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Beware the Boilerplate

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I.
Introduction

You've reviewed appraisals, analyzed rent rolls, negotiated for weeks and, finally, agreed on the substantive terms for a commercial loan. All that's left to do is plug those terms into your standard form and sign on the dotted line, right? Wrong.

Often, the difference between quick enforcement of a loan or guaranty and protracted litigation rests in the terms of those standard provisions carried over from deal to deal and document to document. Changes in the law and in the industry can materially alter the meaning and effect of boilerplate contract terms – and they can do so in case-dispositive ways. So before you paper the next transaction, there are several "standard" contract terms that deserve a second look.

II.
Loans in the Eyes of a Litigator

Whether securitized or unsecuritized, backed by a guaranty or limited recourse, loan transactions are at their core contractual arrangements. Lenders, servicers and investors believe that enforcing their loans should be a quick and easy proceeding – after all, the borrower signed a contract. You just file suit, show the judge the contract, and come home with an enforceable judgment. That is, a party enforcing a loan anticipates entry of a "summary judgment" – judgment for the loan balance without trial based on the documents themselves. But defense lawyers with a little skill and savvy can capitalize on inartfully drafted loan documents to avoid summary judgment, generate fact issues for trial, and generally increase the expense of enforcement. Even if a loan or guaranty is ultimately enforced after trial, lost time and energy are real costs that can turn even the most miraculous trial victory into a business loss. A little work on the front-end reviewing long-ignored standard provisions, however, can remove an arrow from the borrower's quiver and increase the chance of quick, efficient loan enforcement.

This paper examines several standard contract provisions that can materially affect the enforceability of a loan, and identifies issue to consider when including them in transaction documents.

A. Waiver Provisions

Loan documents (generally the note, security instrument and guaranty) often contain waiver provisions. Some common waivers are indemnity provisions, waiver of the right to jury trial, waiver of defenses, and waiver of notice. While parties seeking waivers might favor sneaking such provisions into the document, this can often backfire--and it is sure to for the waivers litigants care about most.

A "waiver" Is the relinquishment of a right that is both (1) knowing and (2) voluntary. One way to help demonstrate that a waiver in a contract Is both knowing and voluntary is to make it conspicuous in the document.

How do I make a waiver conspicuous?

Simply put, a conspicuous waiver is one that jumps out at you. Use of ALL CAPS, contrasting type or color, for example, qualifies as conspicuous. *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 511 (Tex. 1993). The most common, practice is to make a provision conspicuous by setting it apart in bold, all-cap letters. *E.g. In re Gen. Elec. Capital Corp.*, 203 S.W.3d 314, 316 (Tex. 2006) (orig. proceeding) (recognizing that contractual jury waiver provision that was "conspicuous--because it was in bolded font and in all capital letters--met burden of party seeking to enforce provision to make prima facie showing that waiver was knowing and voluntary). Using a heading in addition that specifically states "waiver of jury trial" or "waiver of defenses" enhances conspicuousness and makes waiver provisions easier to defend.

Why is conspicuousness so important?

A conspicuous waiver is presumed to be knowing and voluntary, which shifts the burden to the other party to negate the presumption. Coupled with the general legal principle that persons are charged with knowledge of the contracts they sign and cannot use failure to read as a defense, *In re Lyon Fin. Services, Inc.*, 257 S.W.3d 228, 232-33 (Tex. 2008), conspicuous waivers can be hard to beat.

More importantly, in the case of "extraordinary" risk-shifting waivers (you can read that as "waivers lenders should care about most"), conspicuousness is required. Examples of extraordinary waivers are indemnity agreements, agreements to release another in advance from liability for the other's negligence, and waivers of jury trial. *See Littlefield v. Schaefer*, 955 S.W.2d 272, 273 (Tex.1997); *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993); *In re Bank of Am.*, 278 S.W.342 (Tex. 2009).

How much detail should a waiver have?

The Texas Supreme Court has held that, to be effective, a waiver must be "clear and specific." *Moayedi v. Interstate 35/Chisam Rd., L.P.*, 438 S.W.3d 1, 6 (Tex. 2014). But what that means in actual practice is not particularly clear. Waiver is largely a question of intent; there can be no waiver unless a party intended the waiver and the other party understood it as such. *Lesikar v. Rappeport*, 33 S.W.3d 282, 300 (Tex. App.—Texarkana 2000, pet. denied). So, while the initial impulse may be to draft a general waiver clause that does not clue the

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