

# 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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