

Boilerplate

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Michael Dayton is the chairman of the Business, Finance and Real Estate Department at Nyemaster Goode and a member of the Iowa State Bar Association's Business Law Section Council. During his career, Michael has led and assisted on hundreds of merger and acquisition transactions from public to public mergers to the sales of small privately held companies. Michael also routinely assists clients with general contracting matters, including contract management processes and data and cybersecurity matters relating thereto; corporate formation and governance issues; commercial lending and secured transactions; regulatory matters; local counsel opinions; and other commercial transactions. Michael is passionate about leadership, teaching, coaching, and serving his community, especially in the areas of child education and welfare.

Disclaimer

The following presentation does not represent legal advice. If you have specific questions concerning specific circumstances, please consult your attorney.

Presentation Focus

- Why “boilerplate”
- Provisions and case law



“Boilerplate”

- Definition: “standardized pieces of text for use as clauses in contracts”
- Most common provisions
- Most ignored provisions



ENTIRE AGREEMENT/ MERGER

Example:

This Agreement and all exhibits and schedules hereto constitute the entire agreement between the parties hereto pertaining to the subject matters hereof and supersede all negotiations, preliminary agreements and all prior or contemporaneous discussions and understandings of the parties hereto in connection with the subject matters hereof. All exhibits and schedules are incorporated into this Agreement as if set forth in their entirety and constitute a part hereof.

NO WAIVER; MODIFICATIONS IN WRITING

Example:

No failure or delay on the part of any party in exercising any right, power or remedy hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any such right, power or remedy preclude any other or further exercise thereof or the exercise of any other right, power or remedy. No amendment, modification, supplement, termination or waiver of or to any provision of this Agreement, nor consent to any departure therefrom, shall be effective unless the same shall be in writing and signed by or on behalf of the party to be charged with the enforcement thereof. Any amendment, modification or supplement of or to any provision of this Agreement, any waiver of any provision of this Agreement, and any consent to any departure from the terms of any provision of this Agreement, shall be effective only in the specific instance and for the specific purpose for which made or given.

SEVERABILITY

Example:

In the event any provision of this Agreement is held invalid, illegal or unenforceable, in whole or in part, the remaining provisions of this Agreement shall not be affected thereby and shall continue to be valid and enforceable. In the event any provision of this Agreement is held to be unenforceable as written, but enforceable if modified, then such provision shall be deemed to be amended to such extent as shall be necessary for such provision to be enforceable and it shall be enforced to that extent.

CONSENT TO JURISDICTION

Example:

Each of the parties hereby irrevocably submits to the exclusive jurisdiction of any United States District Court or Iowa District Court sitting in _____, Iowa in any action or proceeding arising out of or relating to this Agreement, and each party hereby irrevocably agrees that all claims in respect of such action or proceeding shall be heard and determined in either of such courts. Each of the parties irrevocably waives any objection, including without limitation, any objection on the grounds of forum nonconveniens, which it may now or hereafter have to the bringing of any such action or proceedings in such respective jurisdictions. In addition, the parties agree that neither of them shall commence any action arising out of or relating to this Agreement in any court other than the United States District Court or the Iowa District Court sitting in _____, Iowa.

WAIVER OF JURY TRIAL

Example:

EACH OF THE PARTIES HERETO IRREVOCABLY WAIVES ALL RIGHT TO TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM (WHETHER BASED ON CONTRACT, TORT OR OTHERWISE) ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE ACTIONS OF THE PARTIES IN THE PERFORMANCE OR ENFORCEMENT HEREOF.

GOVERNING LAW

Example:

This Agreement shall be governed by and construed in accordance with the substantive laws of the state of Iowa, without giving effect to any conflict of law principles that may require the application of the laws of another jurisdiction.

ANTI-ASSIGNMENT

Example:

Notwithstanding any term or condition in this Agreement that may appear to be to the contrary, neither this Agreement, nor any rights or obligations of either party, may be assigned, delegated or subcontracted unless such assignment, delegation or subcontract is in writing and consented to in writing by the other party. Any attempt by either party to assign, delegate or subcontract this Agreement other than as permitted herein shall be null and void.

CONSTRUCTION

Example:

This Agreement shall not be construed more strongly against either party regardless of which party was more responsible for its preparation.

Questions?

