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The Impact of Contractual Integration Clauses on Tort Claims for Misrepresentation in Wisconsin

Background

A standard provision in the boilerplate sections of most commercial and transactional agreements is an integration clause, also commonly referred to as an “entire agreement” provision. Generally, an integration clause states that the agreement containing the clause sets forth the only enforceable covenants and representations among the parties relating to the subject matter of the agreement. Thus, all prior covenants and representations that may have been made by the parties, to the extent not incorporated into the final agreement, may neither be enforced by the parties nor be used to vary or contradict the unambiguous terms of the agreement under the parol evidence rule. Although integration clauses are drafted in different ways, one commonly used integration clause is set forth below:

Entire Agreement. This Agreement (including the exhibits and schedules attached hereto) supersedes all prior agreements among the parties with respect to its subject matter and constitutes (together with the other documents and instruments to be executed and delivered pursuant hereto) a complete and exclusive statement of the terms of the agreement among the parties with respect to its subject matter. There have been and are no agreements, representations or warranties among the parties with respect to the subject matter of this agreement other than those set forth in this agreement.

Many commercial and transactional attorneys assume the legal impact of these provisions will follow their literal wording. Once an agreement is executed that contains an integration provision, many attorneys cease worrying about their client incurring liability from concepts contained in prior drafts of the documents and prior representations that were not included in the final agreement. After all, if the parties agree that no other agreements or representations exist, how could any liability arise outside of the express terms of the agreement?

With respect to prior representations, however, Wisconsin courts have answered this question in a manner that may be inconsistent with those expectations. While Wisconsin courts generally have applied the parol evidence rule to prevent prior representations from modifying the unambiguous terms of an agreement containing an integration clause, the courts often have allowed tort claims relating to such prior representations to be asserted outside of the contract.

This article will briefly summarize a series of Wisconsin cases that have addressed the issue of whether an integration clause prevents the parties to that agreement from asserting misrepresentation tort claims after the agreement is executed. Following that summary, the article will provide some drafting recommendations for integration clauses in light of the guidance provided by those cases.¹

Primary Wisconsin Cases Considering Impact of Integration Clauses on Tort Claims

Grube v. Daun (Wisconsin Court of Appeals, 1992)

The genesis of the line of cases considered by this article is *Grube v. Daun*.² The case involved representations allegedly made by the seller of real estate (Mr. Daun) to the buyers (Mrs. and Mrs. Grube) relating to certain wells on the property that were discovered after the closing to be contaminated with gasoline. The applicable representations were made both in the real estate purchase agreements and in discussions among the buyer, the seller and the broker prior to the closing.

However, the sale documents contained an “as is” clause which was written to be an exception to the representations otherwise made to the buyer. The clause stated, “Buyer is buying the property in a [sic] as is condition without any warranties.” The court considered the question of whether the “as is” clause shielded the seller and his agent not only from breach of warranty claims under the contract, but also from tort claims based on the alleged misrepresentations.

The court held that the “as is” clause did not preclude tort claims based on the misrepresentations. The court stated that:

... [T]ort disclaimers in contracts will not be honored unless the disclaimer is specific as to the tort it wishes to disclaim. In order to be effective, the disclaimer must make it apparent that an express bargain was struck to forgo the possibility of tort recovery in exchange for negotiated alternative economic damages.³

Since the “as is” clause in the agreement did not mention negligence or misrepresentation, it was not effective to bar a tort claim for misrepresentation. However, the existence of the “as is” clause could be used as evidence that the buyer did not rely on the representations allegedly made.

Peterson v. Cornerstone Property Development, LLC (Wisconsin Court of Appeals, 2006)

In *Peterson v. Cornerstone Property Development, LLC*,⁴ the court considered the impact of a clause disclaiming the existence of representations in the context of a sale of real estate. However, the applicable clauses in the *Peterson* case were broader than the provisions considered by the *Grube* court:

This Offer, including any amendments to it, contains the entire agreement of the Buyer and Seller regarding the transaction. All prior negotiations and discussion have been merged into this Offer.

* * * * *

Seller has made no representations other than written in this offer and attached documents concerning the property.

* * * * *

[Buyer] has not relied on any representations made by the Seller in entering into the Condominium Offer to Purchase.⁵

The court held that unlike the clause in *Grube*, the integration clause in *Peterson* specifically disclaimed the purchaser’s right to rely on any alleged representations beyond those in the contract itself. The Court stated,

Indeed, the three provisions of Peterson’s contract that expressly stated that the written contract

made up the entire contract, to the exclusion of all other provisions, provide exactly the kind of specific disclaimer that makes it apparent that an express bargain has been struck. With an integration clause, worded as clearly and unmistakably as the one in question, we see no reason not to give the integration clause its intended effect.⁶

Peterson might lead practitioners to believe that a typical integration clause would negate potential tort claims for misrepresentations relating to the agreement. Even though the integration provision in *Peterson* did not specifically enumerate the torts being disclaimed (such as fraud or misrepresentation), as suggested to be critical by the *Grube* court, the *Peterson* court held that the integration clause’s “non-reliance” language made clear that even alleged fraudulent misrepresentations were intended to be waived. However, the clarity provided by *Peterson* has since been clouded, most recently by the Wisconsin Court of Appeals in the *C&M Hardware* case.⁷

C&M Hardware, LLC v. True Value Company, 2013 WL 1908657 (Final Publication Decision Pending) (Wisconsin Court of Appeals, 2013)

In *C&M Hardware*,⁸ the purchaser of a True Value franchise (C&M) claimed that the franchisor (True Value) made misrepresentations to C&M in connection with the sale. The relevant contract, the Retail Member Agreement, contained a number of provisions intended to disclaim prior representations and to act as an integration clause. The Court focused its analysis on the following provisions:

Success depends, in part, on [C&M] devoting dedicated personal efforts to the business and exercising good business judgment in dealings with

customers, suppliers and employees. [C&M] also acknowledges that neither [True Value] nor any of its employees or agents has represented that [C&M] can expect to attain any specific sales, profits or earnings . . . [TRUE VALUE] MAKES NO REPRESENTATIONS OR WARRANTIES EITHER EXPRESS OR IMPLIED REGARDING THE PERFORMANCE OF [C&M'S] BUSINESS.

* * * * *

This Agreement, and any other agreement which [C&M] signs with [True Value], is the entire and complete Agreement between [C&M] and [True Value] and there are no prior agreements, representations, promises or commitments, oral or written, which are not specifically contained in this Agreement or any other agreement which [C&M] signs with [True Value]. The current form of the Company Member Agreement shall govern all past and present relations, actions or claims arising between [True Value] and [C&M].⁹

Notwithstanding the numerous provisions that attempted to make clear that True Value did not make any enforceable representations to C&M outside of the agreement, the Court of Appeals held that the contract did not successfully preclude claims based on representations allegedly made by True Value prior to the execution of the agreement. The Court found it important that the provisions made no mention of waiver of misrepresentation claims or tort claims in general.¹⁰ In addition, unlike the provision in *Peterson*, the integration clause signed by C&M did not disclaim reliance on True Value's representations.¹¹

Relying on *Yauger v. Skiing Enter., Inc.*, 206 Wis. 2d 76, 557 N.W.2d 60 (1996), the Court also attacked the provisions because they were not sufficiently conspicuous. Since they were not in a larger typeface, were not surrounded by an attention-grabbing box, were not placed in a prominent location, and were not otherwise made to "stand out," the Court found that the provisions did not satisfy the requirement that all exculpatory contract provisions must be sufficiently conspicuous to give notice to the signer of their nature and significance.¹² Notably, the *Peterson* court also cited *Yauger*, but did not find the integration provisions in that case to be insufficiently conspicuous even though they did not have many of the qualities the *C&M Hardware* court held to be required.

Drafting Considerations

As demonstrated by the cases, above, Wisconsin courts often have not construed integration provisions in the broad manner likely intended by the parties when drafting their agreements. If tort claims for misrepresentation survive an integration provision stating that no representations have been made outside of the agreement, the protections gained through the integration provision are largely illusory. While the cases do not provide consistent guidance concerning the elements that an integration provision must meet in order to negate tort claims arising out of pre-closing representations, some practical drafting tips could improve your client's ability to achieve that goal:

- 1. Include Non-Reliance Language in the Integration Provision:** Both the *Peterson* and *C&M Hardware* cases found the presence (or absence) of a specific disclaimer of a right to rely on representations outside of the agreement to be significant. Instead of merely stating that no other

representations exist, a statement that the parties may not *rely* on any other representations will strengthen a defense against misrepresentation claims. While this appears to be "form over substance," the courts have found this non-reliance language to be significant.

- 2. Specifically Address Tort Claims, Fraud Claims and Applicable Statutory Claims in the Integration Provision:** Both *Grube* and *C&M Hardware* emphasized that in order for a disclaimer of tort claims to be effective, it must specifically identify the claims that are being waived (although such a specific identification of waived claims was absent from the integration clause held to be effective in *Peterson*). If you are aware of specific claims that could arise out of pre-closing representations (such as fraud claims or claims under applicable statutes), it would be helpful to list those claims as specifically being negated by the integration provision.
- 3. Make the Integration Provision Conspicuous:** Although the cases again are inconsistent, there is ample authority requiring that an integration clause, in order to function as an exculpatory provision and negate tort claims, must be conspicuous. Thus, the integration provision should be formatted in a manner that makes it stand out from the rest of the document. Suggestions listed by the *C&M Hardware* decision include the use of different typeface, a box around the provision, or bold font.
- 4. Address Specific Representations Made Prior to the Agreement.** To the extent that you are aware of specific representations that your client may have made prior to execution of the agreement and that

you would like to disclaim through the integration provision, it would be a good idea to list them. For example, your client's standard sales literature or PowerPoint slides may contain vaguely worded assurances that you know should be negated through the integration provision. It would improve your client's ability to show both the negation of these representations and the lack of reliance on them if they are specifically listed in the integration provision.

Sample Provision

Given these drafting considerations, an example of an integration provision that may improve your client's ability to negate tort claims would be the following:

Entire Agreement; No Other Representations.

NOTE: BY AGREEING TO THIS SECTION, THE PARTIES ARE WAIVING RIGHTS THAT THEY MAY OTHERWISE HAVE UNDER THIS AGREEMENT AND OUTSIDE OF THIS AGREEMENT TO ASSERT CLAIMS FOR CONTRACTUAL BREACH OF REPRESENTATION OR WARRANTY, MISREPRESENTATION AS A TORT, FRAUD, AND OTHER CLAIMS.

THIS AGREEMENT, TOGETHER WITH [_____] AND THE EXHIBITS AND SCHEDULES ATTACHED HERETO, CONSTITUTES THE SOLE AND ENTIRE AGREEMENT OF THE PARTIES

TO THIS AGREEMENT WITH RESPECT TO THE SUBJECT MATTER CONTAINED HEREIN [AND THEREIN], AND SUPERSEDES ALL PRIOR AND CONTEMPORANEOUS UNDERSTANDINGS, AGREEMENTS, REPRESENTATIONS AND WARRANTIES, BOTH WRITTEN AND ORAL, WITH RESPECT TO SUCH SUBJECT MATTER.

THE PARTIES AGREE THAT THERE HAVE BEEN AND ARE NO OTHER AGREEMENTS, REPRESENTATIONS OR WARRANTIES AMONG THE PARTIES WITH RESPECT TO THE SUBJECT MATTER OF THIS AGREEMENT OTHER THAN THOSE SET FORTH IN THIS AGREEMENT, AND THAT THE PARTIES ARE NOT RELYING ON ANY AGREEMENTS, REPRESENTATIONS OR WARRANTIES THAT ARE NOT SET FORTH IN THIS AGREEMENT, [INCLUDING, BUT NOT LIMITED TO, THOSE STATEMENTS SET FORTH IN _____]. ANY RIGHTS THAT THE PARTIES OTHERWISE WOULD HAVE TO ASSERT CONTRACT, FRAUD, OR OTHER TORT CLAIMS, [OR CLAIMS UNDER SECTION _____ OF THE _____ STATUTES] RELATING TO ANY AGREEMENTS, REPRESENTATIONS OR WARRANTIES OUTSIDE OF THIS AGREEMENT ARE HEREBY IRREVOCABLY WAIVED.

¹ An examination of this issue in states outside of Wisconsin is beyond the scope of this article. However, several other states (such as Alabama, Minnesota and Utah, for example) have cited the cases summarized by this article and performed similar analyses of the scope of the impact of the integration provisions.

² *Grube v. Daun*, 173 Wis.2d 30, 496 N.W.2d 106 (Ct. App. 1992).

³ *Grube*, 173 Wis.2d at 60, 496 N.W.2d at 117.

⁴ *Peterson v. Cornerstone Prop. Dev., LLC*, 2006 WI App. 132 (Ct. App. 2006).

⁵ *Peterson*, 2006 WI App. 132 ¶ 7.

⁶ *Peterson*, 2006 WI App. 132 ¶ 37 (citing *Grube*).

⁷ In addition to the cases discussed in the text, two other recent decisions analyzed the impact of integration clauses. In *Gebhart v. Bosben*, 2010 WI App. 100 (Ct. App. 2010), the Wisconsin Court of Appeals considered the impact of an integration clause in an unpublished opinion. The *Gebhart* court emphasized the specificity required by *Peterson* in order for an integration clause to bar misrepresentation claims in tort. In *American Orthodontics Corp. v. Epicor Software Corp.*, 746 F.Supp.2d 996 (E.D.Wis. 2010), a federal district court, applying Wisconsin law, held that the express carve-out of fraud from an integration provision was sufficient to allow the plaintiff to assert claims under the Wisconsin Deceptive Trade Practices Act, even though a DTPA claim is not technically a fraud claim because the plaintiff does not need to prove an intent to deceive.

⁸ *C&M Hardware, LLC v. True Value Company*, 2013 WL 1908657 (Ct. App. 2013).

⁹ *C&M Hardware*, 2013 WL 1908657 at ¶¶ 4, 9.

¹⁰ *C&M Hardware*, 2013 WL 1908657 at ¶ 15.

¹¹ *C&M Hardware*, 2013 WL 1908657 at ¶ 20.

¹² *C&M Hardware*, 2013 WL 1908657 at ¶¶ 21-24.