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**PROGRAM MATERIALS**

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## **What to do Before your Client Signs on the Dotted Line**

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Dr. Sharon Meit Abrahams is a legal talent development expert with over 25 years of experience in success coaching for attorneys and executing high impact programs for law firms. She has created and implemented firm wide initiatives that help attorneys maximize their productivity while maintaining engagement. When individuals produce, a firm increases its profitability. As a talent development leader, she has handled every aspect of an attorney's firm life from onboarding and integration, through mentoring and training to succession planning and exit interviews.

Dr. Abrahams has published three books with the American Bar Association and regularly publishes articles for Thomson Reuters and American Legal Media. Known for engaging and educational programs, Dr. Abrahams is a sought-after keynote speaker, program facilitator and law firm advisor.

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## SPEAKER



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Courtney Worcester is a trial attorney in Holland & Knight's Boston office. Ms. Worcester focuses her practice on complex commercial litigation involving corporations, limited liability companies (LLCs), venture capital and private equity firms, and financial institutions and their directors and officers.

Ms. Worcester regularly counsels boards, individual directors and officers on a wide variety of corporate governance matters, including books and records demands, removal or election of directors, board committee investigations and reports. In addition, she represents clients in federal securities and shareholder litigation matters, including federal securities and consumer class actions, stockholder derivative litigations, as well as in disputes between co-founders. Ms. Worcester is also experienced in diverse commercial litigation matters, ranging from contractual disputes to the protection of trade secrets, unfair competition and other business torts.

After law school, she clerked for the Honorable W. Stephen Thayer III and the Honorable Linda S. Dalianis of the New Hampshire Supreme Court. During law school, Ms. Worcester served as the administrative editor for the Boston University Law Review and was a member of the national moot court team.

# WHAT TO DO BEFORE YOUR CLIENT SIGNS ON THE DOTTED LINE

**Courtney Worcester**

December 16, 2020

**Holland & Knight**

# Boilerplate Does Not Mean Unimportant

- How is it that highly negotiated documents contain surprises when litigation occurs?
  - Last minute changes
    - Trade-offs/negotiations
  - Cut and Paste
  - Pressure to reduce legal spend
  - Perceived unimportance of boilerplate language

# Common Boilerplate Provisions

- Choice of Law
- Injunction Clauses
- Ipso Facto Clauses

# Choice of Law Provisions

- Almost every contract contains a choice of law provision which is intended to select the law that will govern any dispute between the parties.
- The specific words used in drafting the choice of law provision determine its scope.
- Not all choice of law provisions are created equal and not all will be interpreted in the same way.

# Procedural vs. Substantive

- Sample language:
  - This Agreement shall be construed in accordance with the laws of the State of New York without regard to the conflicts of law provisions thereof.
- Lawsuit is brought in Delaware.
- Defendants move to dismiss arguing that the claims are barred by the statute of limitations, but which state's statute of limitations applies, New York or Delaware?
  - New York's statute of limitations was six years for the claims at issue
  - Delaware's statute of limitations was three years

# Procedural vs. Substantive

Even with a choice-of-law provision selecting New York Law, Delaware's statute of limitations applied:

“Under Delaware law, choice-of-law provisions in contracts do not apply to statute of limitations unless a provision ***expressly includes*** it. If no provision includes it, then the law of the forum applies because the statute of limitations is a procedural matter.”

*Pivotal Payments Direct Corp. v. Planet Payment, Inc.*, C.A. No. N15C-02-059 EMD CCLD (Super. Ct. Del. December 29, 2015)



# Scope: Contract vs. Tort Claims

- What does your choice-of-law provision cover?
- “This Contract shall be governed by, and construed in accordance with, the law of the Commonwealth of Massachusetts.”
  - Breach of contract claim would be governed by Massachusetts Law
  - What about a claim for fraud?
  - What about a claim for fraudulent inducement?

# Scope: Contract vs. Tort Claims

“Under New York law, in order for a choice-of-law provision to apply to claims for tort arising incident to the contract, the express language of the provision must be ‘sufficiently broad’ as to encompass the entire relationship between the contracting parties.”

*Krock v. Lipsay*, 97 F.3d 640, 645 (2d Cir. 1996)

# Scope: Contract vs. Tort Claims

Parties operating in interstate and international commerce seek, by a choice of law provision, certainty as to the rules that govern their relationship. To hold that their choice is only effective as to the determination of contract claims, but not as to tort claims seeking to rescind the contract on grounds of misrepresentation, would create uncertainty of precisely the kind that the parties' choice of law provision sought to avoid. In this regard, it is also notable that the relationship between contract and tort law regarding the avoidance of contracts on grounds of misrepresentation is an exceedingly complex and unwieldy one, even within the law of single jurisdictions. To layer the tort law of one state on the contract law of another state compounds that complexity and makes the outcome of disputes less predictable, the type of eventuality that a sound commercial law should not seek to promote.

*Abry Partners V, LP v. F&W Acquisition LLC*, 891 A.2d 1032, 1048 (Del Ch. 2006)

# When Choice-of-Law May Be Ignored

- Even where a choice-of-law provision is well-drafted, it may still be disregarded.
- Georgia bank sues a citizen of California in California alleging she failed to make loan payments.
- Promissory note:
  - Stated that agreement governed by Georgia law
  - Non-reciprocal attorneys' fee provision providing that the bank could collect attorneys' fees from individual if an attorney had to be used for collection purposes
- California citizen wins case and moves for attorneys' fees and costs under California Civil Code § 1717(a)

# When Choice-of-Law May Be Ignored

California Civil Code § 1717(a):

In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.

# When Choice-of-Law May Be Ignored

- Georgia choice-of-law was reasonable
- But California determined to have a greater material interest as the bank initiated suit in California and Section 1717(a) expresses California's fundamental policy of disfavoring non-reciprocal attorneys' fees clauses.
- Thus, Ninth Circuit found that the individual was entitled to recover attorneys' fees under Section 1717(a) even though the note was to be governed by Georgia law.

*First Intercontinental Bank v. Ahn*, 2015 WL 4899711 (9th Cir. Aug. 18, 2015)

# Injunction Clauses

- Injunction clauses are contractual clauses where the parties agree that a party can obtain an injunction for a breach
  - Goal is to allow the non-breaching party to obtain an injunction quickly and cheaply
  - “Irreparable harm” will occur if x happens
- Does the presence of such a clause guarantee you that a Court will issue an injunction?

# Injunction Clauses

- Probably not
  - Most Courts are not impressed by such clauses

This Court agrees with other district courts in this circuit and gives little weight to the clause in the [funding agreement] that pre-declares that any breach of the Agreement will result in irreparable harm.

*La Jolla Cove Inv'rs, Inc. v. GoConnect Ltd.*, No. 11CV1907 JLS JMA, 2012 WL 1580995, at \*4 (S.D. Cal. May 4, 2012)



# Injunction Clauses

- However, Delaware Court view the clauses more favorably:

Delaware courts do not lightly trump the freedom to contract and, in the absence of some countervailing public policy interest, courts should respect the parties' bargain. [A]s long as the parties did not include the irreparable harm stipulation as a sham, i.e., when an adequate remedy at law clearly exists, or simply as a means to confer jurisdiction on this court, then the stipulation will be upheld".

*Gildor v. Optical Solutions, Inc.*, C.A. No. 1416-N, 2006 Del. Ch. LEXIS 110, at \*37 (Del. Ch. June 5, 2006)

# Ipsa Facto Clauses

- Clause which provides that in the event of a bankruptcy/insolvency a contract can be terminated

- For example,

This Agreement shall terminate, without notice, (i) upon the institution by or against either party of insolvency, receivership or bankruptcy proceedings (ii) upon either party making an assignment for the benefit of creditors, or (iii) upon either party's dissolution or ceasing to do business.

# Ipso Facto Clauses

- The reality is that it is not so easy
- 11 U.S.C. § 541(c) of the Bankruptcy Code
  - The Court controls the property of the debtor which includes contracts
  - Hence the Court decides what happens to a contract

# Ipsso Facto Clauses

- 11 U.S.C. § 365(e)(1) of the Bankruptcy Code

Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

# Presenter



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**Courtney Worcester** is a trial attorney in Holland & Knight's Boston office. Ms. Worcester focuses her practice on complex commercial litigation involving corporations, limited liability companies (LLCs), venture capital and private equity firms, and financial institutions and their directors and officers.

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