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# Summary Judgment in Contract Cases: Strategy and Tactics for Movants and Respondents

TUESDAY, JANUARY 31, 2023

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Today's faculty features:

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# Summary Judgment in Contract Cases: Strategy and Tactics

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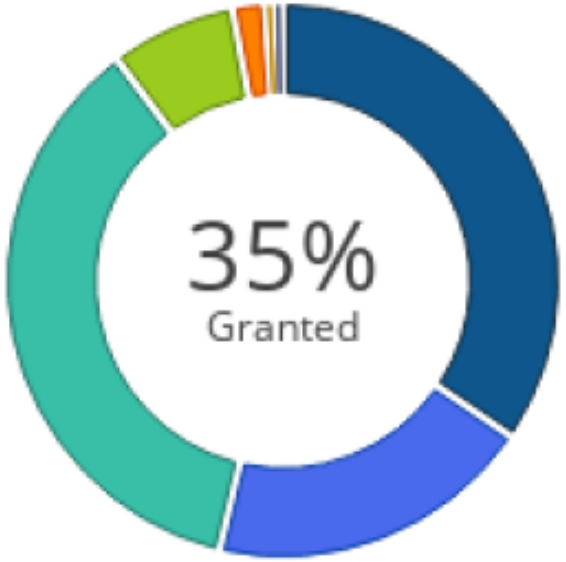
# Why Move for Summary Judgment in Contract Cases?

- Contract disputes are ideally suited for summary judgment.
  - The interpretation of an unambiguous contract is a question of law for the court.
  - Whether a contract is ambiguous is a question of law for the court.

# Why Move for Summary Judgment in Contract Cases?

**Outcome of Motions for Summary Judgment in Contract Cases (Federal Court)**




| Results | Total | Percentage |
|---|---|---|
| Granted | 7,158 | 35% |
| Granted in Part | 3,933 | 19% |
| Denied | 7,489 | 37% |
| Denied as Moot | 1,439 | 7% |
| Struck | 296 | 1% |
| Vacated | 12 | <1% |
| Withdrawn | 6 | <1% |



Source: Westlaw® Litigation Analytics Report; limited to Contract cases; Federal court; Motion type: Motion for Summary Judgment (and all subcategories); Order date: 1/24/18 to 1/24/23.

# Rules of Contract Interpretation

- Terminology
  - Interpretation / Construction
  - Rules / Canons
- Every jurisdiction has various court-created rules of contract interpretation.
- Some jurisdictions have codified rules of contract interpretation.
  - *See, e.g.*, O.C.G.A. § 13-2-2 (setting forth nine "[r]ules for interpretation of contracts generally").
- Primary vs. secondary rules

# Rules of Contract Interpretation

- **Fundamental Principles**
  - Parties' Intent Governs
  - Plain Meaning (Supremacy-of-Text) Principle
- **Semantic Canons**
  - Ordinary-Meaning Canon
  - Negative-Implication Canon (*expresio unius*)
- **Syntactic Canons**
  - Grammar Canon
  - Series-Qualifier Canon
  - Nearest-Reasonable Referent Canon
  - Last-Antecedent Canon
- **Contextual Canons**
  - Whole-Text Canon
  - Harmonious-Reading Canon
  - General/Specific Canon
  - Presumption of Consistent Usage
  - Associated-Words Canon (*noscitur a sociis*)
  - Prefatory-Materials Canon
  - Canon Against Surplusage
  - *Ejusdem generis*
- **Last Resort**
  - Construe Against the Drafter (*contra proferentem*)

# Fundamental Principles of Contract Interpretation

- **Parties' Intent Governs**
  - Fundamental goal of contract interpretation is to ascertain the parties' intent at the time of contracting.
  - Parties' intent must prevail unless inconsistent with law.

- **Plain Meaning (Supremacy-of-Text) Principle**
  - If the contract contains unambiguous language, the parties are bound by its plain meaning.
  - The words of the contract are of primary (if not paramount) concern, and what they convey, in context, is what the contract means.
  - The parties' expressed intent governs any subjective, unexpressed intent.
  - Courts may not rewrite the contract.
    - Limited exception if clauses conflict with one another or with public policy.

# Semantic Canons

- **Ordinary-Meaning Canon**. Words should be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense.
  - Ordinary meaning may be imprecise or even scientifically incorrect.
    - *See Robinson v. Liberty Mut. Ins. Co.*, 958 F.3d 1137, 1141 (11th Cir. 2020) ("That the average person has yet to adopt the scientific vernacular is not unexpected; after all, not every adult recalls the basics of their childhood science lessons as well as they should.")
- **"Exceptions" to the Ordinary-Meaning Canon**
  - **Technical terms or words of art** will be given their technical meaning.
  - **Context** may require that an ordinary word or phrase be given an unusual meaning.
    - *See, e.g., Yates v. United States*, 574 U.S. 528, 537 (2015) ("Ordinarily, a word's usage accords with its dictionary definition. In law as in life, however, the same words, placed in different contexts, sometimes mean different things.").
  - **Specific definitions** set forth in the contract are virtually conclusive.

# Negative-Implication Canon (*expressio unius*)

- *Expressio unius est exclusio alterius:* the expression of one thing implies the exclusion of others.
- Does the contract **list specific items or exceptions**?
  - *See, e.g.*, *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 302 (2017) ("If a sign at the entrance to a zoo says 'come see the elephant, lion, hippo, and giraffe,' and a temporary sign is added saying 'the giraffe is sick,' you would reasonably assume that the others are in good health.").
- Does the contract have **parallel provisions**—*e.g.*, different scopes of work depending on the time period?
  - *See, e.g.*, *Copeland v. Home Grown Music, Inc.*, 856 S.E.2d 325, 331 (Ga. Ct. App. 2021) (applying canon where recording contract gave two methods for calculating royalties, depending on the time period, and only one method referred to royalties for "individual recordings"; *expresio unius* supported inference that the "omission was intentional").
- "Virtually all the authorities who discuss the negative-implication canon emphasize that it **must be applied with great caution**, since its application depends so much on context."
  - Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 10, at 107 (2012) ("Reading Law").
  - *See, e.g.*, *SW Gen.*, 580 U.S. at 302 ("The force of any negative implication, however, depends on context.") (quoting *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 381 (2013)).

# Syntactic Canons

- **Grammar Canon**—Words are to be given the meaning that proper grammar and usage would assign them.
  - *But see, e.g.*, O.C.G.A. § 13-2-2(6) ("The rules of grammatical construction usually govern, but to effectuate the intention [of the parties] they may be disregarded; sentences and words may be transposed, and conjunctions substituted for each other.").
  - *Compare Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1482 (2021) (Gorsuch, J.) ("[W]hen it comes to discerning the ordinary meaning of words, there are perhaps ***few better places to start*** than the rules governing their usage."), *with Payless Shoesource, Inc. v. Travelers Cos., Inc.*, 585 F.3d 1366, 1372 (10th Cir. 2009) (Gorsuch, J.) ("while the rules of English grammar often afford a valuable starting point to understanding a speaker's meaning, they are violated so often by so many of us that they ***can hardly be safely relied upon as the end point*** of any analysis of the parties' plain meaning.").
- **Series-Qualifier Canon**—When there is a straightforward, parallel construction that involves all nouns or verbs in a series, a modifier (whether positioned before or after the series) normally applies to the entire series.
  - *See, e.g., Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1169 (2021).
  - Fourth Amendment example—in the phrase "unreasonable searches and seizures," the adjective "unreasonable" qualifies the noun "seizures" as well as the noun "searches." Reading Law § 19, at 147.
  - Canon is "highly sensitive to context." *Id.* at 150.

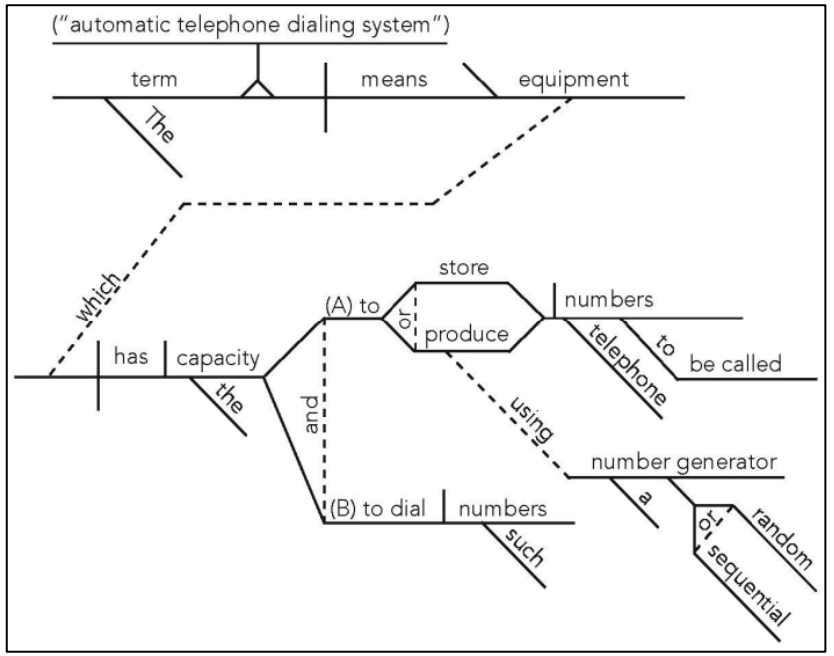
# Syntactic Canons

- **Nearest-Reasonable Referent Canon**—When the syntax involves something other than a parallel series of nouns or verbs, a modifier normally applies only to the nearest reasonable referent.
  - **a/k/a Last-Antecedent Canon—**but, technically, only pronouns have antecedents.
    - *See Grecian Magnesite Mining, Indus. & Shipping Co., SA v. Comm'r of Internal Revenue Serv.*, 926 F.3d 819, 824 (D.C. Cir. 2019) (describing the two canons as "cousin[s]" and stating, "[l]abels aside, the point is the same: ordinarily, and within reason, modifiers and qualifying phrases attach to the terms that are nearest."); Reading Law § 18, at 144–46.
  - Applies "when the alternative reading would **stretch the modifier too far** by asking it to qualify a remote or otherwise disconnected phrase," but *not* "when the modifier directly follows a concise and integrated clause."
    - *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1077 (2018) (marks omitted).
  - Canon "**can assuredly be overcome by other indicia of meaning**"—*e.g.*, where a modifier follows a series of "items that readers are used to seeing listed together," or where a "concluding modifier" is one "that readers are accustomed to applying to each of" the words preceding it.
    - *Lockhart v. United States*, 577 U.S. 347, 352 (2016).

# Syntactic Canons

- **Briefing tip**—try to illustrate grammatical and other technical arguments whenever possible.
- **Example #1**
  - "If 'at the time of his or her death' was intended to modify the word 'determined,' the provision would have been framed differently: 'a miner who was determined at the time of his or her death to be eligible to receive benefits ~~at the time of his or her death~~.'" *Oak Grove Res., LLC v. Dir., OWCP*, 920 F.3d 1283, 1290 (11th Cir. 2019) (Newsom, J.)

- **Example #2**




Br. of Respondent at 17, *Facebook, Inc. v. Duguid*, No. 19-511 (U.S. filed Oct. 16, 2020) (diagramming statutory definition from the Telephone Consumer Protection Act)

# Contextual Canons

- **Whole-Text Canon**—The entire contract should be considered as a whole when interpreting any part of the contract.
  - *See, e.g.*, Restatement (Second) of Contracts § 202(2) (1981) ("A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together.").
- **Harmonious-Reading Canon**—The provisions of the contract should be interpreted in a way that renders them compatible, not contradictory.
- **General/Specific Canon**—If there is a conflict between a general provision and a specific provision, the specific provision prevails.
  - Requires a genuine, unavoidable conflict.
- **Prefatory-Materials Canon**—a whereas clause or other recital is a permissible indicator of meaning.
  - But prefatory materials can't override the operative language of the contract. *See, e.g.*, *Peery v. City of Miami*, 977 F.3d 1061, 1069–71 (11th Cir. 2020) (Florida law) ("prefatory statement" of contract "does not have binding effect").

# Contextual Canons

- **Presumption of Consistent Usage**—a word or phrase is presumed to bear the same meaning throughout the contract; a material variation in terms suggests a variation in meaning.
  - But sometimes a consistent meaning is impossible to discern. *See, e.g.*, *Return Mail, Inc. v. U.S. Postal Serv.*, 139 S. Ct. 1853, 1863 (2019) (consistent-usage canon "breaks down" when the same word is used in "multiple conflicting ways").
  - "Yet more than most other canons, this one assumes a perfection of drafting that, as an empirical matter, is not often achieved." Reading Law § 25, at 170.
- **Associated-Words Canon**—Associated words bear on one another's meaning (*noscitur a sociis*).
  - "Words, like people, are judged by the company they keep." *Langley v. MP Spring Lake, LLC*, 834 S.E.2d 800, 805 (Ga. 2019) (citation omitted).
  - For example, if a contract applies to "tacks, staples, nails, brads, screws, and fasteners," it should be clear "that the word *nails* does not denote fingernails and that *staples* does not mean reliable and customary food items." Reading Law § 31, at 196.

# Canon Against Surplusage

- A "**cardinal principle** of contract construction" is that "a document should be read to give effect to all its provisions and to render them consistent with each other."
  - *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995); *see also* 11 Williston on Contracts § 32:5 (4th ed. 2012); Restatement (Second) of Contracts § 203(a) (1981).
- Related to the Whole-Text Canon:
  - "We will **read a contract as a whole and we will give each provision and term effect**, so as not to render any part of the contract mere surplusage." *Kuhn Const., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396–97 (Del. 2010).
  - "[S]tatutory construction is a 'holistic endeavor,' and the same is true of construing any document." Reading Law § 24, at 168.

# Canon Against Surplusage

Is this turn lane a "surface road exit ramp"?

- A legal text "should be construed to give effect to all its provisions, so that no part will be inoperative or superfluous, void **or insignificant**."
  - *Corley v. United States*, 556 U.S. 303, 314 (2009) (marks omitted).
- This canon counsels against an interpretation that "would in practical effect render" a term "entirely superfluous in **all but the most unusual circumstances**"—even if the term could function in "rare" cases.
  - *TRW Inc. v. Andrews*, 534 U.S. 19, 29–31 (2001).

# Canon Against Surplusage

- Does the interpretation still give the contract provision "work to do"?
- Language that **removes doubt** is not superfluous.
  - *See, e.g.*, *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013); *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 294 (2016) (Alito, J., concurring in part and dissenting in part) ("Language is not superfluous when it removes any doubt about a point that might otherwise be unclear." (marks and citation omitted)).
- Presumption against surplusage is "**not a silver bullet**" or "**an absolute rule**."
  - *Rimini St., Inc. v. Oracle USA, Inc.*, 139 S.Ct. 873, 881 (2019); *Marx*, 568 U.S. at 385; *see also Barton v. Barr*, 140 S. Ct. 1442, 1453 (2020) ("Sometimes the better overall reading … contains some redundancy." (citation omitted)
  - For example, insurance contracts "often use overlapping provisions to provide greater certainty on the scope of coverages and exclusions." *Crescent Plaza Hotel Owner, L.P. v. Zurich Am. Ins. Co.*, 20 F.4th 303, 311 (7th Cir. 2021).
- Canon doesn't apply if the competing interpretation **also** results in surplusage.
  - *Microsoft Corp. v. i4i Ltd.*, 564 U.S. 91, 106 (2011); *Domain Prot., LLC v. Sea Wasp, LLC*, 23 F.4th 529, 538 (5th Cir. 2022); *Whole Woman's Health v. Jackson*, 642 S.W.3d 569, 582 (Tex. 2022).

# *Ejusdem Generis* Canon

- "Where general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned (*ejusdem generis*)." Reading Law § 32, at 199.
- In other words: Catchall clauses (*e.g.*, "and any other ___") should be read restrictively to be like the listed terms.
- Canon is usually applied to a list of specific items separated by commas and followed by a general or collective term.

# *Ejusdem generis* does **not** apply when…

- **Only one word describes the genus.**
  - *See, e.g.*, *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 225 (2008); *Warren v. State*, 755 S.E.2d 171, 173 n.2 (Ga. 2014); Reading Law § 32, at 206 ("'Theaters and other places of public entertainment' does not invoke the canon.").
- **Specifics exhaust the class**—*i.e.*, the general term would add nothing if limited to the same genus as the specifics.
  - *See, e.g.*, *Gabbard v. Madison Loc. Sch. Dist. Bd. of Educ.*, 179 N.E.3d 1169, 1180 (Ohio 2021); *City of Seattle v. State, Dep't of Lab. & Indus.*, 965 P.2d 619, 622 (Wash. 1998).
- **Specifics don't fit into a "common genus."**
  - *See* Reading Law § 32, at 209 ("the general words *all manner of merchandise* were held not to be limited by a preceding enumeration of fruit, fodder, farm produce, insecticides, pumps, nails, tools, and wagons.").
- **"Including but not limited to" precedes the enumeration.**
  - *See, e.g.*, *Casey v. Lamont*, 258 A.3d 647, 656 (Conn. 2021); *Yager v. State*, 362 P.3d 777, 783–84 (Wyo. 2015). *But see Wilson v. Clark Atlanta Univ., Inc.*, 794 S.E.2d 422, 437 (Ga. Ct. App. 2016) (apparently rejecting this view).

# Construe Against the Drafter (*contra proferentem*)

- *Contra proferentem* is the common law rule that a court should construe ambiguous contract language against the interest of the party that drafted it.
  - *See, e.g.*, Restatement (Second) of Contracts § 206 (1981) ("In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.").

- The reach of this rule "**must have limits**, no matter who the drafter was."
  - *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1417 (2019) (quotation omitted).

- The rule "applies '**only as a last resort**' when the meaning of a provision remains ambiguous after exhausting the ordinary methods of interpretation."
  - *Id.* (quoting 3 Arthur Corbin, Contracts § 559, at 268–70 (1960)); *see also* 11 Willison on Contracts § 32:12 at 792-93 (4th ed. 2012) ("the rule does not require that any and all contract terms be construed against the drafter, but only those terms that are genuinely ambiguous.").

# Construe Against the Drafter (*contra proferentem*)

- Inapplicable to contracts negotiated by **sophisticated parties** of equal bargaining power.
  - *See, e.g.*, *New Jersey v. Merrill Lynch & Co.*, 640 F.3d 545, 550 (3d Cir. 2011); *FabArc Steel Supply, Inc. v. Composite Const. Sys., Inc.*, 914 So. 2d 344, 360 (Ala. 2005) (collecting cases).
  - *But see Morgan Stanley Grp. Inc. v. New England Ins. Co.*, 225 F.3d 270, 279 (2d Cir. 2000) ("[T]here is no general rule in New York denying sophisticated businesses the benefit of *contra proferentem*").
  - Is the parties' relative sophistication and bargaining power a fact question?
- The interpretation put forward by the non-drafting party **must be a reasonable one**.
  - *Langley v. MP Spring Lake, LLC*, 834 S.E.2d 800, 804 (Ga. 2019); *see also* Restatement (Second) of Contracts § 206 cmt. A (1981) ("the rule does not apply if the non-drafting party's interpretation is unreasonable.").
  - *Contra proferentem* does not allow a court to "construe less-than-clear terms in implausible and harmful ways against the drafter." *Yellowbook Inc. v. Brandeberry*, 708 F.3d 837, 847 (6th Cir. 2013).
- Parties can contract around the *contra proferentem* rule.

# What is an “ambiguity”?

- Contracts are construed in accord with the parties’ intent, the best evidence of which is the language of the contract itself, read as a whole.
- Ambiguity arises when the contract, read as a whole, fails to disclose the parties’ intent.
- Whether or not contract language is ambiguous is a question of law.
- Provisions in a contract are not ambiguous merely because the parties interpret them differently.

# Types of ambiguity

- Types of ambiguity:
  - Contractual language is reasonably susceptible to two different meanings.
  - Inconsistencies in the contract.
  - Contract language could apply equally to two different things or subject matters.
  - The contract, read as a whole, fails to disclose the parties' intent.

# Parol Evidence Rule

- The parol evidence rule bars extrinsic evidence that contradicts or creates a variation of a term in writing that the parties intended to be completely integrated.
- Parol evidence is inadmissible to add to, take from, or vary a written contract.
- Parol evidence is admissible only if a court finds an ambiguity in the contract.
- The rule gives stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses, infirmity of memory, and the fear that the jury will improperly evaluate the extrinsic evidence.

# Types of parol evidence

- Extrinsic evidence that will be considered to give meaning to ambiguous language includes:
  - The dealings of the parties leading up to the execution of the agreement.
  - The parties' practical construction of the provision at issue during the course of performance.
  - The parties' prior course of dealing under similar contracts.
  - Custom and usage in the trade.

# Examples of ambiguity in contracts

- *Collins v. Harrison-Bode*, 303 F.3d 429 (2d Cir. 2002) (finding the term "Monet" in settlement agreement was ambiguous when the term was used in number of inconsistent ways throughout agreement)
- *Williams & Sons Erectors, Inc. v. S.C. Steel Corp.*, 983 F.2d 1176 (2d Cir. 1993) (finding ambiguity in contract when § 7 provided for delay impact costs arising from change orders, and § 10 contained a general "no-damages-for-delay clause")
- *19 Recordings Ltd. v. Sony Music Ent.*, 2016 WL 5408167 (S.D.N.Y. Sept. 28, 2016) (finding contact is ambiguous "because the meaning of the words 'describe or characterize' is [too] imprecise")

# Surrounding Circumstances

- "Ordinarily, the circumstances surrounding the execution of a contract may always be shown and are relevant to a determination of what the parties intended by the words they chose."
  - 11 Williston on Contracts § 32:7 (4th ed. 2012).

- "The parol evidence rule … does not prohibit consideration of surrounding circumstances that inform, rather than vary from or contradict, the contract text."
  - *Houston Expl. Co. v. Wellington Underwriting Agencies, Ltd.*, 352 S.W.3d 462, 469 (Tex. 2011).

# Surrounding Circumstances

## (Typically) Permissible

- ✓Commercial or other setting
- ✓Whether each party had counsel
- ✓Nature and length of parties' relationship
- ✓Age, experience, education, and sophistication of each party

## Impermissible Parol Evidence

- Collateral agreements
- Evidence of a party's subjective intentions
- Evidence that varies or contradicts the written terms

# Expert Testimony

- Experts can testify concerning the particular practices and customs in a trade.
- The expert may testify as to the meaning a contract term has in a particular industry.
- An expert also may testify whether an interpretation of a contract is reasonable in light of industry practice and whether it is consistent with such practice.
- Although an expert may testify concerning the meaning of technical terms in a contract, he or she may not testify as to the meaning of ordinary contractual provisions.

# Ethical Considerations

- Are you litigating a contract your firm drafted?
- Model Rule of Professional Conduct 3.7(b) – "A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9."
  - Rules 1.7 and 1.9 address conflicts of interest, e.g., "A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests … will materially and adversely affect the representation of the client."

# Best practices to avoid creating issues of fact

- Keep it simple.
- Define material terms.
- Avoid subjective terms.
- Be precise if a term can have two meanings.
- Get an independent attorney unfamiliar with the transaction to read and review the contract.

# Merger/anti-reliance clauses

Generally speaking, in contract law, an integration clause—also sometimes called a merger clause or an entire agreement clause—is a provision that states that the terms of a contract are the complete and final agreement between the parties.

Integration clause | Wex – Law.Cornell.Edu

# Except

- Is fraud alleged?
  - *Browning v. Stocks*, 595 S.E.2d 642, 265 Ga. App. 803 (2004) (merger clause irrelevant to fraud claim alleging active or passive concealment).
- Was the misrepresentation after the contract was made?
  - *Northwest Plaza, LLC v. Northeast Enterprises, Inc.*, 699 S.E.2d 410, 305 Ga. App. 182, 192 (2010).

# Typical jury instruction

A merger clause will not defeat a fraud or negligent misrepresentation claim where the allegedly false statement at issue is made a part of the contract itself.

*Reichman v. Southern Ear Nose and Throat Surgeons, P.C.*, 598 S.E.2d 12, 266 Ga. App. 696 (2004).

*Ben Farmer Realty Co. v. Woodard*, 441 S.E.2d 421, 212 Ga. App. 74, 75 (1994).

*Woodhull Corp. v. Saibaba Corp*., 507 S.E.2d 493, 234 Ga. App. 707, 711-12 (1998).

*Orion Capital Partners, L.P. v. Westinghouse Elec. Corp.*, 478 S.E.2d 382, 223 Ga. App. 539, 541–543(2) (1996).

*Bowden v. Med. Ctr., Inc.*, 845 S.E.2d 555, 564, 309 Ga. 188, 199 n.11 (2020) ("The same principles apply to both fraud and negligent misrepresentation cases and the only real distinction between negligent misrepresentation and fraud is the absence of the element of knowledge of the falsity of the information disclosed") (marks and citation omitted).

# Example of false statement in contract

- *Wanna v. Navicent Health, Inc.*, 850 S.E.2d 191, 199 n.2, 357 Ga. App. 140 (2020).
  - Trial court denied motion for summary judgment as to the contract.
  - Trial court concluded that the contract was ambiguous.
  - Conflicting parol evidence on the issue.

# Example

- On December 15, 2014, the parties, A and B, signed the contract.
- On December 18, 2014, one party, B, re-signed the contract and inserted words to a key provision that concerned compensation.
- A, the party who only signed on December 15, believed that the inserted words guaranteed him a certain level of compensation because they were consistent with what he was told before signing.
- B, the party who added the words, asserted the merger clause, and claimed the words had nothing to do with compensation.
- A asserts that representations made before the contract were a negligent misrepresentation.

# Burden of Proof

- In the trial court
- On appeal
  - De novo – right for any reason
  - Evaluation of trial court's expressed reasoning

# Planning for the end of the “honeymoon”

- Have you planned for the eventuality that the “honeymoon” of the “deal” will evaporate and the parties will be at odds with each other?
  - Business Court versus arbitration versus general jurisdiction? [Fundamental business decision for client]
  - Jurisdiction and venue? [Convenience of client]

# Forum selection clauses

- Could be outcome determinative
- Will also play a role in how quickly and efficiently your dispute may get resolved.
  - Is there a discrepancy between resources and leverage of the parties?
  - Pandemic backlog of cases?
  - Is injunctive relief necessary?

# Factors to consider

- Business people want a convenient, fair, predictable, and prompt decision with minimal expense.
- Is it important to have a decision maker with specialization?
- Is there a need for confidentiality?  (arbitration)
- Has the forum embraced virtual proceedings?  (necessary information technology resources and staff)
- Choice of law provision.
- Designate a specific court? Generic – “any court in New York”?  Do nothing and leave it up to chance?

# Create your own arbitration forum?

- Avoid cost of arbitration service?
- Create by agreement a private, party-driven arbitration process rather than going through an established arbitration system.
- Great care will need to be taken to make sure the process and procedures are clear so disputes regarding the process don’t themselves end up in court.

# Thank You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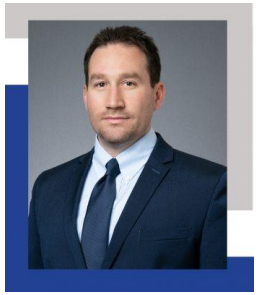

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