

The Perils of Cut and Paste: Common Contract Provisions that Deserve a Second Look



Beware the Boilerplate

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Waiver Provisions

- An enforceable waiver is **knowing** and **voluntary**
- Conspicuousness helps with enforceability of all waivers
- Conspicuousness is **required** for extraordinary waivers
 - Release from liability for one's own negligence
 - Waiver of right to jury trial



How to Make a Waiver Conspicuous

- ALLCAPS
- **Bold type**
- **Different color**
- **Different size** (hint: not smaller)
- Preceded by a HEADING
- *See UCC* § 1.201(10)

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Clear and Express Waivers

- Waivers must clearly express the intention of the parties
 - Notice of acceleration
 - Express negligence rule
- But sometimes they don't have to
 - FMV offset

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Merger and Integration Clauses

All understandings, representations and agreements heretofore had with respect to this Agreement are merged into this Agreement which alone fully and completely expresses the agreement of the Parties.

What do Merger Clauses do?

- Invalidates/supersedes prior agreements
- Eliminates authority of agents of contracting parties to modify terms
- Absent ambiguity, limits evidence on meaning of the contract to the contract itself (no parol)
- Focus is on ***what the contract requires***, not the validity of the contract itself

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