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THE DANGERS OF INCONSISTENCIES AND AMBIGUITIES

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Notice Provisions – Common Problems

- ▶ What happens when agreement requires “notice in accordance with agreement” and there’s no notice provision or address is blank?
- ▶ What happens when the person to be notified is gone, or there’s been a merger or sale or bankruptcy?
- ▶ What happens when there are problems with an address (lessons from the pandemic and closed offices)

Notice Provisions

Best Practice for Notice – Include a Robust Provision addressing the 5 W's

Who – Identify position/department of person to receive notice

What – Specify what the possibilities are for what they are receiving
(An email, a mailing, a courier or hand delivery and so forth)

When – Include when the notice is considered received
(When delivered in person, date on courier receipt, within X days of when sent by mail and so forth)

Where? – Identify the address(es)
Match the type of addresses with the types of deliveries (physical address, email, fax and so on)
Consider whether a second address would be helpful to make sure legal or others are in the loop

Why? – Consider why you are sending a notice and exclude if formal notice not necessary
(Quality notices or notices for committee may not need to go through formal process)

Forum Selection Clauses - Importance

- ▶ Importance of consistent forum selection across deal documents, including insurance policies

Forum Selection Clauses

- ▶ Develop an the analysis to consider when deciding whether to choose court vs arbitration!
 - ▶ Risks of arbitration
 - ▶ Location of the parties and the transaction activities (US vs international transactions and parties may impact your decision)
 - ▶ Costs of arbitration vs court proceedings
 - ▶ Arbitration can be more cumbersome
 - ▶ Litigators are frequently called upon to try to overturn bad arbitration decisions, which is nearly impossible to do

Forum Selection Clauses, cont.

- ▶ Common Question – Do I choose a NY forum over Delaware?
 - Can still use Delaware law
 - Consider your needs to hire local counsel

Forum Selection Clauses, cont.

- ▶ Choice of court doesn't guarantee court has jurisdiction
 - Some states, notably NY, will generally enforce a choice of forum even if the underlying contract does not bear a reasonable relationship to NY.
 - NY Gen. Obligations Law sections 5-1401 and 1402
 - Other states are more reluctant
 - See *Handoush v. Lease Finance Group, LLC*, 41 Cal. App. 5th 729 (2019) (striking down choice of Delaware forum because Delaware permits pre-suit jury waiver and California does not)

Forum Selection Clauses, cont.

- ▶ Risks of choice of alternative decision-maker
 - E.g., choice of accountant to decide earnout
 - Is the issue legal or accounting?

Forum Selection – Best Practice

Depends on your company

Develop a standard provision and a reason to justify

Other parties are often willing to adjust if you have a specific company position

Choice of Law

- ▶ Ambiguity in selection of what may appear to be neutral metric, e.g., “registered” office
- ▶ Delaware or New York
- ▶ Use of Other States or Countries?

Choice of Law

- ▶ Best Practice – Make a checklist for your use to make sure a provision is included. Do a search for other state names to make sure conflicting provisions are not.
- ▶ Like Forum Selection – develop a standard provision and a reason to justify. Other parties are often willing to adjust if you have a specific company position.

Defined Terms

- ▶ Risk of leaving key terms undefined
- ▶ User of lower case where there is a defined term for the same word
 - “fraud” vs “Fraud”
 - “net income” vs “Net Income”
- ▶ Defining “Damages”

Defined Terms

- ▶ Best Practices – Use programs that your word processing or other service vendors make available. Many of these programs will point out defined terms not used.
- ▶ Develop a personal editing checklist for steps you plan to take before sharing a draft

Distinctions without a difference

- ▶ “efforts” clauses: basically no difference between “best efforts,” “reasonable best efforts,” “reasonable efforts,” “commercially reasonable efforts,” and “good faith efforts.”
 - Menn v. ConMed Corp (Del. 2022)

While we're talking about "Fraud"

- ▶ We've discussed before, but bears reminding:
 - There are buyer-friendly "fraud" definitions and seller-friendly "fraud" definitions

Definitions of Fraud

- ▶ **"Fraud"** means common law fraud and equitable fraud under Delaware Law.
- ▶ **"Actual Fraud"** with respect to any Person shall mean that: (i) a representation and warranty set forth in this Agreement or in any certificate and made by such Person delivered pursuant to this Agreement was false when made; (ii) such Person had **actual knowledge** that such representation and warranty was false when made; (iii) such Person **intended** another Person party to this Agreement to rely on such representation and warranty; and (iv) such other Person party to this Agreement **relied**, and was reasonably justified in relying, on such misrepresentation.
- ▶ **"Fraud"** means a Person's fraud (**as determined under the Laws of the State of Delaware**) in the making of a specific representation or warranty expressly set forth in Article III or Article IV of this Agreement or any certificate or other document delivered by such Person in connection herewith.

Definitions of Fraud

- ▶ **“Fraud”** means, with respect to any party to this Agreement or an Ancillary Document, an **actual and intentional fraud** with respect to the making of any representation or warranty contained in this Agreement or an Ancillary Document and not with respect to any other matters; provided, that such actual and intentional fraud of a party hereto **specifically excludes any statement, representation or omission made negligently or recklessly** and shall only be deemed to exist if (a) such party or any of its equityholders, directors or executive officers, had **actual knowledge** that the representation or warranty made by such party was actually false, misleading or inaccurate when made, (b) such representation or warranty was made with **the intent to induce** another party to this Agreement or an Ancillary Document to enter into this Agreement or such Ancillary Document or was made with the intent to deceive or mislead such other party and (c) the party to whom such representation or warranty was made **acts or refrains from acting in justifiable reliance** upon such representation or warranty.

Schedules

- ▶ Missing schedules
- ▶ Empty schedules
- ▶ Importance of collating all final documents when deal has closed so there's no question what exactly was included

Force Majeure - Lessons from the Pandemic

- ▶ Limits on Force Majeure Provisions – lessons learned from the Pandemic
- ▶ Developing Provisions for the situations that are unique to your industry (e.g. chip shortages during pandemic)

Authority

- ▶ What if there's a challenge to the authority of the signers and there's no provision affirming they have authority to sign



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