Strafford

Presenting a live 90-minute webinar with interactive Q&A

Contractual Pitfalls of Ancillary Documents, Attachments, and Exhibits: Resolving Inconsistencies

Drafting Cross Reference and Incorporation by Reference Provisions: Definitions

WEDNESDAY, NOVEMBER 13, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Mark Cohen, J.D., LL.M., Attorney, Boulder, Colo.

Jessica Everett-Garcia, Partner, **Perkins Coie**, Phoenix

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 1**.

Tips for Optimal Quality

FOR LIVE EVENT ONLY

Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-877-447-0294** and enter your **Conference ID and PIN** when prompted. Otherwise, please **send us a chat** or e-mail **sound@straffordpub.com** immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

Viewing Quality

To maximize your screen, press the 'Full Screen' symbol located on the bottom right of the slides. To exit full screen, press the Esc button.

Continuing Education Credits

FOR LIVE EVENT ONLY

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For additional information about continuing education, call us at 1-800-926-7926 ext. 2.

Program Materials

FOR LIVE EVENT ONLY

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the link to the PDF of the slides for today's program, which is located to the right of the slides, just above the Q&A box.
- The PDF will open a separate tab/window. Print the slides by clicking on the printer icon.

Contractual Pitfalls of Ancillary Documents

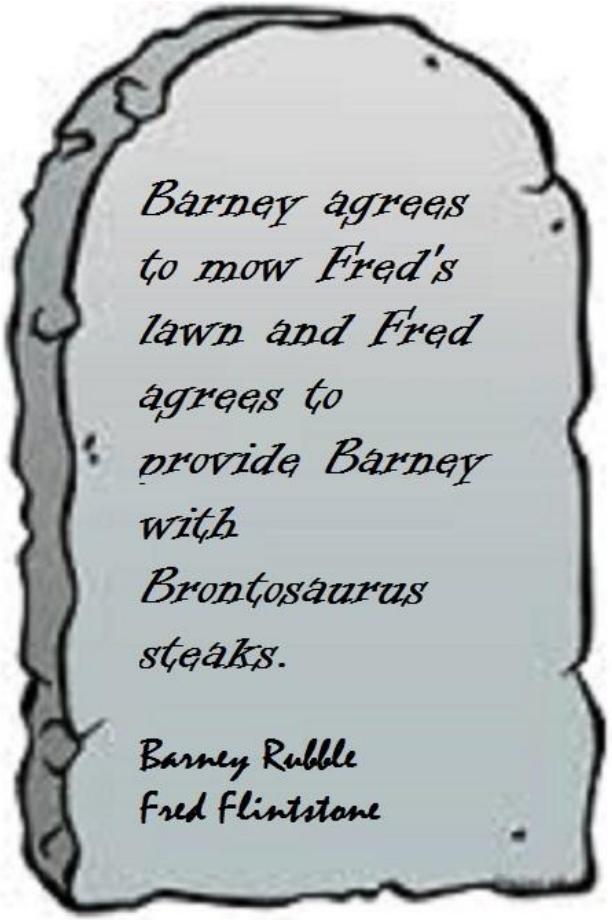
Mark Cohen, J.D., LL.M.
Boulder, Colorado
(303) 638-3410
mark@cohenslaw.com
www.cohenslaw.com

Contractual Pitfalls of Ancillary Documents

Review of Relevant Contract Law Principles to understand "The Big Picture"

The First Contract:

Contracts were short, but failed to address many issues.



Contracts Became Longer

Lawn Care Contract

This agreement for Lawn Maintenance services between _____ (hereafter referred to as "Client") and _____ (hereafter referred to as "Contractor") is made and entered into upon the following date: ____/____/____.
The lawn stated in this agreement is found at the following address:
_____.
The Client would like to have the above mentioned lawn maintained on a regular basis. The Client and Contractor hereby agree to the following terms:

1. The Client will grant the Contractor access to the lawn during regular business hours Monday - Friday (8:00am - 5:00pm) CST and additional mutually agreed upon times.
2. Client or Contractor (Designate one or the other) will provide all equipment and supplies that are necessary to perform normal maintenance services on the above mentioned yard.
3. Client will pay Contractor $_____ on the first day of each month for regular maintenance services performed for the rest of the month.
4. Client will pay Contractor for additional maintenance or repair that may become required for the lawn to sustain an acceptable appearance. The Contractor shall bill the Client for the cost of work that is needed that is above and beyond what is considered reasonable and customary for normal maintenance of the lawn. This additional "above and beyond" repair hereafter shall be referred to as "ad hoc work".
5. Ad hoc work that has a cost that is less than or equal to $50 shall be performed by the Contractor without the Client's consent. However, work that is to be estimated greater than $50 the Contractor must receive authorization by the Client before the additional maintenance is provided.
6. "Regular Maintenance" will include the following: removal of debris from the yard, mowing of the lawn and trimming of trees and shrubs and any other plants that are in need of pruning, fertilization of the lawn's soil, inspection of plants and soil for insects, also the extermination of any insects or rodents that are discovered during normal maintenance activities.
7. Contractor will begin performing regular lawn maintenance on the following date: ____/____/____. Thereafter, regular lawn maintenance will be performed on a mutually agreed upon schedule.
Either party may terminate this contract at any time by supplying a written notice of termination on a specified date to the other party, with at least two weeks notice prior to the stated date of termination.
If there is any litigation needed between the Client and Contractor it shall be filed and tried in the Contractor's local jurisdiction.

In agreement to the above mentioned terms the Client and Contractor sign below:

Applicable Law

This contract shall be governed by the laws of the State of _____ in _____ County and any applicable Federal Law.
_____ Date_____
Signature of the Client
_____ Date_____
Signature of Contractor

Contracts Became Still Longer

- Drafters began to attach other documents (Exhibits and Schedules) to contracts.
- Drafters sometimes referred to or incorporated other documents.
- Now drafters sometimes refer to or incorporate online documents.

The 3 Main Causes of Contract Disputes

- Ambiguity

When an ambiguity is found to exist and cannot be resolved by reference to other contractual provisions, **extrinsic evidence** must be considered by the trial court in order to determine the mutual intent of the parties at the time of contracting. *Pepcol Mfg. Co. v. Denver Union Corp.*, 687 P.2d 1310 (Colo. 1984).

- Inconsistency

Where it is impossible to reconcile conflicting clauses of a contract, it is proper to receive **extrinsic evidence** for the purpose of determining the intent of the parties. *Ryan v. Fitzpatrick Drilling Co.,* 342 P.2d 1040 (Colo. 1959).

- Failure to address an issue altogether

Silence on a matter in a contract creates an ambiguity when it involves a matter naturally within the scope of the contract. *Cheyenne Mtn. Sch. Dist. #12 v. Thompson*, 81 P.2d 711 (Colo. 1993). **Extrinsic evidence** is admissible to determine the intent of the parties.

Ancillary Documents

The use of ancillary documents may reduce the risk of failing to address an issue, but it increases the risk of inconsistent provisions and sometimes makes the contract more difficult to understand.

Questions of Fact and Questions of Law

Whether a contract is ambiguous is a question of law. *Pepcol Mfg. Co. v. Denver Union Corp.*, 687 P.2d 1310 (Colo. 1984).

However, once a court determines that a contract is ambiguous, the meaning of the ambiguous term is a question of fact. *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909 (Colo. 1996).

Once a court determines that a contract is ambiguous, the intent of the parties is question of fact. *Metropolitan Paving Co. v. City of Aurora*, 449 F.2d 177 (10th Cir. 1971).

And If a Question of Fact Exists…

NO SUMMARY JUDGMENT – Litigators Happy

The Parol Evidence Rule

In the absence of allegations of fraud, accident, or mistake in the formation of the contract, parol evidence may not be admitted to add to, subtract from, vary, contradict, change, or modify an **unambiguous integrated** contract. *Boyer v. Karahenian*, 915 P.2d 1295 (Colo. 1996).

Terms used in a contract are **ambiguous** when they are susceptible to more than one reasonable interpretation. *B&B Livery, Inc. v. Riehl,* 960 P.2d 134 (Colo. 1998).

An **integrated contract** is one that contains all the terms the contracting parties agreed to. *Harmon v. Waugh*, 414 P.2d 110 (Colo. 1966).

Rules of Construction

A contractual provision is ambiguous if, given the "plain, popular, and generally accepted meaning of the words employed," *Heller v. First Ins. Exch.,* 800 P.2d 1006, 1008 (Colo. 1990), it is subject to two possible interpretations. *Davis v. M.L.G. Corp.,*712 P.2d 985, 989 (Colo. 1986).

Once an ambiguity appears, the court must examine the contract **as a whole** to determine if any of the other provisions might resolve the ambiguity. *Travelers Ins. Co. v. Jeffries–Eaves, Inc.,* 166 Colo. 220, 223, 442 P.2d 822, 824 (1968).

If the ambiguity remains and therefore the challenged provision is susceptible to two different but reasonable meanings, the provision must be construed against the drafter thereof. *Hecla Mining Co. v. New Hampshire Ins. Co.,* 811 P.2d 1083, 1090 (Colo. 1991).

Rules of Construction

Contracts must be construed as a whole and effect must be given to every provision, if possible. *Holland v. Bd. of Cnty. Comm'rs,* 883 P.2d 500, 505 (Colo. App. 1994).

It is a basic principle of contract law that specific clauses of a contract control the effect of general clauses. *Id.*; *see also E–470 Pub. Highway Auth. v. Jagow,* 30 P.3d 798, 801 (Colo. App. 2001), *aff'd on other grounds,* 49 P.3d 1151 (Colo. 2002).

PERKINSCOIE

Contractual Pitfalls of Ancillary Documents

November 13, 2019

Jessica Everett-Garcia
Phoenix Managing Partner

Views expressed in this presentation are not necessarily those of Perkins Coie LLP. These slides are for educational purposes only and are not intended, and should not be relied upon, as legal advice.

A couple of basic considerations…

“It is impossible to unsign a contract, so do all your thinking before you sign.”

Warren Buffet

“It wouldn’t be inaccurate to assume that I couldn’t exactly not say that it is or isn’t almost partially incorrect.”

Pinocchio

Now for some details…

1. Case Studies and Examples

- Case law approach to resolving disputes over incorporation of terms in ancillary documents
- Clickwrap and browsewrap agreements

2. Pitfalls and Unintended Consequences

- What not to do
- What may happen if you do

Incorporation by Reference Doctrine

Incorporating Document

Collateral Document

- No magic words, but incorporating document must:
  - specifically provide that it is subject to the collateral document; AND
  - sufficiently describe the collateral document so that the intent of the parties can be ascertained

Incorporation by Reference Doctrine

- Mere reference to a collateral document is not enough to make it part of contract
- Must be clear that parties to agreement had knowledge of and assented to incorporated terms
- Parties are free to incorporate terms found in other agreements to which they are not a party
- To determine whether a contract has incorporated a document by reference, courts apply an objective standard (i.e., what a reasonable person would have understood)

An Example:

Affinity Internet, Inc. v. Consolidated Credit Counseling Services, Inc.

- Computer service contract stated that the contract was "subject to all of [the service provider's] terms, conditions, user and acceptable use policies located" at its website
- Referenced terms contained arbitration clause
- Court held reference to website as repository of collateral documents insufficiently described them
- Thus, no valid arbitration agreement

"When a contract refers to another document, it must not only expressly refer to the document, but it must also sufficiently describe the document…."

920 So.2d 1286 (Fla. Ct. App. 2006)

Case Law Lessons (other examples)

Courts will not review ancillary documents just because they're relevant.

See, e.g., Seeligson v. Devon Energy Prod. Co (5th Cir. 2019) (rejecting argument "that a court must locate every potential ancillary document" before determining whether group of leases imposed same duty to obtain best price attainable for sale of gas).

Case Law Lessons (other examples)

Timing matters.

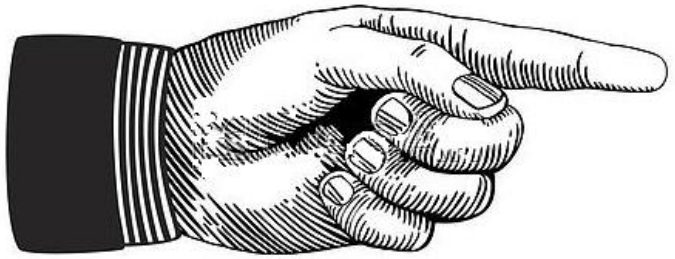
See, e.g., Oak Street Printery, LLC v. Fujifilm N. Am. Corp. (M.D. Penn. 2012) (rejecting argument that forum selection clause was part of contract where, after creation of contract, one party sent invoice with terms, including forum selection clause).

Case Law Lessons (other examples)

Vagueness causes headaches.

See, e.g., Starr Indemnity & Liability Co. v. Brightstar Corp. (S.D.N.Y. 2019) (insurance policy provided that limitation of liability applied to all locations "as per schedule on file with underwriters," but no schedule was identified with any detail, and no schedule was attached to policy; insurer argued that reference incorporated spreadsheet attached to an email; court ultimately determined that spreadsheet was only candidate, but confusion could have easily been avoided).

Case Law Lessons (other examples)



Referencing and incorporating are not the same thing.

See, e.g., Northrop Grumman Info. Tech., Inc. v. United States (Fed. Cir. 2008) (distinguishing instances where parties merely acknowledge that referenced material is relevant to a contract, as opposed to incorporating by reference).

Case Law Lessons (other examples)

Only the relevant portion of collateral document is incorporated, not the whole thing.

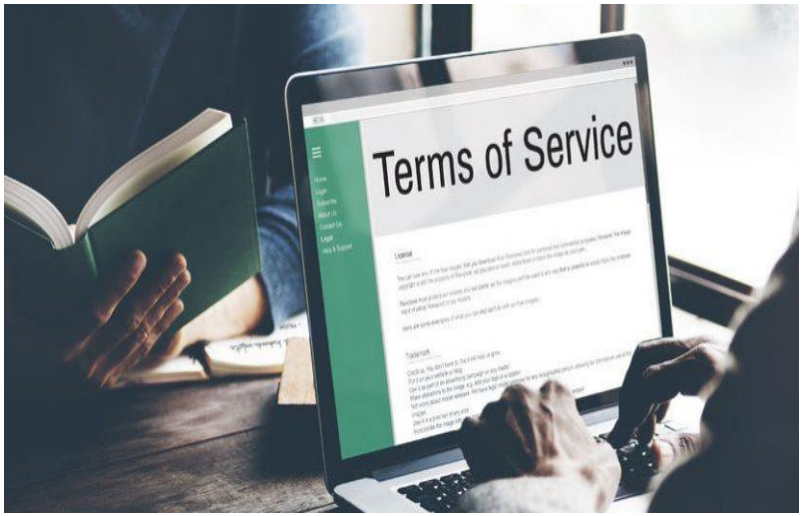
See, e.g., Miller v. Mercuria Energy Trading, Inc. (S.D.N.Y. 2018) ("incorporation by reference is limited to the section and purpose for which the incorporated document is identified"); *Capital Real Estate Partners, LLC v. Nelson* (Ohio Ct. App. 2019) ("it is not at all clear … that the contract provision can reasonably be interpreted to include all of the ancillary terms of the separate agreement, including attorney's fees and interest").

Case Law Lessons (other examples)

While failure to read terms is not a defense, no incorporation by reference if no opportunity to assent to terms.

See, e.g., Nieves v. LYFT, Inc. (D. N.J. 2018) (Rejecting request to incorporate terms of commission schedule by reference where agreement "did not recite the terms of the Commission Schedule, provide a link on how to access the Commission Schedule, or attach the Commission Schedule as an addendum or exhibit.").

Clickwrap Agreements



By clicking Sign Up, you agree to our Terms, Data Policy and Cookie Policy. You may receive SMS notifications from us and can opt out at any time.

Sign Up

- Clickwrap agreements: require an assenting click before a purchase or access to software or other materials
  - Routinely upheld. *See, e.g., Fteja v. Facebook, Inc.* (S.D.N.Y. 2012) ("[c]lickwrap agreements 'have been routinely upheld by circuit and district courts'")
  - Click provides sufficient consent to terms included in ancillary document. *See, e.g., Nicosia v. Amazon.com, Inc.* (2d Cir. 2016) ("One common way of alerting internet users to terms and conditions is via a 'clickwrap' agreement, which typically requires users to click an 'I agree' box after being presented with a list of terms or conditions of use.)

PERKINSCOIE

But a caution…

PLACE ORDER

Having a purchaser click “place your order” does not specifically manifest assent to additional terms, because purchaser is not specifically asked for agreement to terms.

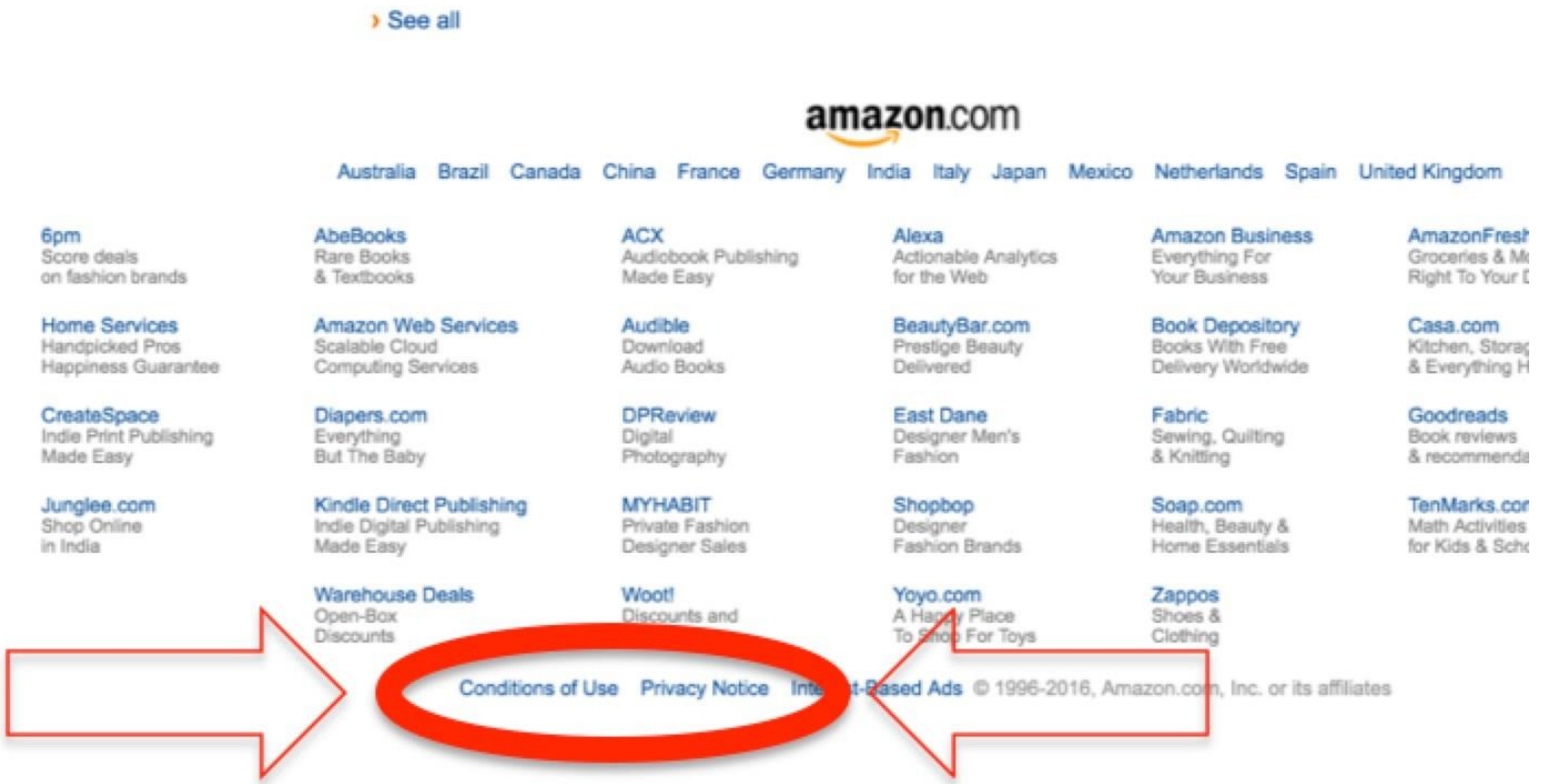
See, e.g., Nicosia v. Amazon.com, Inc. (“Nothing about the ‘Place your order’ button alone suggests that additional terms apply, and the presentation of terms is not directly adjacent to the ‘Place your order’ button so as to indicate that a user should construe clicking as acceptance.”).

Browsewrap Agreements

- Browsewrap agreements: no assenting click, but terms available through hyperlink
  - Enforceable if the user had actual or constructive knowledge of the site's terms and conditions
  - Website should prompt user to review terms and conditions and display hyperlink to those terms conspicuously
  - Highlighted or colored text on a page that every user must view, without scrolling

"[A] reference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms." *Specht v. Netscape Commc'n Corp.*, 306 F.3d 17 (2d Cir. 2002) (court found provision that user would not encounter until scrolling down multiple screens was not enforceable).

An example



Hyperlinks buried at bottom of page

PERKINSCOIE

More Online Transaction Case Examples

- Requiring a click helps to show assent. *Schnabel v. Trilegiant Corp. & Affinion, Inc.*, 697 F.3d 110, 129 n.18 (2d Cir. 2012) (presentation of terms fell "outside both the clickwrap and browsewrap categories" because while there was no click-to-assent to terms, "there is some indication" that user is assenting to terms by clicking "Yes" button to subscribe to service).
- It's notice and opportunity to review hyperlinked terms that matters. *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 840 (S.D.N.Y. 2012) (plaintiff had assented to terms where terms and conditions were accessible via a hyperlink and clicking "Sign Up" could be construed as an assent to those hyperlinked terms; user "was informed of the consequences of his assenting click and he was shown, immediately below, where to click to understand those consequences. That was enough.").
- Make it easy. *In re Zappos.com, Inc.*, 893 F. Supp. 2d 1058 (D. Nev. 2012) (no reasonable user would have reason to click on terms of use link, even where the hyperlink was found on every page, because scrolling was required and link was not conspicuous).
- Make it unmissable. *Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362, 366 (E.D.N.Y. 2009) (court refused to enforce arbitration provision where plaintiff lacked notice of terms because website did not prompt her to review terms and conditions and because link was not prominently displayed).

Online Agreement Best Practices

- Clickwrap click-to-assent = surest bet for enforceability
- If using browsewrap format:
  - Make the link conspicuous (no way to miss it—no scrolling required)
  - Include the hyperlink on every page
  - Make sure customer has clear opportunity to review terms and conditions *before* any transaction
  - For example, include written notice that placement of purchase order or enrollment in service, etc. indicates your acceptance of company's terms and conditions, available for review at _____

Pitfall Examples

- Referencing an attached document that is not actually attached.
- Referencing terms and conditions but failing to provide the other side with a copy during the negotiating process.
- Referencing a document in passing without expressly incorporating by reference.
- Referencing only a portion of a document you intended to incorporate more broadly.
- Incorporating a document through a stale hyperlink or web address that years later takes you to nothing.
- Incorporating a document that in turn incorporates other documents (nesting doll nightmare).
- Relying on an inconspicuous hyperlink to incorporate terms and conditions (even worse if font is small and user has to scroll).

Schedules and Exhibits

"Schedules and Exhibits are additional materials not within the body of the contract, but that are nonetheless part of it." *Drafting Contracts*, Tina K. Stark, page 282.

Schedules

Parties use Schedules to provide details about the transaction that it would be burdensome to include in the contract. Parties use Schedules to disclose information that would otherwise be part of the contract proper, such as representations and warranties, or exceptions to other provisions. Parties may use Schedules for several reasons:

1. It may make the contract easier to read.
2. It may simplify the drafting of the contract since drafting schedules can be assigned to a different lawyer.
3. Including a Schedule may be useful where some of the information is not available when the drafter prepares the Schedule.
4. In some cases, such as with S.E.C. filings, schedules are not filed or made available to the public.

Exhibits

Exhibits are separate documents relating to the contract that the parties want incorporated into the contract.

An Exhibit is a stand-alone document. It can be a document currently in effect or one to be effective sometime after the parties sign the contract. It can be a signed contract, an unsigned contract, a form to be used in complying with a contract requirement, or some other document

Drafting Tips

- Define the “Contract Documents” in the contract. To refer to “Contract Documents” without defining what they are is an invitation to ambiguity.

- It is probably not necessary to specifically state that the Schedules and Exhibits are incorporated into the contract, since that it clear from the context, but it is necessary to be clear when using terms such as “Contract Documents.”

Drafting Tips

- Number or letter Exhibits and Schedules in the order they first appear in the contract.
- The customize is to capitalize Exhibit and Schedule.
- If a Schedule or Exhibit is not attached, specifically refer to it by title and date.

Drafting Tips

- Avoid incorporating documents to be prepared later.

- Avoid incorporating documents "in a form substantially similar to Exhibit A." "Substantially similar" is an invitation to a dispute. This could potentially open the door to a claim that the contract does not represent the complete agreement of the parties. If necessary, attach the agreed document and leave only blanks to be filled in later.

Drafting Tips

Delete “hereto”

“Attached as Exhibit 1 hereto.”

becomes

“Attached as Exhibit 1.”

Drafting Tips

Don't try to bury a potentially contentious provision by putting it in an Exhibit or Schedule. In a consumer contract, the result may be that it is unenforceable. Even in a business to business context, it won't fool anyone and will reduce trust.

Indemnification provision was enforceable where it is "clear and unambiguous and is written in plain language, **not hidden nor lost in a haze of small print and legalese.**" Midwest Concrete Placement, Inc. v. L&S Basements, Inc., 363 Fed.Appx. 570 (10th 2010).

Drafting Tips

If you "bury" a provision, a court may declare it procedurally unconscionable and unenforceable.

Procedural unconscionability includes the existence of factors such as sharp practices, the use of fine print and convoluted language, as well as a lack of understanding and an inequality of bargaining power. **Brown v. Louisiana-Pacific Corp., 820 F.3d 339, (8th Cir. 2016).**

Substantive unconscionability includes harsh, oppressive, and one-sided terms. Id.

Some states require that a provision be both procedurally and substantively unconscionable to be unenforceable, but not all do. See In re Marriage of Shanks, 758 N.W.2d 506, 516–19 (Iowa 2008) (addressing **procedural unconscionability** even after finding a lack of **substantive unconscionability**).

Drafting Tips

If Schedules or Exhibits are very large, they may not be physically attached to the contract. That is fine if the contract itself makes clear that they are part of the agreement.

"Agreement means this Agreement, as amended, and the Schedules and Exhibits to it"

Drafting Tips

- Use the terms “agreement” and “contract” consistently. Be careful when an exhibit is also labeled as an “agreement” or “contract.”
- Be careful not confuse “Exhibits” with “Schedules.” Consider using numbers for one and letters for the other.

Drafting Tips

Specify what document governs if there is a conflict:

“In case of a conflict or inconsistency between this Agreement and any other contract documents, this Agreement shall control.” City of Benkelman, Nebraska v. Baseline Engineering Corporation, 2016 WL 1092476 (D. Neb. 2016)

"The language and terms set forth in this Exhibit shall prevail in the event of a conflict between this Exhibit and the foregoing printed Lease" Westlaw Home Magnolia Point Minerals, LLC v. Chesapeake Louisiana, LP, 2013 WL 398957 (W.D. La. 2013)

Virtual Attachments

It is becoming more common to incorporate documents not physically attached to the contract. One issue is whether a party may unilaterally amend a virtual attachment. A related issue is whether one party must notify the other of such an amendment, and if so, how.

Virtual Attachments

Customer was not bound by revised terms of contract with long distance telephone service provider, posted on provider's website, inserting additional service charges, class action waiver, arbitration clause, and choice-of-law provision, since customer had not assented to changes due to not receiving notice of proposed changes; customer would not know when to check website for possible contract changes, and would have no reason to look at posted contract on website, without notice of changes. Douglas v. U.S. Dist. Court for Cent. Dist. of California, 495 F.3d 1062 (9th Cir. 2007).

But see, McKee v. Audible, Inc., 2017 WL 4685039 (C.D. Ca. 2017)(Plaintiff who made repeated purchases from Amazon was not notice of its conditions of use).

Virtual Attachments

4 types of online contracts:

- Browsewrap exists where the online host dictates that assent is given merely by using the site.
- Clickwrap refers to the assent process by which a user must click “I agree,” but not necessarily view the contract to which she is assenting.
- Scrollwrap requires users to physically scroll through an internet agreement and click on a separate “I agree” button in order to assent to the terms and conditions of the host website.
- Sign-in-wrap couples assent to the terms of a website with signing up for use of the site’s services.

See, Berkson v. Gogo LLC, 597 F.Supp.3d 359 (E.D.N.Y. 2015)

Thank You

Mark Cohen, J.D., LL.M.
mark@cohenslaw.com

Jessica Everett-Garcia
jeverettgarcia@perkinscoie.com