

The Hidden Risks of Boilerplate Clauses in Healthcare Contracts: Avoiding Unintended Consequences and Implementing Practical Solutions

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Today's faculty features:

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The Hidden Risks of Boilerplate Clauses in Healthcare Contracts

Avoiding Unintended Consequences & Implementing Practical Solutions

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**Buchanan
Ingersoll &
Rooney** PC

Agenda

Recitals	Reps & Warranties
Entire Agreement	Survival
Severability	Indemnification
Waiver	Dispute Resolution
Amendment	Governing Law
Compliance with Laws	Provisions
Third Party Rights	Remedies
Assignment	
Notice	
Force Majeure	
Counterparts	
Confidentiality	

Why Discuss Boilerplate?

- Often overlooked
 - Standard terms
 - Not substantive
 - Fatigue when reviewing long contracts
- But these clauses are just as important as the rest of the agreement

Recitals

Recitals.

NOW, THEREFORE, in consideration of the foregoing recitals, which such recitals are incorporated herein, the mutual covenants and agreements set forth herein, and for other good and valuable consideration, the receipt and legal sufficiency of which are hereby acknowledged, the Parties agree as follows:

Recitals – Practice Considerations

- Used by the parties to identify the purpose of the agreement, identity of the parties, and reason parties have entered into the agreement
- Should recitals be made expressly part of the contract?
 - Helps to ensure that recitals are admissible in interpreting contract's substantive provisions, but need to make sure that facts are correct and remove unnecessary language
- “Statement of consideration”
 - Not necessarily direct evidence that the agreement is supported by adequate consideration, even if courts will recognize a (rebuttable) presumption of adequate consideration
 - Lack of consideration deems contract unenforceable

Entire Agreement

Entire Agreement. This Agreement together with all Exhibits attached hereto constitutes the entire understanding and agreement among the Parties concerning the subject matter hereof and supersedes all prior written or oral agreements or understandings existing between the Parties concerning the subject matter hereof.

Entire Agreement – Practice Considerations

- Often fail to include limits on the scope of the subject matter of the specific agreement
- Include by reference all other necessary agreements, such as confidentiality agreement
- Address specific agreements that are superseded
 - Do not rely on a generic Entire Agreement clause to terminate a prior agreement
- Consider express representations that no other promises or inducements have been made by the parties
 - “The Parties also intend that this Agreement may not be supplemented, explained, or interpreted by any evidence of trade usage or course of dealing. The Parties did not rely upon statements or representations not contained within the Agreement itself.”

Severability

Severability. If any term, provision, covenant, or restriction contained in this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable or against public policy, the remainder of the provisions, covenants, and restrictions contained herein shall remain in full force and effect and shall in no way be affected, impaired, or invalidated.

Severability – Practice Considerations

- Severs clauses that were unenforceable when drafted or rendered unenforceable by changes in law from the rest of the Agreement
- Courts more likely to sever unenforceable clauses from contracts when severability clauses are present
- Consider excluding terms that are inextricably essential to the agreement to avoid enforcement of a disadvantageous arrangement
 - “If any provision of this Agreement is held illegal or unenforceable in a judicial proceeding, such provision shall be severed and shall be inoperative, and, provided that the fundamental terms and conditions of the Agreement (including, without limitation, Sections ___ and ___) remain legal and enforceable, the remainder of this Agreement shall remain operative and binding on the Parties.”

Waiver and Amendment

Waiver. Neither Party may waive or release any of its rights under this Agreement except in writing. The waiver by either party hereto of a breach of violation of any provision of this Agreement shall not operate as, or be construed to be, a waiver of any subsequent breach of the same or other provision hereof.

Amendment. This Agreement may not be amended, modified, superseded, cancelled, renewed, or extended, except as otherwise provided herein, without a written agreement executed by both parties.

Waiver and Amendment – Practice Considerations

- Waiver and amendment provisions are often not negotiated but can have an impact in three major ways:
 - Whether course of conduct can constitute amendment of agreement
 - Whether provision permits waiver based upon delay in acting
 - How does delay impact indemnification claims?
 - Include survival period for reps & warranties and/or “unless as otherwise provided” language
 - Whether delay should be permitted in the first instance
 - Whether remedies are cumulative

Amendment – Practice Considerations

- Modification of Schedules
- Changes to Notice provisions
- Relationship to surviving reps & warranties

Compliance with Laws

Compliance with Laws. Party A represents and warrants that neither entering into nor performing the obligations contemplated in this Agreement will be in breach of any legislation or regulation or law or rule of application and that it is in compliance with all applicable laws and regulations.

Compliance with Laws – Practical Considerations

- ALL laws at signing
- ALL laws during term
- Specific laws
- Unknown future laws and regulations
- Impact of change to existing law
- Degree of compliance
- Reciprocity

Third Party Rights

No Third Party Rights. This Agreement does not, nor is it intended to, create any rights, benefits, or interest to any third party, person or organization.

Successors and Assigns. This Agreement shall be binding upon and shall inure to the benefit of the heirs, executors, administrators, successors, and permitted assigns of the parties hereto.

Third Party Rights – Practice Considerations

- Issues generally arise in two contexts:
 - Whether a third party has standing with respect to an agreement between two other parties
 - The area of assignees, transferees, heirs, executors, administrators, and successors

Third Party Rights – Practice Considerations (cont.)

- Whether a third party has standing:
 - Generally not unless “invited” into agreement, but the intent of the parties may not be clear
 - Without specific language disclaiming third party rights, a court could infer the parties intended to grant rights to certain outside parties
 - Courts generally enforce clear and unambiguous disclaimers but may make exceptions where the primary or sole purpose of an agreement is to benefit a third party
 - Example: treatment of employees and determination of their rights post-transaction (*i.e.*, can employees enforce buyer’s employment covenants in purchase agreements?)
 - Example: asset purchase deals where the shareholders are not parties
- Address the issue:
 - If the parties intend to disclaim third party beneficiary rights, clearly state that intent; if the parties desire for other parties to have rights, specifically state those rights and the limited sections to which those rights apply
 - Avoid internal inconsistencies

Third Party Rights – Practice Considerations (cont.)

- Assignees, transferees, heirs, executors, administrators, and successors
 - Typical boilerplate contractual language provides that agreement is “binding upon and inures” to the benefit of these persons
 - This is potentially inconsistent with other boilerplate provisions that address assignment rights of the parties
 - Inconsistencies can also arise in the case of death
 - Important to understand difference between “assignment” and “successors and assigns” provision
 - Drafter’s tip: avoid confusion by combining the provisions to make clear that only permitted transferees are entitled to benefits under the agreement and that all permitted transferees are subject to the terms of the agreement

Assignment

Assignment. Neither party shall have the right to assign this Agreement or any rights, interests, or obligations hereunder, without the prior written consent of the other party.

Assignment – Practice Considerations

- General rule – contracts/contractual rights are assignable, unless contract provides otherwise
- Consider:
 - Anticipated situations where assignment may be probable
 - Impact of merger or consolidation
 - Transfer to wholly-owned subsidiary or affiliated entity
- Anti-assignments and the need to obtain consent create potential closing risks in asset acquisitions and other transactions
 - Landlord consent can be difficult to obtain

Notice

Notices. All notices, requests, approvals, demands, and other communications required or permitted to be given in connection with the terms and provisions of this Agreement shall be in writing and shall be deemed to have been duly given up receipt, if personally delivered or sent by facsimile transmission one (1) business day after sending, if sent by overnight delivery service, or two (2) business days after mailing if mailed by certified mail with return receipt requested, postage prepaid to such party at the following address:

Notice – Practice Considerations

- Various types of communications may be necessary – “routine” vs. “formal”
- Manner of notice
 - Use of obsolete methods vs. newer delivery methods
 - Examples: registered mail, facsimile, email
 - Consider return receipts
 - Should all notices be sent in the same manner? (Work Order in contractor agreement vs. notice of termination)
 - Ability to change manner of notice

Notice – Practice Considerations (cont.)

- To whom notice is given
 - Be cautious when using a name instead of a title
 - Consider the right for parties to change contact information, update if individual leaves company or has a new role
- Third parties
 - When are notices appropriate for third parties?
 - Formal notice vs. informational purposes only or cc
- When notice is deemed to be effective/accepted
 - Be cautious to prevent a party to avoid or delay receiving notice by refusing to accept delivery or sign a certified delivery letter
 - Avoid inconsistencies regarding delivery and receipt

Force Majeure

Force Majeure. Neither Party is responsible for any failure to perform its obligations under this Agreement, if it is prevented or delayed in performing those obligations by a Force Majeure Event. Where there is a Force Majeure Event, the Party prevented from or delayed in performing its obligations under this Agreement must immediately notify the other Parties, which notice should describe the Force Majeure Event and the reasons that the Force Majeure Event prevents that Party from, or delays that Party in, performing its obligations under the Agreement.

Force Majeure – Practice Considerations

- Four elements
 - Was there a Force Majeure Event, as defined by the contract?
 - Ex: “including, without limitation, acts of God or of a public enemy, including terrorists, acts of the government in its sovereign capacity, fires, floods, epidemic or pandemic, strikes, picketing or boycotts, or any other circumstances caused by natural occurrences or third party actions beyond the reasonable control and without the fault or negligence of the party whose performance is affected (each a “Force Majeure Event”).”
 - Was the event reasonably beyond control of the party invoking the clause?
 - Does the event excuse or relieve performance?
 - Were procedural requirements set forth in the contract (e.g., notice) followed?

Force Majeure – Practice Considerations

- Construed by courts in strict and conservative fashion
 - Ex: force Majeure Event must be unforeseen (COVID-19 is no longer unforeseen)
- Non-Force Majeure Events:
 - Market changes in prices
 - Human events caused by a party's own negligence/failure to plan
 - Inability to perform except at financial loss
 - Environmental or operational issues that make performance more expensive (but not impossible)
- Mitigation and resumption of obligations
 - “The affected Party must use reasonable efforts to mitigate the effect of the Force Majeure Event upon its performance of the Agreement and to fulfill its obligations under the Agreement. Upon completion of the Force Majeure Event, the affected party must as soon as reasonably practicable recommence the performance of its obligations under this Agreement. A Force Majeure Event does not relieve a Party from liability for an obligation that arose before the occurrence of that Force Majeure Event.”

Counterparts

Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original, and all of which together shall constitute one and the same instrument. Delivery of an executed signature page hereof by facsimile or portable document format (.pdf) shall have the same effect as delivery of a manually executed counterpart hereof.

Counterparts – Practice Considerations

- Fax, copiers, PDF, DocuSign programs make it easier to collect signatures on different, but identical, copies of the same agreement
 - Fewer in-person signings/closings
- But some courts will not accept separate signatures as a validly executed contract if there is no counterparts provision

Confidentiality

Confidentiality. In connection with this Agreement, either Party (“Disclosing Party”) may disclose Confidential Information to the other Party (“Receiving Party”). Receiving Party shall use Confidential Information solely for the purposes set forth in this Agreement and shall not disclose such Confidential Information other than to its attorneys, accountants, and financial advisors need access to such Confidential Information, are informed of its confidential nature, and are bound by confidentiality obligations no less protective than the terms contained herein. . . .

Confidentiality – Practice Considerations

- Define “Confidential Information”
 - *E.g.*, information relating to raw materials, formulae, specifications, software, patent applications, trademarks, brands, process designs or models, passwords
 - Usually excludes information available to public, received from a third party
 - Marking obligations
- Define scope of use of other Party’s Confidential Information and prohibit disclosure
- Require protection of other Party’s Confidential Information
 - “Receiving Party shall safeguard the Confidential Information from unauthorized use, access, or disclosure using no less than a commercially reasonable degree of care and agrees to notify Disclosing Party within five (5) business days of any misuse or misappropriation of the Disclosing Party’s Confidential Information.”

Confidentiality – Practice Considerations

- Exceptions to disclosure prohibition
 - To (limited) affiliated companies/employees, accountants/attorneys, as needed
 - Required by law or regulation to be disclosed, court orders
- Duration, survival of confidentiality obligations
- Return/destruction of Confidential Information
- Damages vs. injunctive relief
- Public statements
 - “The Parties shall consult with each other prior to issuing any press release or any written public statement with respect to this Agreement or the transactions contemplated hereby and shall not issue any such press release or written public statement prior to such consultation.”

Confidentiality – Practice Considerations

- Comply with HIPAA when parties are covered entities and patient information may be exchanged
 - Include PHI, information about patients and patient records, billing information, patient lists in definition of Confidential Information
 - Prohibit use or disclosure of Confidential Information in violation of HIPAA, state privacy laws (and Notice of Privacy Practices for employees)
 - Business Associate Agreement may be necessary for the transaction

Reps & Warranties

Representations and Warranties. All representations and warranties of the Sellers and the Company set forth in this Agreement shall be true and correct in all material respects as of the Closing as though made as of the Closing (except to the extent that any such representation and warranty expressly speaks as of an earlier date, in which case such representation and warranty shall be true and correct as of such earlier date).

Reps & Warranties – Practice Considerations

- Fundamental Representations:
 - Organization
 - Authority
 - No conflicts
- General Representations
 - Ownership of shares
 - Title to/sufficiency of assets
 - Employee benefits/ERISA
 - Environmental Laws
 - Intellectual Property
 - Taxes
- Healthcare Representations
 - Compliance with anti-kickback statutes
- Compliance with self-referral prohibitions
- Medicare participation, accreditation
- Medicare cost reports
- No actions, investigations, or inquiries by government authorities, accreditation bodies, payors related to billing practices
- All necessary permits, licenses, certifications, accreditations
- Compliance program

Reps & Warranties – Practice Considerations

- How true do they have to be?
 - In all respects
 - In all respects, other than *de minimis* inaccuracies
 - In all material respects
 - In all respects, except as would not be expected to result in a Material Adverse Effect
- Qualifiers:
 - Materiality
 - Knowledge (specific individuals)
 - Time periods
 - Reasonableness
- Disclosure schedules

Survival

Survival. The Parties' obligations under the Confidentiality, Non-Competition, and Effect of Termination Sections of this Agreement shall survive the Closing. The representations, warranties, and covenants of the Parties contained in this Agreement or in any certificate delivered by them under this Agreement will survive the Closing for a period of twelve (12) months, except for the Organization Representation and Authorization Representation, which shall survive the Closing indefinitely.

Survival – Practice Considerations

- General rule is non-survival post-termination
- Survival of reps & warranties vs. core obligations (confidentiality, non-competes, effect of termination)
- Consider:
 - Defined time periods vs. unlimited time periods
 - Do not have to be identical for all reps & warranties
 - Fundamental reps (like organization and authorization representation) and other warranties specific to the transaction should survive indefinitely or for some defined time post-termination
 - Impact on statute of limitations

Indemnification

Indemnification. Each Party hereby agrees to indemnify, defend, and hold the other Party harmless from any and all claims, demands, costs, liabilities, losses, expenses, and damages (including reasonable attorneys' fees, costs, and expert witnesses' fees) arising out of or in connection with any claim that, taking the claimant's allegations to be true, would result in a breach by the indemnifying party of any of its warranties and covenants set forth herein.

Indemnification – Practice Considerations (cont.)

- Limiting indemnity obligations:
 - Qualify indemnifying party's acts and omissions by “gross negligence”
 - Obligations that cover only claims arising in certain jurisdictions
 - Definition of “Indemnified Party”
 - Excluded losses and liabilities covered by insurance proceeds or tax benefits received by indemnified party
 - Exclude damages
 - “Except to the extent Buyer is liable to a third party, including, without limitation, any Government Authority, for punitive, special, indirect, consequential or individual damages, including loss of profits, neither Buyer nor Seller shall be liable to the other for any punitive, special indirect, consequential, or incidental damages, including loss of profits.”

Indemnification – Practice Considerations

- Use of escrow:
 - “All claims for indemnification under Section ____ shall be paid first out of the Escrow Amount until exhausted and thereafter shall be paid severally by Seller in accordance with their respective Pro Rata Share until paid in full.”
- Sole and exclusive remedy:
 - “Except as otherwise provided in this Agreement, from and after the Closing, the exclusive remedy of each party in connection with this Agreement and the transactions contemplated hereby shall be as provided in this Section.”

Indemnification – Practice Considerations (cont.)

- Other considerations:
 - Use of caps and baskets
 - Rights to set off
 - Impact of insurance
 - Joint and several liability
 - Differentiation between covenants and reps & warranties
 - Conflicting indemnification provisions throughout the agreement
 - Mutual vs. unilateral indemnifications

Dispute Resolution

Dispute Resolution. The Parties agree that they will attempt in good faith to promptly resolve any dispute, controversy, or claim arising out of or relating to this Agreement, or the breach, termination, or validity thereof (each a “Dispute”), first by informal negotiations between their CEOs. Any Dispute that is not settled by the Parties’ respective CEOs within thirty (30) business days after notice of such Dispute is given by one Party to the other in writing shall be submitted to binding arbitration conducted by the American Health Law Association (“AHLA”) Dispute Resolution Service in accordance with its rules, and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. . . .

Dispute Resolution – Practice Considerations

- Manners of alternative dispute resolution prior to or in lieu of litigation
 - Good faith, informal negotiations
 - Mediation
 - Arbitration
- Can be helpful to discuss dispute resolution process and implications with litigation counsel
 - Fewer opportunities for appeals (“fraud or corruption” standard for most arbitrations)

Dispute Resolution – Practice Considerations (cont.)

- Whether alternative dispute resolution process is mandatory
- Scope of process – all disputes or claims?
- Remedies available – equitable remedies, consequential or punitive damages
- Location for mediation/arbitration
- How mediators/arbitrators are selected
- Number of arbitrators
- Specific expertise required of mediator/arbitrator
- Entity that will administer the mediation/arbitration and what rules apply (*i.e.*, AHLA, AAA)
- Costs of mediation/arbitration, attorney's fees
- Binding vs. non-binding
- Right to enforce
- Specific discovery or evidentiary rights necessary

Governing Law Provisions

Choice of Law. This Agreement shall be governed in accordance with the laws of the Commonwealth of Pennsylvania, excluding its rules governing conflicts of law.

Forum. Both Parties hereby agree to the jurisdiction and forum of the Commonwealth of Pennsylvania, Philadelphia County, with respect to any cause of action, lawsuit, claim, or dispute arising hereunder.

Governing Law Provisions – Practice Considerations

- Several clauses:
 - Choice of law (“Governing Law”)
 - Jurisdiction
 - Forum
 - Venue
 - Jury trial rights

Governing Law Provisions – Practice Considerations (cont.)

- Issues:
 - Silence as to choice of law – court decides
 - Often, chosen law is the state where the drafter’s office is located
 - Conflicts of law
 - Choosing favorable jurisdiction and obtaining consent
 - Choosing “friendly” forum and venue
 - Whether it is in the client’s best interest to waive the right to a jury trial
 - Potential inconsistencies with dispute resolution clauses

Remedies

Remedies. Each of the Parties to this Agreement will be entitled to enforce its rights under this Agreement specifically, to recover damages and costs (including attorney's fees) caused by any breach of any provision of this Agreement and to exercise all other rights existing in its favor. The Parties hereto agree and acknowledge that money damages may not be an adequate remedy for any breach of the provisions of this Agreement and that any Party may in its sole discretion apply to any court of law or equity of competent jurisdiction (without posting bond or deposit) for specific performance and/or other injunctive relief in order to enforce or prevent any violations of this Agreement.

Remedies – Practice Considerations

- Cumulative remedies
 - Permits parties to pursue “any and all remedies” available under the facts of the dispute, even if some of those remedies are inconsistent with each other
 - Boilerplate language stating that remedies are “cumulative” can override and contradict sole remedy provisions set forth in indemnification provisions, which are heavily negotiated
- Can expressly permit or prohibit particular remedies (like injunctive relief)

Closing Comments

Buchanan
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Thank you!

Questions?



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John R. Washlick is a Shareholder with Buchanan Ingersoll & Rooney in their Philadelphia and Princeton offices. John is Co-Chair of the firm's Health Care Industry team, and he focuses his practice on health care transactions and corporate compliance. John's clients include hospitals, health care systems, physician practices, individual physicians, medical device companies and entrepreneurs and investment-backed entities.

John has experience in structuring, negotiating and documenting a variety of complex business transactions, including mergers and acquisitions, joint operating agreements, joint ventures, clinical co-management agreements, academic and clinical affiliations and contractual relationships among providers and with third-party payers. He advised health care industry clients on general corporate law and regulatory health care related issues, such as the corporate practice of medicine and fee

splitting laws. Additionally, John assists clients with developing and implementing corporate compliance plans, HIPAA programs and governance restructuring and planning. John speaks nationally and writes frequently on contemporary health care topics.

In 2014, John was recognized among the leading health care lawyers in Pennsylvania by international legal research publisher Chambers USA, an honor based on an intensive research process incorporating client feedback. John has been listed in The Best Lawyers in America® since 2007 in the health care law area. He has also been recognized by Pennsylvania Super Lawyers® and has garnered an AV® Preeminent distinction, the highest available mark for professional excellence from Martindale-Hubbell's® Peer Review Ratings.

John is a member of the Bloomberg BNA Editorial Advisory Board, Health Law Advisory Board of Drexel University School of Law, Health Care Editorial Advisory Board of Law360, Chair of the Live Transactions Program of the American Health Lawyers Association, Co-Chair of the Health Care Law Committee of the Philadelphia Bar Association and the Founder and Co-Chair of the Health Law Committee of the Camden County Bar Association. In addition, John is on the Board of Directors for the charities For Pete's Sake and DMAX Foundation.



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Heather Alleva focuses her practice on representation of health systems, hospitals, physician groups, behavioral health facilities and other healthcare providers in a broad range of regulatory and compliance matters. She represents clients in mergers, acquisitions, affiliations, provider integration and other strategic transactions, as well as in reimbursement disputes with public and private payors.

Heather frequently counsels clients on state and federal regulation of healthcare providers, state and federal fraud and abuse matters, professional licensing issues, changes of ownership, payor enrollment, and HIPAA compliance. She is also experienced with billing and other internal investigations, including investigations of data-security incidents and breaches. In addition, Heather frequently counsels clients with respect to disclosure of compliance issues to state, federal, and commercial payors and has experience preparing, submitting, and resolving matters under various self-disclosure protocols. Heather also advises healthcare clients on corporate issues and assists with contractual relationships, including by drafting and negotiating physician (and other non-physician clinician) employment agreements.

Heather also assists clients in establishing telehealth and telemedicine programs, consulting on the practice of medicine, data security, and reimbursement issues that arise in the context of virtual care.