 607 (1st Cir. 1993) (contract clause providing that "[t]his Agreement and the rights and obligations of the parties hereto shall be governed by and construed in accordance with the laws of California" covered all contract claims, whether motivated by bad intent or not, but did not cover fraud in inducement claim because it "concerns the validity of the formation of the contract, it cannot be categorized as one involving the rights or obligations arising under the contract"); *Valley Juice Ltd. v. Evian Waters of France, Inc.,* 87 F.3d 604 (2d Cir. 1996) (contract providing that "the Agreement is to be governed by the laws of the State of New York" did not apply to claim under Massachusetts Unfair Trade Practices Act); *Maltz v. Union Carbide Chemicals & Plastics Co.*, 992 F. Supp. 286 (S.D.N.Y. 1998) (fact that agreement was "to be construed in accordance with the law of New York" did not apply to tort claims); *Sunbelt Veterinary Supply, Inc. v. International Business Systems US, Inc.*, 985 F. Supp. 1352 (M.D. Ala. 1997) ("this agreement and the terms hereof shall be governed by and construed in accordance with the laws of the State of Florida" did not encompass tort claims); *Shelley v. Trafalgar House Public Ltd.*, 918 F. Supp. 515 (D.P.R. 1997) ("this letter shall be subject to and construed in accordance with the laws if the State of New York" did not apply to tort claims).

[33] *See* Restatement (Second) of Conflict of Laws § 187(3) & comment h.

[34] *See, e.g., Chan v. Society Expeditions, Inc.*, 123 F.3d 1287 (9th Cir. 1997); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 20 F.3d 713 (7th Cir. 1994), *rev'd on other grounds*, 514 U.S. 52 (1995).

> 1. Lender, a resident of State X, loans $100,000 to Borrower, a resident of State Y. The loan calls for interest at a rate that is permissible under the law of State X but which is usurious in State Y. The loan agreement specifies that the law of State X governs the parties' relationship. If litigation is commenced in State Y – a likely prospect no matter who brings the action – Lender bears the risk that courts in State Y will decide that State Y's usury laws represent fundamental policy. If State Y's law would have applied had there been no contractual choice-of-law provision, the court may well invalidate the loan agreement. In contrast, if the parties litigated their dispute in State X, there would be no risk that the loan would be deemed usurious.
>
> 2. Investment Bank is a New Jersey corporation with its principal place of business in New York. It enters into a large interest rate swap with Importer, whose business is located primarily in Florida. All the negotiations took place in Florida and over the phone. Relying on the New York statute that allows parties to opt into New York law, the swap agreement provides all matters arising under or relating to the swap are to be governed by the laws of the State of New York. A dispute arises and Importer brings an action against Investment Bank in Florida. A Florida court may refuse to enforce the contractual choice of law if it concludes New York does not have a substantial relationship to either the parties or the transaction.

Therefore, parties who select a governing law should always select the same jurisdiction as the *exclusive* forum for any litigation.[35]

Most states will enforce an exclusive choice-of-forum clause by dismissing an action brought in a forum other than the one selected.[36] In federal courts, the matter can be dealt with through a motion to transfer or a motion to dismiss. However, a forum selection clause can be invalidated on many grounds. First, such a clause can be substantively unconscionable if it makes one party – particularly the one with less bargaining power and fewer litigation resources – litigate in a distant place.[37] Second, it can also be unenforceable if, because of unforseen circumstances, they are

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[35] In addition to having a statute that allows parties to opt into New York law, the State of New York also has a statute that allows parties to agree to litigate in New York courts regardless whether jurisdiction would otherwise be proper there. N.Y. Gen. Law § 5-1402. Note, however, that this rule has a $1 million threshold rather than the $250,000 threshold for selecting New York law to govern.

[36] *But see, e.g.,* Idaho Code § 29-110 (invalidation some contractual restrictions on forum); Mont. Code § 18-1-403. *But see Fisk v, Royal Caribbean Cruises, Inc.*, 108 P.3d 990 (Id. 2005) (invalidating the Idaho statute with respect to certain maritime claims)

[37] This is especially true with respect to arbitration fora. *See Nagrampa v. Mailcoups, Inc.*, 469 F.3d 1257 (9th Cir. 2006) (arbitration provision was substantively unconscionable because it selected a forum at the franchisor's headquarters, 3,000 miles away from the franchisee's location and where the franchise agreement was to be performed); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569 (N.Y. Sup. Ct. 1998) (arbitration clause that required N.Y. consumer to arbitrate in Chicago was financially prohibitive and

extremely inconvenient.[38] Third, a forum selection will not affect where venue lies for a bankruptcy proceeding,[39] Finally, absent express contractual language to the contrary, a forum selection clause will not be deemed to create personal jurisdiction where there is none or prevent application of the doctrine of *forum non conveniens*. Because of this last point, a forum selection clause should be drafted to include waiver of personal jurisdiction and of *forum non conveniens*.

Suggested Clause

X.X. Choice of Forum.

(a) Any party who wishes to bring against the other party a civil action or proceeding arising out of or relating to either this Agreement or the relationship of the parties may bring such action or proceeding only in a state or federal court in [insert location by state or county].

(b) For this purpose, each party consents to personal jurisdiction in such state or federal court and waives any right to dismiss or transfer such action or proceeding because of the inconvenience of the forum.

(c) Nothing in this section shall prevent enforcement in another forum of any judgment obtained in a court identified in subsection (a).

Note, a forum selection clause does not have to be exclusive. Occasionally, contracting parties wish merely to provide for the freedom to litigate in a particular forum, rather than to restrict all litigation to that forum. If a clause is intended to be exclusive, however, state that clearly. Otherwise, it may be deemed not to be mandatory.[40] Also, be sure to specify whether the parties may use state courts, federal courts, or either, and be unambiguous if removal is to be prohibited. If using a federal court, be careful not to specify a location that doesn't have one. That might render the clause completely unenforceable.

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effectively barred consumer from enforcing his rights, and was therefore unconscionable).

[38] *See* TINA L. STARK, ED., NEGOTIATING AND DRAFTING CONTRACTUAL BOILERPLATE § 6.03[2] (2003).

[39] *See* 28 U.S.C. § 1408. Because bankruptcy courts apply the law of the jurisdiction in which they sit with respect to nonbankruptcy law issues, such venue can affect which state law governs. *See supra* note 20.

[40] *E.g., Excell Inc. v. Sterling Boiler & Mechanical, Inc.* 916 F. Supp. 1063 (D. Colo. 1996).

12.5 FURTHER ASSURANCES

If the Closing occurs, the parties will (a) execute and deliver to each other such other documents and (b) do such other acts and things as a party may reasonably request for the purpose of carrying out the intent of this Agreement, the Contemplated Transactions, and the documents to be delivered pursuant to this Agreement.

EXPLANATION

The explanation on the following page is from Section 10.11 of MAPA.

COMMENT

This section reflects the obligation, implicit in other areas of the Model Agreement, for the parties to cooperate to fulfill their respective obligations under the agreement and to satisfy the conditions precedent to their respective obligations. This section would be invoked if one party were, for example, to intentionally fail to undertake actions necessary to fulfill its own conditions to closing and use the failure of those conditions as a pretext for refusing to close.

A further-assurances provision is common in acquisition agreements. Often there are permits, licenses, and consents that can be obtained as a routine matter after the execution of the acquisition agreement or after the closing. The further-assurances provision assures each party that routine matters will be accomplished and that the other party will not withhold signatures required for transferring assets or consenting to transfers of business licenses in an attempt to extract additional consideration.

In addition to the covenants in Section 10.11, the acquisition agreement may contain covenants that involve matters that cannot be conditions precedent to the closing because of time or other considerations but that the buyer views as an important part of the acquisition. These additional covenants may arise out of exceptions to the seller's representations noted in the disclosure letter. For example, the seller may covenant to remove a title encumbrance, finalize a legal proceeding, or resolve an environmental problem. Ordinarily, there is a value placed upon each post-closing covenant so that if the seller does not perform, the buyer is compensated by an escrow or hold-back arrangement. Post-closing covenants may also include a covenant by the seller to pay certain debts and obligations of the seller to third parties not assumed by the buyer or deliver promptly to the buyer any cash or other property that the seller may receive after the closing that the acquisition agreement requires it to transfer to the buyer.

Finally, the buyer may want either to include provisions in the acquisition agreement or to enter into a separate agreement with the seller requiring the seller to perform certain services during the transition of ownership of the assets. Such provisions (or such an agreement) typically describe the nature of the seller's services, the amount of time (in hours per week and number of days or weeks) the seller must devote to such services, and the compensation, if any, they will receive for performing such services. Because such arrangements are highly dependent upon the circumstances of each acquisition, these provisions are not included in the Model Agreement. See the Comment to Section 10.7.

12.6 ENFORCEMENT OF AGREEMENT

Sellers acknowledge and agree that Buyer would be irreparably harmed if any of the provisions of this Agreement are not performed in accordance with their specific terms and that any Breach of this Agreement by Sellers could not be adequately compensated in all cases by monetary damages alone. Accordingly, Sellers agree that, in addition to any other right or remedy to which Buyer may be entitled at law or in equity, Buyer shall be entitled to enforce any provision of this Agreement by a decree of specific performance and to obtain temporary, preliminary, and permanent injunctive relief to prevent Breaches or threatened Breaches of this Agreement, without posting any bond or giving any other undertaking.

EXPLANATION

The explanation on the following page is from Section 13.5 of MAPA.

COMMENT

This section provides that the buyer is entitled to certain equitable remedies in those situations where monetary damages may be inadequate. For example, the buyer may, after the closing, seek to compel performance of the further assurances provision (Section 10.11), the confidentiality provision (Article 12) or, if included in the acquisition agreement, an arbitration provision.

The buyer may also seek specific performance of the acquisition agreement if the seller fails to perform its obligations to close the transaction. The Restatement (Second) of Contracts§ 357(1) provides that, with certain exceptions, "specific performance of a contract duty will be granted in the discretion of the court against a party who has committed or is threatening to commit a breach of the duty." One of the exceptions is "if damages would be adequate to protect the expectation interest of the injured party." *Id*. § 359(1). Courts in exercising their discretion generally will specifically enforce contracts for the sale of real estate, subject to satisfaction of the usual equitable doctrines, but not contracts for the sale of personal property or the sale of stock, at least where there is a ready market or control does not shift. For specific performance to be granted, the buyer will have to convince a court that the business to be acquired is unique and damages would not be adequate to protect its interest. *See* Allegheny Energy, Inc. v. DQE, Inc., 171 F.3d 153 (3d Cir. 1999). The seller may request a similar provision for its benefit, but its ability to obtain specific performance may be limited, particularly where the consideration is quantifiable in monetary terms.

The buyer may seek to enjoin a breach by the seller or the shareholders of their covenants in the acquisition agreement, such as the covenant not to compete. In the case of a covenant not to compete, an injunction may be the only way for a buyer to prevent irreparable injury to the goodwill purchased by the buyer. As in the case of specific performance, an injunction against a breach of contract duty can be granted in the discretion of the court. Restatement (Second) of Contracts § 357(2).

Providing for equitable remedies will not insure that the buyer will be successful in obtaining the requested relief, but the acknowledgment of the buyer's right to equitable relief may be persuasive to a court that is considering the matter. Similarly, on granting an injunction, a court may have little or no discretion in requiring a bond or undertaking, but expressly negating this in the acquisition agreement may be helpful in causing a court to minimize the impact on the buyer.

12.7 REMEDIES CUMULATIVE; NO WAIVER; ATTORNEYS' FEES

The rights and remedies of the parties are cumulative and not alternative. Neither any failure nor any delay by any party in exercising any right, power, or privilege under this Agreement or any of the documents referred to in this Agreement will operate as a waiver of such right, power, or privilege, and no single or partial exercise of any such right, power, or privilege will preclude any other or further exercise of such right, power, or privilege or the exercise of any other right, power, or privilege. To the maximum extent permitted by applicable Legal Requirements, (a) no claim or right arising out of this Agreement or any of the documents referred to in this Agreement can be waived by a party, in whole or in part, unless made in a writing signed by such party; (b) a waiver given by a party will only be applicable to the specific instance for which it is given; and (c) no notice to or demand on a party will (i) waive or otherwise affect any obligation of that party or (ii) affect the right of the party giving such notice or demand to take further action without notice or demand as provided in this Agreement or the documents referred to in this Agreement. In the event any Proceeding is brought in respect of this Agreement, the prevailing party will be entitled to recover reasonable attorneys' fees and other costs incurred in such Proceeding, in addition to any relief to which such party may be entitled.

EXPLANATION

The explanation on the following page is from Sepinuck and Stark.

WAIVERS

1. Definition

   (a) Classic definition – A party's intentional relinquishment of a known right.

   (b) Commentators criticize the classic definition.

      i) Waiver typically concerns waiver of a condition, not a right.

      ii) "Known" is misleading. A party who waives need not understand the legal effect of waiving a condition; rather, it need only know that it is waiving the condition.

      iii) A waiver need not be intentional.

2. Oral Waivers Are Enforceable Despite a Provision Prohibiting Oral Waivers

3. Drafting Matters

   (a) Provide that failure to exercise a remedy is not a waiver.

   (b) Provide that no course of dealing constitutes a waiver.

   (c) Provide that a waiver on one occasion is effective only for that occasion.

   (d) Provide that a waiver is not effective against any other person.

Suggested Clause

X.X. Waivers.

(a) **No Oral Waivers.** The parties may waive this Agreement only by a writing executed by the party or parties against whom the waiver is sought to be enforced.

(b) **Effect of Failure, Delay or Course of Dealing.** No failure or delay

(i) in exercising any right or remedy, or
(ii) in requiring the satisfaction of any condition,

under this Agreement, and no act, omission or course of dealing between the parties, operates as a waiver or estoppel of any right, remedy or condition.

(c) **Each Waiver for a Specific Purpose.** A waiver made in writing on one occasion is effective only in that instance and only for the purpose stated. A waiver once given is not to be construed as a waiver on any future occasion or against any other Person.

ATTORNEYS' FEES & OTHER LITIGATION COSTS

Throughout the United States, parties are normally expected to pay their own costs in negotiating, executing, performing, and enforcing their own contracts.[6] Pursuant to this general rule, parties must pay their own expenses in bringing or defending contract actions – even when successful – unless either a specific statute provides to the contrary or the contract both places and, under the law, is permitted to place the burden on the other party.[7] This is certainly true in connection with litigation under the Uniform Commercial Code.[8]

Thus, parties wishing to reallocate these expenses must ensure that their contract contains a reallocation provision broad enough to cover all the different types of expenses that the party to be recompensed might incur.

Discussion Problem

Lender is providing capital financing to Borrower, secured by a lien on virtually all of Borrower's assets. The Credit/Security Agreement includes the following provision intended to make the Borrower responsible for all of Lender's expenses and attorneys' fees:

> Borrower hereby agrees to indemnify, save, defend, and hold Lender harmless from any loss, cost, expense, or liability, including reasonable attorneys' fees, incurred by Lender arising out of or in connection with this Agreement.

What expenses, other than attorneys' fees, might Lender incur? Does this clause cover them? What attorney services might Lender need in the course of the parties' relationship? Will the fees incurred for those services be covered by this clause?

[6] *See, e.g.,* TINA L. STARK, ED., NEGOTIATING AND DRAFTING CONTRACT BOILERPLATE § 12.05 (2003).

[7] However, some pre-contract costs may be recoverable in a successful claim for rescission and reliance damages, because there the goal of recover is to place the aggrieved party in the position it would have occupied had the contract never been made. *See id.* at § 12.05[2].

[8] *See* § 1-305(a) (denying consequential damages except as expressly provided). *Cf.* §§ 2A-108(4), 4A-305(e) (both authorizing recovery of attorneys' fees in specific situations).

A Synopsis of the Law

Because attorneys' fees clauses override what is thought to be a general policy of the law, they are often construed rather strictly. Consequently, a clause requiring reimbursement of "costs" or "expenses" may not be adequate to cover attorneys' fees.[9]

Similarly, a contract clause providing for reimbursement of attorneys' fees for any claim "to enforce the agreement" may not reach a claim for rescission based on fraud or a related claim for damages in tort, such as for misrepresentation.[10] Parties who want an attorneys' fees provision with broad reach – as most lenders do – should instead use language such as "any action or proceeding arising out of or in any way relating to either this agreement or the relationship of the parties."[11]

Prevailing Party

Contracts often provide that in the event of litigation, the "prevailing party" shall be entitled to reimbursement of attorneys' fees. One problem with such clauses is that, even when there is only a single claim, it is often difficult to ascertain who is the prevailing party. For example, if the plaintiff obtains a judgment for only a small amount on a very large claim, is it fair to treat the plaintiff as prevailing?[12] Trial courts generally have significant discretion in determining which party prevailed. They are to make their decisions in reference to the extent each party realized its litigation objectives, whether through trial, settlement or otherwise,[13] and in doing so should consider the parties' contentions in pleadings and settlement discussions.[14] In some cases, neither party

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[9] *See Coastal Power Int'l Ltd. v. Transcontinental Capital Corp.*, 182 F.3d 163 (2d Cir. 1999); *Allstate Ins. Co. v. Loo*, 54 Cal. Rptr. 2d 541 (Cal. Ct. App. 1996); *Jackson v. Hammer*, 653 N.E.2d 809 (Ill. Ct. App. 1995). *But cf. Boulevard Bank v. Philips Medical Systems Int'l B.V.,* 827 F. Supp. 510 (N.D. Ill. 1993) (clause in guaranty agreement allowing recovery of "collection costs" included attorneys' fees).

[10] *Compare Marcus v. Fox*, 723 P.2d 682 (Ariz. 1986) (rescission claim is not one "arising out of a contract"), *with Diamond D Enterprises USA, Inc. v. Steinsvaag*, 979 F.2d 14 (2d Cir. 1992) (franchisor's contractual right to attorneys' fees "incurred in enforcing" the agreement extended to those incurred in defending a fraud in inducement claim); *Lerner v. Ward*, Cal. Rptr. 2d 486 (Cal. Ct. App. 1993) ("any action or proceeding arising out of this agreement" covered a fraud in inducement claim).

[11] *See, e.g., Janotta v. Subway Sandwich Shops, Inc.*, 225 F.3d 815 (7th Cir. 2000) (action to recover punitive damages for fraud was "relative to the rights and obligations of the parties").

[12] *See, e.g., Marine Enterprises, Inc. v. Security Pacific Trading Corp.*, 750 P.2d 1290 (Wash. Ct. App. 1988) (party who won a judgment for $5,701 in an action for $600,000 was not substantially prevailing party).

[13] *See, e.g., Santisas v. Goodin*, 951 P.2d 399 (Cal.1998).

[14] *See, e.g., Hsu v. Abbara*, 891 P.2d 804 (Cal. 1995).

substantially prevails and thus neither gets attorneys' fees.[15] Their determinations are often treated on review as factual findings, and thus are rarely reversed.

Lenders often want their loan agreements to provide for reimbursement of their legal fees regardless of whether the Lender is successful in bringing a claim against or defending a claim by the borrower. The enforceability of such clauses is questionable, however, and is highly unlikely in any state with a statute providing for reciprocity with respect to attorneys' fees.

Reciprocity

At least six states have some sort of statute that convert a unilateral attorneys' fees provision into a bilateral one.[16] That is, by law, if one party to a contract is entitled to attorneys' fees in successfully litigating an issue arising under the contract, then whichever party is successful will be entitled to attorneys' fees from the other. Note, however, such statutes may not apply to tort claims, and thus a contract clause broad enough to cover attorneys' fees incurred in connection with a tort claim may not become reciprocal.[17]

Attorneys should be aware of these rules when selecting which jurisdiction's law will govern the parties' relationship. However, that selection may not be sufficient to ensure that some other law will not apply.[18] Accordingly, attention must also be given to drafting of a choice-of-forum clause,

[15] *See, e.g., Walton General Contractors, Inc. v. Chicago Forming Co.*, 111 F.3d 1376 (8th Cir. 1997). *Cf. Wilkes v. Zurlinden*, 984 P.2d 261 (Or. 1999) (each party prevailed in defending against the other's claim). *See also* Cal. Civ. Code § 1717(b)(1) (providing that the court may determine that there is no prevailing party).

[16] *See* Cal. Civ. Code § 1717; Fla. Stat. Ann. § 57.105(7); Mont. Code § 28-3-704; Or. Rev. Stat. § 20.096; Utah Code § 78-27-56.5; Wash. Rev. Code § 4.84.330. *See also* Ariz Rev Stat. § 12-341.01 (authorizing the court to award attorneys' fees to any successful party in a contract action); Tex. Civ. Prac. & Rem Code § 38.001 (authorizing award of attorneys' fees to successful party in a variety of contract actions).

[17] *See Moallem v. Coldwell Banker Commercial Group, Inc.*, 31 Cal. Rptr. 2d 253 (Cal. Ct. App. 1994).

[18] *Compare ABF Capital Corp. v. Grove Properties Co.* 126 Cal. App. 4th 204 (2005) (because California Civil Code § 1717, which makes reciprocal a contractual clause awarding attorney's fees to only one of the contracting parties, is fundamental policy of the state, it applies to commercial litigation in California even though the parties' agreement had a valid clause choosing application of New York law), *with ABF Capital Corp. v. Berglass*, 130 Cal. App. 4th 825 (2005) (because, under choice-of-law principles, New York law would be applicable to this litigation in California court even if the parties had not contractually agreed to the application of New York law, New York rule enforcing unilateral attorneys' fees governs and whether that rule violates California fundamental policy is irrelevant).

as well as to the fact that no contract clause can alter the proper venue for a bankruptcy proceeding,[19] and such venue can affect which state law governs.[20]

Incurred in Bankruptcy

Reimbursement of attorneys' fees incurred in connection with one party's bankruptcy proceeding presents difficult issues of both law and contract interpretation. With respect to the former, there is some question whether a party may recover attorneys' fees – even if expressly covered by a contractual provision – in litigating issues of bankruptcy law, rather than issues relating to the enforceability or breach of the contract.[21] Thus, for example, there may be a difference between fees incurred by a creditor in defending against an objection to its claim (an issue of nonbankruptcy law) and fees incurred in defending against a preference action (an issue of bankruptcy law). The issue is currently before the Supreme Court, which heard oral argument on January 16, 2007.[22]

With respect to the latter, careful drafting is essential. For example, a clause authorizing attorneys' fees in connection with any effort to collect a debt may not be broad enough to reach fees incurred in reviewing or objecting to a plan of confirmation or to defending a preference action. It may even not be broad enough to cover efforts to obtain relief from the automatic stay, to challenge the debtor's discharge, or to determine the nondischargeability of the creditor's claim.

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[19] *See* 28 U.S.C. § 1408.

[20] *See In re Miller*, 341 B.R. 764 (Bankr. E.D. Mo. 2006) (default rate of interest on business loan, though valid under Iowa law that the parties had chosen in their agreement, violated Missouri law, was against fundamental policy of Missouri, and was therefore unenforceable).

[21] *Compare In re Fobian*, 951 F.2d 1149 (9th Cir. 1991), *cert. denied*, 505 U.S. 1220 (1992) (bank not entitled to award of attorneys' fees in litigating the proper application of §§ 506 and 1225 of the Bankruptcy Code despite attorneys' fees clauses in promissory note and in deed of trust because issues were not contractual claims, rather matters of federal bankruptcy law) *with In re Dow Corning Corp.*, 456 F.3d 668 (6th Cir. 2006) (attorneys' fees incurred in litigating pure issues of bankruptcy law are recoverable if so provided by contract). *See also In re Shangra-La, Inc.*, 167 F.3d 843 (4th Cir. 1999) (landlord is entitled to recover attorneys' fees incurred postpetition in seeking relief from the stay and in opposing assumption of the lease if the agreement so provides).

[22] *See Travelers Casualty & Surety Co. v. Pacific Gas & Electric Co.,* 167 Fed. Appx. 593 (9th Cir.), *cert. granted*, 127 S. Ct. 377 (2006).

Suggested Clause

X.X. Costs & Attorneys' Fees.

Borrower shall indemnify, save, defend, and hold Lender harmless from any loss, cost, expense, or liability, including fees of accountants, attorneys, consultants, and expert witnesses reasonably incurred in defending or enforcing Lender's rights in connection with this Agreement or otherwise relating to the relationship of the parties, regardless of whether they are incurred before, during, or after any litigation or other dispute resolution procedure, regardless of success on the merits, and regardless of whether they relate to issues arising out of contract, tort, bankruptcy, or some other area of law.

12.8 ENTIRE AGREEMENT AND MODIFICATION

This Agreement supersedes all prior agreements, whether written or oral, between the parties with respect to its subject matter (including any letter of intent and, upon the Closing, the Confidentiality Agreement between Buyer and Sellers dated __________) and constitutes (along with the Disclosure Letter, the exhibits, and the other documents to be delivered pursuant to this Agreement) a complete and exclusive statement of the terms of the agreement between the parties with respect to its subject matter. This Agreement may not be amended, supplemented, or otherwise modified except in a writing executed by the party to be charged with the amendment.

EXPLANATION

The explanation on the following page is from Sepinuck and Stark.

AMENDMENTS

1. Enforceability of a No Oral Amendments Provision Under the Common Law.

   (a) The provision is generally unenforceable.

   (b) Written contracts are of no higher status than oral contracts.

   (c) Parties may orally amend a no oral amendments provision, and then amend the contract.

   (d) In some states, a party will be estopped (based upon its actions) from relying on the no oral amendments provision.

2. Effect of Statutory Provisions Regarding No Oral Amendments Provisions

   (a) U.C.C. § 2-209(2) states that a no oral amendments provision is enforceable, but U.C.C. § 2-209(4) provides that even if a provision may not be amended, it may be waived by course of conduct.

   (b) N.Y. Gen. Oblig. L. § 15-301. The statute provides that no oral amendment provisions are enforceable. However, partial performance can overcome the effect of the statute.

3. Drafting Matters

   (a) If New York law governs, consider requiring that the amendment identify itself as an amendment to the agreement. *See DFI Communications, Inc. v. Greenberg*, 41 N.Y.2d 602, 606-608.

   (b) Consider whether there should be any conditions precedent to effectiveness. For example, delivery of a certified copy of the resolutions authorizing the amendment.

   (c) Determine whether any statutes are applicable. *See, e.g.*, Del. Gen. Corp. L. § 251(d) which applies if there is a merger.

   (d) Determine whether a supermajority is appropriate (e.g., in a shareholders' agreement or a multi-lender credit agreement).

Suggested Clause

X.X. Amendments.

The parties may amend this Agreement only by a written agreement of the parties that identifies itself as an amendment to this Agreement.

12.9 DISCLOSURE LETTER

(a) In the event of any inconsistency between the statements in this Agreement and those in the Disclosure Letter (other than an exception expressly set forth as such in the Disclosure Letter with respect to a specifically identified representation or warranty), the statements in this Agreement will control.

(b) The statements in the Disclosure Letter, and those in any supplement thereto, relate only to the provisions in the Section of this Agreement to which they expressly relate and not to any other provision in this Agreement.

EXPLANATION

The explanation on the following page is from Section 13.8 of MAPA.

COMMENT

Section 13.8 represents the buyer's opening position in a debate that occurs frequently in the negotiation of acquisition agreements: What effect does a disclosure made with respect to one representation have on other representations? The buyer typically seeks to limit the effect of such a disclosure to the specific representation to which the disclosure refers, arguing that the impact of the matter disclosed cannot be evaluated in the absence of the context given by the particular representation. For example, the buyer may view differently a contract disclosed in response to a representation that calls for a list of material contracts than one disclosed in response to a representation concerning transactions with related parties; the latter situation increases the likelihood that the economic terms of the contract are not at arm's length. The seller and the shareholders will frequently argue that it is unfair for them to be penalized for a failure to identify each of the many representations in a long-form acquisition agreement, which often overlap, to which a disclosed state of facts relate. Indeed, the seller often prefers not to characterize the disclosures made in the Disclosure Letter by reference to any representations and attempts to qualify all representations by the Disclosure Letter (for example, Article 3 would begin "Seller and each Shareholder represent and warrant, jointly and severally, to Buyer as follows, except as otherwise set forth in the Disclosure Letter"). A frequent compromise is to modify Section 13.8(a) by adding at the end "except to the extent that the relevance to such other representation and warranty is manifest on the face of the Disclosure Letter."

Some sellers might prefer to insert a provision such as the following in lieu of Section 13.8:

> (a) Any disclosure under one Part of the Disclosure Letter shall be deemed disclosure under all Parts of the Disclosure Letter and this Agreement. Disclosure of any matter in the Disclosure Letter shall not constitute an expression of a view that such matter is material or is required to be disclosed pursuant to this Agreement.
>
> (b) To the extent that any representation or warranty set forth in this Agreement is qualified by the materiality of the matter(s) to which the representation or warranty relates, the inclusion of any matter in the Disclosure Letter does not constitute a determination by Seller and Shareholders that any such matter is material. The disclosure of any [information concerning a] matter in the Disclosure Letter does not imply that any other, undisclosed matter that has a greater significance [or value] is material.

12.10 ASSIGNMENTS AND SUCCESSORS

No party may assign any of its rights or delegate any of its obligations under this Agreement without the prior consent of the other parties, except that Buyer may assign any of its rights and delegate any of its obligations under this Agreement to any Subsidiary of Buyer and to the purchaser of all or substantially all [a substantial part of] of the equity securities or business of the Acquired Companies and may collaterally assign its rights under this Agreement to any financial institution providing financing in connection with the Contemplated Transactions. Any purported assignment of rights or delegation of obligations in violation of this Section 12.10 will be void. Subject to the foregoing, this Agreement will apply to, be binding in all respects upon, and inure to the benefit of the successors and permitted assigns of the parties.

EXPLANATION

The explanation on the following page is from Sepinuck and Stark.

ASSIGNMENT, DELEGATION & CHANGE OF CONTROL

1. Common Law

   (a) State law governs.

   (b) Rights are generally assignable, except if assignment would increase the nonassigning party's burdens.

   (c) Performance is generally delegable, except if the contract is one for personal service.

2. Anti-assignment Provisions

   (a) Anti-assignment provisions are theoretically enforceable, but the courts have a bias against their enforceability because they dislike restraints on alienability.

   (b) U.C.C. Article 2 and U.C.C. Article 9 provide that anti-assignment provisions are unenforceable.

   (c) To prohibit the assignment of rights under an agreement, an anti-assignment provision must specifically prohibit the "assignment of rights" under the agreement.

   (d) A prohibition against an "assignment of the Agreement" prohibits only the delegation of performance, not the assignment of rights.

   (e) Most states interpret a prohibition against an assignment of rights as not only a prohibition against a delegation of performance, but also a prohibition against an assignment of rights.

   (f) Despite a prohibition against an assignment of rights, an assignment is still enforceable unless the contract provides that any assignment in breach of the prohibition is "void." See F(2).

      i) Rationale: common law dislikes restraints against alienability.

      ii) Courts distinguish between the prohibition of the right to assign rights under a contract and the prohibition of the power to assign rights under a contract. If a contract provision merely prohibits assignment, the provision takes away only a party's right to assign. That party, however, retains the power to assign. Thus, if a party exercises its power to assign in the face of an anti-assignment provision, that party is in breach (because it violated the anti-assignment provision), but its assignment is enforceable (because the party

retained the power to assign). The following provision takes away only the right to assign.

"X shall not assign its rights under this Agreement."

If the parties also want to take away the power to assign, the contract must declare void any assignment in violation of the anti-assignment provision. The following additional sentence takes away the power to assign:

"Any assignment of rights in violation of this Section is void."

iii) Due diligence implications of an anti-assignment provision:

a) What are the ramifications if a party assigns its rights despite a prohibition against assignment? It depends.

(1) Breaches of the anti-assignment covenant entitle the nonassigning party to sue for damages. However, there will often be no damages.

(2) BUT: Make sure to check whether the contract has specific remedies provisions. For example, a lease might state that if lessee breaches any provision of the contract, the landlord is entitled to evict the assignee. In this instance, although the landlord might not suffer monetary damages, it would have other rights against the assignee that could make the assignment problematic. Also, check whether a default in the contract would cause a cross-default in other agreements.

(g) Consents to assignment in the anti-assignment provision.

i) When there is a consent provision, does the contract expressly provide that the nonassigning party may not unreasonably withhold consent?

ii) If the consent provision does not expressly provide that consent may not be unreasonably withheld, does the governing law impute a reasonableness requirement? That is, is the nonassigning party obligated not to unreasonably withhold its consent?

(h) Does the contract prohibit assignments by merger or consolidation?

i) By its express terms?

ii) In many states, the prohibition must be express (actual use of the word "merger") in order for mergers to be prohibited.

(i) Does the contract prohibit assignments by operation of law?

i) How does the governing law interpret the phrase "by operation of law?"

ii) Does assignment by operation of law include mergers and consolidations?

(j) Does the contract prohibit involuntary assignments made by the court using its equitable powers?

3. Change of Control

(a) Consider whether the contract should prohibit a change of control. This kind of prohibition is placed either in the anti-assignment provision or in the list of events of defaults. If the prohibition against change of control is in the anti-assignment provision, it is usually phrased so that "any change of control is deemed an assignment for purposes of this Section."

(b) Is control defined? If so, how?

4. Anti-Delegation Provisions

(a) Anti-delegation provisions are generally enforceable.

(b) Prohibit delegation of "performance" rather than duties. "Performance" is broader, taking into account not only delegation of a duty, but also delegation of a condition.

(c) Consider whether it is appropriate to permit delegation to a specific person or a class of persons.

i) Consider whether there should be conditions precedent to an effective delegation.

a) Test of creditworthiness.

b) Delivery of counsel's opinion.

ii) When defining a class of potential delegates, determine what standards they need to meet. Wholly-owned subsidiary? More than majority-owned?

(d) If a delegation is permitted, consider whether the delegating party should be released, causing a novation.

Sample Clause

X.X. Assignment and Delegation.

(a) **No Assignments.** No party may assign any of its rights under this Agreement, except with the prior written consent of the other party. That party shall not unreasonably withhold its consent. All assignments of rights are prohibited under this subsection, whether they are voluntary or involuntary, by merger, consolidation, dissolution, operation of law, or any other manner. For purposes of this Section,

(i) a "change of control" is deemed an assignment of rights; and

(ii) "merger" refers to any merger in which a party participates, regardless of whether it is the surviving or disappearing corporation.

(b) **No Delegations.** No party may delegate any performance under this Agreement.

(c) **Consequences of Purported Assignment or Delegation.** Any purported assignment of rights or delegation of performance in violation of this Section is void.

12.11 NO THIRD PARTY RIGHTS

No Person other than the parties will have any legal or equitable right, remedy, or claim under or with respect to this Agreement, except such rights as shall inure to a successor or permitted assignee pursuant to Section 12.10 and other than an Indemnified Person. Prior to the Closing or the termination of this Agreement, this Agreement may be amended and any provision of this Agreement may be waived without the consent of any Indemnified Person.

EXPLANATION

The explanation on the following page is from the Fall 2006 issue of Deal Points.

Halliburton Company Benefits Committee v. Graves, 2006 WL 2499142 (5th Cir. August 30, 2006).

In the Summer 2005 issue of Deal Points, we reported on the District Court opinion in Halliburton Company Benefits Committee v. Graves, 2004 WL 2938645 (S.D. Tex. Dec. 20, 2004). See also Annual Survey of Judicial Developments Pertaining to Mergers and Acquisitions, 61 Business Lawyer 987, 988 (2006). That opinion, in which the United States District Court for the Southern District of Texas enforced a provision of a merger agreement that obliged the buyer to continue the acquired company's benefit programs for its retirees, was recently affirmed by the U.S. Court of Appeals for the Fifth Circuit. The Fifth Circuit opinion has such important implications for M&A practice that it merits discussion at the Committee meeting in Dallas.

Halliburton Company agreed, in a 1998 merger agreement governing the merger of Dresser Industries, Inc. into a wholly owned subsidiary of Halliburton, to maintain the Dresser retiree medical plan except to the extent modifications were consistent with changes in medical plans provided by Halliburton and its subsidiaries to active employees.

Five years after the merger, Halliburton, acting through its plan administrator, amended three subplans of the Dresser retiree medical program, with the goal of achieving parity for all Halliburton and Dresser retirees. The amendments were not consistent with changes in plans for active employees, as contemplated by the merger agreement. The Halliburton Benefits Committee then initiated a declaratory judgment action seeking declarations that the amendments were permissible and did not violate the merger agreement or the Halliburton welfare benefits plan or ERISA, and that the merger agreement did not limit Halliburton's right to amend or terminate the Dresser retiree medical program. Dresser retirees filed counterclaims and third party claims.

An issue central to both the district court and the Fifth Circuit opinions was whether the merger agreement could operate as an amendment of the Dresser plan. The Fifth Circuit held that under ERISA, an amendment to an ERISA plan need not be labeled as such, and that any act directed to a provision of an ERISA plan may be deemed to constitute a plan amendment. Thus the merger agreement could amend the Dresser plan, as long as it complied with any procedures for amendment specified in the Dresser plan.

As to conformance with specified procedures for amendment, Halliburton argued that the plan provided that it could be amended by "written instrument signed by the Vice President, Human Resources," and that since the merger agreement was not signed by that officer, it did not comply with the plan's specified procedures for amendment. The Fifth Circuit gave that argument short shrift, pointing out that the merger agreement was signed by Dresser's Chief Executive Officer and Chairman, and approved by the Dresser Board of Directors. The fact that authority to amend had been delegated to the Vice President, Human Resources, did not mean that the company, acting through a more senior officer and the directors, could not amend the plan without the signature of that officer.

Halliburton also argued that the Dresser retirees could not enforce, as third party beneficiaries, the provision of the merger agreement that amended the Dresser plan, due to a provision in the

merger agreement that Halliburton contended prohibited third party beneficiary enforcement. The court of appeals stated that this position "wrongfully equates a plan participant's enforcement of a plan right under ERISA with a third party's enforcement of a provision in a contract." 29 U.S.C. sec. 1132(a)(1)(B) specifically permits a participant or beneficiary under ERISA to bring a civil action to enforce his rights under the plan or to clarify his rights to future benefits under the terms of the plan. Such enforcement, the court held, "falls exclusively in ERISA's remedial scheme."

Like Prouty v. Gores Technology Group, 18 Cal. Rptr. 3d 178 (Cal. Ct. App. 2004), discussed in our 2004 survey, see 60 BUS. LAW. 843, 847-49 (2005), Halliburton raises the question whether employees (in Halliburton, retired employees) of the target company can claim benefits under an acquisition agreement. But unlike Prouty (which held that certain target company employees could enforce the acquisition agreement as third party beneficiaries), the Halliburton decisions suggest that to the extent employees are enforcing rights under ERISA, the ERISA remedial scheme is exclusive, so that the question whether the employees have third party beneficiary rights under the acquisition agreement becomes irrelevant. Thus, if an acquisition agreement can be read to create obligations of the buyer with respect to an ERISA plan of the target company, it will be difficult, and perhaps impossible, to avoid the possibility that employees of the target company can enforce the buyer's obligations – not through third party enforcement of the acquisition agreement, but through the remedial scheme of ERISA. In light of Halliburton, M&A practitioners who are involved in drafting acquisition agreement provisions pertaining to the buyer's post-closing handling of an ERISA plan of the target company might want to consider language to the effect that those provisions are not intended by the parties to constitute a plan amendment or to create any obligations of the buyer with respect to the target company ERISA plan.

12.12 SEVERABILITY

If any provision of this Agreement is held invalid or unenforceable by any court of competent jurisdiction, the other provisions of this Agreement will remain in full force and effect. Any provision of this Agreement held invalid or unenforceable only in part or degree will remain in full force and effect to the extent not held invalid or unenforceable.

EXPLANATION

The explanation on the following page is from Section 13.10 of MAPA.

COMMENT

Whether a contract is entire or severable depends upon the parties' intention, the subject matter of the agreement, and the circumstances of the transaction. *See, e.g*., Christian v. Christian, 42 N.Y.2d 63 (1977); Keene v. Harling, 61 Cal. 2d 318 (1964); Heilwood Fuel Co. v. Manor Real Estate Co., 175 A.2d 880 (Pa. 1961); Knight v. Hamilton, 233 S.W.2d 969 (Ky. 1950). Under Section 13.10, if a provision of the acquisition agreement is held unenforceable, the remaining provisions are separated from the invalid or unenforceable provision and remain in effect. *Cf.* Christian, 42 N.Y.2d at 73 ("Here the parties had a right to and did, by expressly stipulating that if any provision of the separation agreement be held invalid or unenforceable all other[s] shall nevertheless continue in full force, make the agreement within reasonable limits divisible, and there is little room for construction.").

The language in Section 13.10 may not be effective, however, if the invalid provision constitutes an essential element of the contract. According to the Restatement (Second) of Contracts § 184:

> (1) If less than all of an agreement is unenforceable . . . a court may nevertheless enforce the rest of the agreement in favor of a party who did not engage in serious misconduct if the performance as to which the agreement is unenforceable is not an essential part of the agreed exchange.
>
> (2) A court may treat only a part of a term as unenforceable under the rule stated in Subsection (1) if the party who seeks to enforce the term obtained it in good faith and in according with reasonable standards of fair dealing.

As the comment to this section of the Restatement explains:

> If the performance as to which the agreement is unenforceable is an essential part of the agreed exchange, the inequality will be so great as to make the entire agreement unenforceable. Under Subsection (1), however, if that performance is not an essential part of the agreed exchange, a court may enforce all but the part that contravenes public policy. For example, a promise not to compete that is unreasonably in restraint of trade will often not invalidate the entire agreement of which it is a part. Whether the performance is an essential part of the agreed exchange depends on its relative importance in the light of the entire agreement between the parties.

The parties may also want to consider inserting a provision calling for judicial reformation of the acquisition agreement to modify the invalid provision to achieve the parties' intention. This practice is common with respect to covenants not to compete. The buyer may want to consider whether it will want to rescind the entire acquisition agreement if a major, yet nonessential, provision is held to be invalid or unenforceable.

12.13 TIME OF ESSENCE

With regard to all dates and time periods set forth or referred to in this Agreement, time is of the essence.

EXPLANATION

The explanation on the following page is from Section 13.12 of MAPA.

COMMENT

In order to take advantage of, among other things, the "drop-dead" date termination provisions in Section 9.1(f) and (g), the Model Agreement contains a time-is-of-the-essence provision in Section 13.12. An express statement of this provision is important because time may not be of the essence in a contract unless it is specifically provided or the circumstances clearly indicate that it was the intention of the parties. *See, e.g.*, National Data Payment Sys., Inc. v. Meridian Bank, 18 F. Supp. 2d 543, 547 (E.D. Pa. 1998); Mercer v. Phillips, 676 N.Y.S. 2d 334, 336 (1998); Mailloux v. Dickey, 523 A.2d 66, 69 (N.H. 1986); Hollars v. Randall, 554 N.E.2d 1177, 1179 (Ind. Ct. App. 1990).

Courts differ, however, about whether the failure of a party to comply with its obligations under an agreement in a timely manner will permit the enforcement of the remedies provided for in the agreement. Relying on a state statute and precedent dating to 1897, the North Dakota Supreme Court in E.E.E., Inc. v. Hanson, 318 N.W.2d 101 (N.D. 1982), allowed a party to enforce its rights under a time-is-of-the-essence provision:

> [N]ormally, parties to a contract are allowed to write the terms of the contract themselves. A court may be called upon to interpret a contract written by the parties thereto but the court's authority to interpret a contract does not give a court the authority to modify it. Here, the parties took special pains to assure that the contract reflected their intent that time was of the essence . . .. [T]here can be no doubt of their intent and we cannot ignore it under the guise of interpreting the contract.

Id. at 104-05 (citations omitted); *see also* Sun Bank of Miami v. Lester, 404 So.2d 141, 143 (Fla. Dist. Ct. App. 1981); Prime Retail, L.P. v. Caribbean Airport Facilities, Inc., 975 F. Supp. 148, 153 (D.P.R. 1997) ("[w]hen the expiration date has passed, all obligations are completely extinguished"). Enforcement of "time is of the essence" provisions, however, has often been subject to application of principles of equity. For example, courts have held that such a provision will not be given effect if it causes a forfeiture. *See* Kaiman Realty, Inc. v. Carmichael, 655 P.2d 872, 874 (Haw. 1982) ("[A] 'time is of the essence' clause in an agreement of sale will not foreclose equitable relief where, absent gross negligence or bad faith conduct of the vendee, forfeiture would be harsh and unreasonable"); Rothenberg v. Follman, 172 N.W.2d 845, 850 (Mich. Ct. App. 1969) ("[T]he fact that the parties have stipulated that time is of the essence is but one of the factors to be taken into consideration in determining whether equity will intervene to set aside a forfeiture. Where the forfeiture is disproportionately large and the other facts, circumstances and equities cry out for relief, a court of equity may, nevertheless, intervene."); *see also* Restatement (Second) of Contracts § 242(c) cmt. d; Sun Bank of Miami, 404 So. 2d at 143-44 (Ferguson, J., dissenting).

Finally, a party should remember that, by its conduct, it may negate the effectiveness of a time-is-of-the-essence provision if a waiver is found. In Porterco, Inc. v. Igloo Products Corp., 955 F.2d 1164 (8th Cir. 1992), the court observed:

> Provisions in a contract which specify or limit the time of performance, even where time is of the essence of the contract, may be waived. Further, such a waiver may be express or implied . . . .

> A waiver of the time of performance of a contract will result from any act that induces the opposite party to believe that exact performance within the time designated in the contract will not be insisted upon.

Id. at 1171 (quoting Laredo Hides Co., Inc. v. H & H Meat Products, 513 S.W.2d 210, 217-18 (Tex. Civ. App. 1974)). *See also* Frank v. Fleet Finance, Inc. of Georgia, 489 S.E.2d 523, 525 (Ga. App. 1997). Section 13.6 of the Model Agreement, which provides that a party's delay in exercising any of its rights, powers, or privileges under the agreement will not operate as a waiver, may be of little help to the party seeking to enforce rights under Section 13.12 because, as the Porterco court observed, "it is within the jury's power to find that such a provision was itself waived or modified by the parties' agreement or conduct." *Id*. at 1172. n.9.

12.14 GOVERNING LAW

All matters relating to or arising out of this Agreement or any Contemplated Transaction and the rights of the parties will be governed by and construed and interpreted under the laws of the State of __________ without regard to conflicts of laws principles that would require the application of any other law.

EXPLANATION

Please refer to the explanation from Sepinuck and Stark under Section 12.4 (Jurisdiction; Service of Process), which includes governing law.

12.15 COUNTERPARTS

This Agreement and other documents to be delivered pursuant to this Agreement may be executed in one or more counterparts, each of which will be deemed to be an original copy and all of which, when taken together, will be deemed to constitute one and the same Agreement or document. The delivery of copies of this Agreement or other documents to be delivered pursuant to this Agreement, including executed signature pages where required, by electronic transmission will constitute effective execution and delivery of this Agreement or such other document for all purposes. Signatures transmitted electronically will constitute original signatures for all purposes.

EXPLANATION

The explanation on the following page is from Section 13.14 of MAPA.

COMMENT

This section, which permits execution in counterparts, is common in acquisition agreements. It is inserted for the convenience of the parties and facilitates execution of the agreement when the signatories are not available at the same time or place.

This section does not alter the effective date specified on the initial page of the acquisition agreement. The articles of incorporation or the charter, bylaws, and minutes will determine which persons have the authority to execute the agreement on behalf of corporations that are parties to the transaction.

The language with respect to exchange of copies and signature pages by facsimile recognizes the increasing trend to rely on facsimile transmission for execution and delivery of acquisition agreements. In most cases, arrangements are made to exchange the original signed copies, but there is always the concern that this might, for some reason, not take place. The question then becomes whether one can rely on a signature that is only digitally recreated by facsimile transmission.

The essential elements to the formation of a contract are an offer, acceptance, and manifestation of assent or meeting of the minds. When an offer upon specified terms is accepted without conditions, and acceptance is communicated to the other party without unreasonable delay, a contract arises. The offeror can prescribe conditions on the method of acceptance. Restatement (Second) of Contracts § 30. If a condition calling for a signature is not met, the contract does not come into being. *See* Kroeze v. Chloride Group Ltd., 572 F.2d 1099 (5th Cir. 1978). Like earlier cases dealing with telegrams and telexes, there is authority to the effect that the exchange of writings and acceptance by facsimile creates a binding contract. *See* Holbrook v. A C and S, Inc., No. Civ. A. 92-1906 1997 WL 52060, at *1 (E.D. Pa. Feb. 3, 1997); Coin Automatic Laundry Equip. Co. v. Pheasant Hollow Assocs., No. Civ. A. 92-7041 1993 WL 267446 (E.D. Pa. June 30, 1993). In addition, a facsimile signature can satisfy the statute of frauds. *See, e.g.,* NY GEN. OBLIG. LAW § 5-701 (written text produced by telefacsimile constitutes a writing and any symbol executed or adopted by a party with the present intention to authenticate a writing constitutes a signing); *see also* Restatement (Second) of Contracts § 134 cmt. b; Birenbaum v. Option Care, Inc., 971 S.W.2d 497, 502 (Tex. Ct. App. 1997) (statute of frauds not satisfied because buyer signed a post-it cover memo rather than letter of intent that was sent by facsimile).

Although language in the Model Agreement validating signature by facsimile transmission may not be essential, it might be helpful to have authorized the practice of exchanging signature pages by facsimile if a dispute should arise over the acquisition agreement.

12.16 WAIVER OF JURY TRIAL

THE PARTIES WAIVE ANY RIGHT TO TRIAL BY JURY IN ANY PROCEEDING ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY CONTEMPLATED TRANSACTION, WHETHER NOW EXISTING OR HEREAFTER ARISING, AND WHETHER SOUNDING IN CONTRACT, TORT, OR OTHERWISE. THE PARTIES AGREE THAT ANY OF THEM MAY FILE A COPY OF THIS AGREEMENT WITH ANY COURT AS WRITTEN EVIDENCE OF THE KNOWING, VOLUNTARY, AND BARGAINED-FOR AGREEMENT AMONG THE PARTIES IRREVOCABLY TO WAIVE TRIAL BY JURY AND THAT ANY PROCEEDING BETWEEN THEM RELATING TO THIS AGREEMENT OR ANY CONTEMPLATED TRANSACTION SHALL INSTEAD BE TRIED IN A COURT OF COMPETENT JURISDICTION BY A JUDGE SITTING WITHOUT A JURY.

EXPLANATION

The explanation on the following page is from Sepinuck and Stark.

WAIVER OF RIGHT TO A JURY TRIAL

1. Common Law

    (a) The right to a jury trial is set forth in the Constitution of the United States and the constitutions of the individual states.

        i) All criminal trials. (U.S. Constitution).

        ii) Civil suits "at common law." (U.S. Constitution). Not equitable matters.

    (b) Some statutes provide a right to a jury trial.

2. Rationale for Waiving Right to a Jury Trial

    (a) Large institutional clients often fear that jurors will be biased against them. Conversely, individuals often want to take advantage of juror bias in favor of "the little guy."

    (b) Bench trials are often quicker.

    (c) Bench trials are often less expensive because the parties do not need to pick a jury, draft jury instructions, *etc.*

    (d) Bench trials are often preferred when the issues are highly technical.

3. Enforceability of Jury Waiver Provisions

    (a) Presumption is against the enforceability of jury waiver provisions.

    (b) Despite presumption, jury waiver provisions are enforceable if properly drafted (except for Georgia).

4. Drafting Matters

    (a) Waiver should be knowing, intentional and voluntary. Make the provision the last before the signature line.

    (b) Language should be clear and prominent (*e.g.*, bold face font, large font size, and capitalization).

(c) Parties should be of roughly equal bargaining power, or the party with the inferior bargaining power should be represented by effective counsel. Consider a provision requiring the party with inferior bargaining power to acknowledge that it has been effectively represented.

(d) The scope of the waiver should be coordinated with the language in the choice of law and choice of forum provisions.

Suggested Clause

[Last section]. Waiver of Jury Trial.

Each party knowingly, voluntarily, and intentionally waives its right to a trial by jury in any litigation arising out of or relating to this Agreement and the transactions it contemplates. This waiver applies to any litigation, whether sounding in contract, tort or otherwise. Each party acknowledges that it has received the advice of competent counsel.

This Section should immediately precede the testimonium (the concluding paragraph) and the signature lines. It should be prominent. Options are a large font, bold font, caps or a combination of the listed options.

12.17 SELLERS’ OBLIGATIONS

The liability of each Seller under this Agreement will be joint and several with the other Sellers. Sellers jointly and severally shall cause each Acquired Company to take, or refrain from taking, all actions as may be necessary or appropriate to implement this Agreement.

EXPLANATION

The explanation on the following page is from Section 13.15 of MAPA.

COMMENT

The first sentence of this section confirms the joint and several liability of Shareholders for the liabilities of Seller that is otherwise implicit in the fact that Shareholders have joined with Seller in executing the Model Agreement. The Fact Pattern assumes that Seller will not continue in business after the Closing and that the Assets of Seller will be distributed to its Shareholders, and this section increases the likelihood that post-Closing indemnifications will be honored by placing the credit of Shareholders behind those obligations. This may be unnecessary if there is an escrow, Promissory Note, or other “holdback” that adequately secures the indemnification obligations of Seller under the Model Agreement. This section would be less appropriate where a seller is a substantial business enterprise with other assets and intends to remain in business after closing.

The second sentence of this section contains an obligation on the part of Shareholders to take such actions as are necessary to cause Seller to fulfill its obligations under the Model Agreement. Such an obligation, which is sometimes contained in numerous places in the acquisition agreement by the use of phrasing such as “Seller shall, and Shareholders shall cause Seller to, . . .”, is also implicit in the fact that Shareholders are joining in the Model Agreement. This obligation is set forth in a single section in order to avoid the need to scrutinize numerous other places in the document where the obligation of Shareholders to cause Seller to take certain action would be critical.

12.18 SELLERS' REPRESENTATIVE

(a) Each Seller constitutes and appoints __________ as its representative (the "Sellers' Representative") and its true and lawful attorney in fact, with full power and authority in its name and on its behalf:

(i) to act on such Seller's behalf in the absolute discretion of the Sellers' Representative with respect to all matters relating to this Agreement; and

(ii) in general, to do all things and to perform all acts, including executing and delivering all agreements, certificates, receipts, instructions, and other instruments contemplated by or deemed advisable to effectuate the provisions of this Section 12.18.

This appointment and grant of power and authority is coupled with an interest and is in consideration of the mutual covenants made in this Agreement and is irrevocable and will not be terminated by any act of any Seller or by operation of law, whether by the death or incapacity of any Seller or by the occurrence of any other event. Each Seller hereby consents to the taking of any and all actions and the making of any decisions required or permitted to be taken or made by the Sellers' Representative pursuant to this Section 12.18. Each Seller agrees that the Sellers' Representative shall have no obligation or liability to any Person for any action taken or omitted by the Sellers' Representative in good faith, and each Seller shall indemnify and hold the Sellers' Representative harmless from and against any and all loss, damage, expense, or liability (including reasonable attorneys' fees and expenses) that the Sellers' Representative may incur as a result of any such action or omission by the Sellers' Representative under this Agreement.

(b) Buyer and the Escrow Agent shall be entitled to rely upon any document or other paper delivered by the Sellers' Representative as being authorized by Sellers, and neither Buyer nor the Escrow Agent shall be liable to any Seller for any action taken or omitted to be taken by Buyer or the Escrow Agent based on such reliance.

(c) Until all obligations under this Agreement shall have been discharged (including all indemnification obligations under Article 11), Sellers who, immediately prior to the Closing, are entitled in the aggregate to receive more than fifty percent (50%) of the Purchase Price, may, from time to time upon notice to Buyer, appoint a new Sellers' Representative upon the death, incapacity, or resignation of the Sellers' Representative. If, after the death, incapacity, or resignation of the Sellers' Representative, a successor Sellers' Representative shall not have been appointed by Sellers within fifteen (15) Business Days after a request by Buyer, Buyer may appoint a Sellers' Representative to fill any vacancy so created by notice of such appointment to Sellers.

EXPLANATION

The explanation on the following page is from Section 13.16 of MAPA.

COMMENT

When there are multiple parties to an acquisition agreement or who, whether through the acquisition agreement or a separate joinder agreement, will be responsible for indemnification, it often is found to be practical to appoint one or more representatives to act on their behalf. The authority of a representative can be limited to specific matters or can cover any matters that might arise concerning the acquisition agreement and any ancillary agreements, such as an escrow agreement. Sometimes, a buyer will require that a representative be appointed so that the buyer need only deal with one or a few people in matters such as purchase price adjustments or indemnification.

The Fact Pattern posits that there are ten shareholders, only two of whom will be parties to the Model Agreement and required to indemnify Buyer. In addition, Seller is a closely held corporation that will be represented by its own officers and directors, presumably including the two principal Shareholders. Because there are relatively few parties, it is unlikely that Buyer would require that a Representative be appointed. Buyer, however, still may find it helpful to centralize the decision making and deal with one person, particularly if Seller is to be dissolved. After Seller is dissolved, its officers and directors still might have authority to continue to wind up its affairs, but the scope and duration of their power and authority will be governed by state law. Sometimes the authority granted to the representative only becomes effective by its terms upon the dissolution of the seller.

Section 13.16(a) provides that one person is to be appointed to serve as the Representative of Seller and both Shareholders. The acceptance by the Representative to act in that capacity is added to the Model Agreement following the signature page for the parties. Provision is sometimes made for the appointment of a successor representative in the event of the resignation, death, or incapacity of the representative designated in the acquisition agreement. The authority of the representative in the Model Agreement is limited to those matters specified in clauses (A) through (H) of Section 13.16(a)(i), including any Purchase-Price adjustment and indemnification, but with general power to perform all acts to effectuate the provisions of the section.

The appointment and grant of authority is irrevocable and not subject to termination by any act of the shareholders or the seller (including dissolution) or by operation of law. The law of agency will ordinarily apply to this appointment and grant of authority under which the authority of the agent would terminate on revocation by the principal or the death or incapacity of the principal. See Restatement (Second) of Agency §§ 118, 120, 122.An exception is made, however, for agencies coupled with an interest, which in Restatement (Second) of Agency §139 is referred to as a "power given as security." Although this agency is characterized as coupled with an interest, the case law in a particular jurisdiction may suggest a different result.

In appropriate circumstances, the parties may wish to appoint a corporate representative or designate one or more persons to serve as alternate representative to act in place of the person named in case of such person's death, incapacity, or unavailability.

The remainder of Section 13.16(a) contains typical exculpation and indemnification language for the protection of the representative. Counsel for the seller may want to expand this to cover a

representative's reliance on advice of counsel, reports of accountants, and documents believed to be genuine and to have been signed by the proper party, using language similar to the protective provisions often used for escrow agents.

The right of Buyer and the escrow agent to rely on documents or other papers delivered by the Representative is covered in Section 13.16(b). Sometimes the representative is substituted for the selling parties in the notice provision and in certain of the operative provisions of the acquisition agreement to make it even clearer that the buyer is entitled to rely on its dealings with the representative.

BIOGRAPHIES OF PANELISTS