Contract Boilerplate

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This article examines New Jersey case law on, and provides examples of, contract boilerplate provisions. The provisions examined include waiver of jury trial, governing law (also known as choice of law), forum selection, amendment, anti-assignment and anti-delegation, severability, and integration (also known as merger).

WAIVER OF TRIAL BY JURY

Parties to a contract have a right to a trial by jury to resolve their disputes. However, they often desire a judge rather than a jury. This is based on the belief that juries are unpredictable, or that they are unable to resolve technical or complex issues. Or, it is based on the fact that bench trials are quicker and less expensive. The parties may achieve their goal by including a provision in their contract waiving their rights to a jury trial.

The right to a jury trial, whether based upon a constitution, statute or the common law, may be waived by the parties.[1] However, there is a presumption against such a waiver.[2] For this reason, a contractual waiver must be voluntary, intentional and knowing in order to be enforceable.[3]

One court refused to enforce "a non-negotiated jury waiver clause appear[ing] inconspicuously in a standardized form contract entered into without assistance of counsel..."[4] It did note, however, a tendency by the courts to enforce a contractual waiver of a trial by jury where: a) the parties have been represented by counsel, b) there have been negotiations without substantial inequality in bargaining positions, or c) the contract provision is conspicuous.[5] Thus, another court enforced a contractual waiver of a jury trial when it was clearly visible and in clear and plain language (and in a form approved by the New Jersey Department of Insurance).[6]

Based upon existing New Jersey law, parties may waive their right to a jury trial by including such a waiver in their contracts. It is likely that such a contract waiver will be upheld if the parties were represented by legal counsel who negotiated and drafted the contract, and/or if the parties had substantially equal bargaining power. In order to increase the odds that a contractual waiver of a jury trial will be upheld by a court as voluntary, intentional and knowing, it should use clear and plain language, be conspicuous in appearance (*e.g.*, in bold, all capital letters, larger font size) as well as in location (*e.g.*, the last provision before the signatures). The parties may even be required to initial the provision.

The following is a good example of a waiver of trial by jury provision:

> Each party knowingly, voluntarily, and intentionally waives its right to a trial by jury in any action or other legal proceeding, whether in contract, tort or otherwise, arising out of or in any way relating to this agreement and the transactions contemplated hereunder.

GOVERNING LAW

The old or traditional rule was that the law of the state where the contract was entered into would determine the rights and duties of the contracting parties.[8] However, in 1980 this mechanical rule was replaced with a more flexible one that focuses on the state that has the most significant contacts or connections with the parties and the transaction.[9] Thus, the law of the state of contracting no longer automatically and conclusively determines the parties' rights and duties.[10]

However, even under the more flexible approach, the law of the state where the contract was entered into should be applied to determine the parties' rights and duties because it usually comports with the parties' reasonable expectations, unless another state has a more dominant and significant relationship to and closer contacts with the parties, the transaction and the underlying issues.[11] Indeed, one court has characterized this as a presumption.[12]

The foregoing analysis is consistent with the factors and contacts set forth in Sections 6 and 188 of the Restatement (Second) of Contracts.[13] Section 188 lists several relevant contacts to be considered in the analysis under Section 6, including the domicile, residence, nationality, place of incorporation and place of business of the parties, and the places of contracting and performance.[14] Section 6 sets forth the factors relevant to the court's analysis, including the relevant policies of the forum and of other interested states, the protection of justified expectations, the basic policies underlying the particular field of law, and certainty, predictability, and uniformity of result.[15]

In the absence of a contract provision specifying the law to be applied, the court will engage in the foregoing choice of law analysis.[16] However, the parties have the power to specify which state's law will govern their contract, and

given the relative uncertainty over which state's law will apply in determining their rights and duties, they often do specify the governing law in their contracts.[17]

The court will apply the law of the state chosen by the parties so long as doing so does not contravene New Jersey public policy.[18] New Jersey law is consistent in this regard with the principles of law set forth in Section 187(2)(b) of the Restatement (Second) of Conflict of Laws.

There have been a number of cases where the court has refused to honor the parties' choice of law in order to protect a party under New Jersey public policies. In one case, a party argued that Delaware law allowed it to unilaterally modify the parties' agreement to include an arbitration provision. The court, however, held that the application of Delaware law, which was the governing law specified in the agreement, would violate New Jersey public policy—New Jersey does not allow the unilateral modification of a contract of adhesion—thus, the choice of law provision would not be given effect.[19]

Likewise, in another case, the court refused to apply Delaware law, which was specified in the parties' property settlement agreement, to resolve an issue concerning a child residing in New Jersey.[20] In a third case, a franchise agreement provided for the application of New Jersey law. The court, however, refused to apply New Jersey statutory law because the franchisee was located in Connecticut. It reasoned that it would have applied New Jersey law if a New Jersey franchisee was a party to a contract providing for the application of another state's law. Thus, Connecticut statutory law should be applied to the Connecticut franchisee despite the parties' selection of New Jersey law.[21]

In addition, the court will not apply the parties' choice of law if the state chosen has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice of law.[22] For example, parties located in New Jersey cannot select the law of California to govern their contract, unless there is a reasonable basis for them to do so.

However, some states have enacted statutes allowing the parties to select their law even if there is no connection to the state, provided the parties meet certain statutory requirements.[23] For example, the parties would have a reasonable basis to select Delaware law to govern a corporate transaction or New York law to govern a commercial transaction because these states have a large amount of settled law on such matters.

Finally, it should be noted that there is case law providing that an inconspicuous choice of law provision will not be given effect.[24] However, they involve contracts of adhesion between parties of unequal bargaining power.

An attorney should bear these principles in mind when deciding which state's law should govern the parties' contract. Otherwise, the parties' rights may be governed by the law of a state other than the one selected by them.

The following is a good governing law provision:

> This Agreement has been negotiated, executed and delivered at and shall be deemed to have been made in the State of New Jersey. The laws of the State of New Jersey, without giving effect to its conflict of law principles, govern all matters arising out of or relating to this Agreement, including, but not limited to, its validity, interpretation, construction, performance, and enforcement.[25]

FORUM SELECTION

The parties to a contract may select the forum—the court—to resolve their future disputes. Forum selection provisions are *prima facie* valid and have long been enforced in New Jersey.[26] In general, a forum selection provision will be enforced unless it is the result of fraud or overweening bargaining power, it violates a strong public policy of the local forum, or the selected forum would be seriously inconvenient for the trial.[27]

The circumstances of fraud and overweening bargaining power are well-known and do not require explanation. However, it should be noted that businesspeople are presumed to act at arm's length and to be of equal bargaining power.[28] Further, perfect parity is not necessary for the parties to have substantially equal bargaining power.[29]

The exception for violation of strong public policy of the local forum may be explained by a case where the court held that the public policy considerations in the New Jersey Franchise Act—protecting franchisees in New Jersey—invalidated the forum selection provision in a franchise agreement.[30]

Seriously inconvenient for the trial "does not apply in cases where geographic distance merely inconveniences production of non-party witnesses; rather, it is reserved for the situation where 'trial in the contractual forum would be so gravely difficult and inconvenient that the party will for all practical purposes be deprived of his day in court.'"[31]

In addition to the foregoing factors, the enforceability of a forum selection provision is governed by the requirement of reasonable or adequate notice. That is, the party objecting to the forum must have had notice of the forum selection provision, and the forum, at the time he or she signed the agreement.[32]

The following simple forum selection provision has been upheld in New Jersey:

> The courts of the State of Jersey shall have jurisdiction to hear and determine any claims or disputes pertaining directly or indirectly to this agreement and to any matter arising therefrom.[33]

Likewise, the following provision

has been upheld:

> ...you consent to the exclusive jurisdiction and venue of courts in King County, Washington in all disputes arising out of or relating to your use of MSN or your MSN membership.[34]

In upholding the foregoing provision, the court noted that "there was nothing extraordinary about the size or placement of the forum selection clause text....[T]he clause was presented in exactly the same format as most other provisions of the contract. It was the first item in the last paragraph of the electronic document...."[35]

The following comprehensive provision has also been upheld:

> Any cause of action, claim, suit or demand by dealer, allegedly or arising from or related to the terms of this agreement or the relationship of the parties shall be brought in the federal district court for the District of Nebraska in Lincoln, Nebraska, or in the district court for the third District of the State of Nebraska. Both parties hereto irrevocably admit themselves to, and consent to, the jurisdiction of either or both of said courts.[36]

With regard to the foregoing provision, the court noted that the parties executed the agreement annually, the forum selection provision in each agreement appeared immediately above the signature line, the company's president read and understood the provision before signing the agreement and he never questioned, complained about or attempted to negotiate the provision.[37]

It is advisable to state the forum in the contract provision. However, even in the absence of a specific forum, a provision is still valid if the forum can be determined at the time the parties entered into the contract. For example, the following provision was upheld because the location of the principal place of business could be determined at the time the contract was formed: "Any actions, claims or suits (whether in law or equity) arising out of or relating to this Contract, or the alleged breach thereof, shall be brought only in courts located in the State where Seller's principal place of business is located."[38]

By contrast, the following provision was invalidated because the location of the unnamed assignee could not be determined at the time the contract was formed and, thus, the forum in which the action would be brought could not be determined: "...You consent to the jurisdiction of any local, state, or federal court located within our or our assignee's state, and waive any objection relating to improper venue."[39]

In drafting a forum selection provision, the forum should be stated in the contract provision or the parties should be able to determine the forum at the time they enter into the contract. The provision should be placed near the signature lines, and the parties may even be required to initial the provision. Finally, a larger font size, capital letters and/or bold text should be used to make the provision more conspicuous in order to provide reasonable and adequate notice to the parties.

The following is a good example of a forum selection provision:

> Each party consents to the exclusive jurisdiction of the state and federal courts located in the state of New Jersey in any and all claims, actions, suits, proceedings or disputes arising out of or in any way relating to this agreement.[40]

AMENDMENTS

In New Jersey, one party may not unilaterally amend, modify or change (hereinafter amend) the material terms of a contract.[41] Both parties must agree to mutually amend their contracts:

> [L]imited changes or amendments to a contract can be accomplished through modification. Such modification can be proved by an explicit agreement to modify, or...by the actions and conduct of the parties, so long as the intention to modify is mutual and clear.
>
> A proposed modification by one party to a contract must be accepted by the other to constitute mutual assent to modify. Unilateral statements or actions made after an agreement has been reached or added to a completed agreement clearly do not serve to modify the original terms of a contract, especially where the other party does not have knowledge of the changes, because knowledge and assent are essential to an effective modification. Finally, an agreement to modify must be based upon new or additional consideration.[42]

A standard contract usually includes a provision stating that it cannot be amended except in a writing signed by both parties. The signed writing is typically the evidence of the mutual assent of the parties to the contract. Such a provision should prevent the parties from orally amending their written contract. However, that is not the case. The law in this regard provides:

> Every agreement, no matter how firmly drawn, may always be modified by another agreement. Even a formal agreement which expressly states that it cannot be modified except in writing, is subject to modification by oral agreement since the requirement for a writing is itself subject to modification.[43]

Thus, the parol evidence rule "does not bar proof of a subsequent agreement or, for that matter, of a modification of an existing agreement even if the agreement itself prohibits...an oral agreement."[44]

In light of the foregoing law, why include an amendments provision in a contract? The answer is the hope that the parties will abide by their agreement to memorialize any amendments in a writing signed by both of them because such a signed writing is the best evidence of their mutual assent.

The following is an example of a simple provision on amendments:

> The parties shall not amend this Agreement, except in a writing signed by the parties.[45]

ANTI-ASSIGNMENT AND ANTI-DELEGATION

Generally, New Jersey law allows parties to assign their contract rights and delegate their contract duties.[46] Parties may not, however, assign their contract rights or delegate their contract duties when doing so is prohibited by operation of law or is contrary to public policy.[47]

Parenthetically, it should be noted that even if a party (*i.e.*, the assignor/obligor) delegates its contract duties, the delegation does not relieve it of either its duty to perform under the contract or its liability to the other party (*i.e.*, the obligee) in the event of a breach of contract by the assignee.[48] In other words, the assignment does not release the assignor from its duties and obligations under the contract, unless the obligee consents to the release.[49] In such a case, there is a novation of contract between the assignee and the obligee.[50]

As a result of this freedom to assign contract rights and delegate contract duties, the parties to a contract usually include a provision prohibiting the assignment of contract rights and the delegation of contract duties. The provision may prohibit all or some assignments. Conversely, the provision may expressly authorize assignments by the parties, even if only specific assignments (*e.g.*, to subsidiary or affiliated companies).[51]

In the late 1990s, the New Jersey courts began relying on the principles in the Restatement (Second) of Contracts relating to assignment and delegation, specifically Sections 317 and 322. New Jersey law on anti-assignment provisions is set forth in a trilogy of cases, one by the New Jersey Supreme Court,[52] another by the Appellate Division,[53] and the third by the Third Circuit.[54]

With regard to these sections of the Restatement, the Supreme Court has noted:

> Sections 322 and 317 are the relevant sections in the *Restatement of Contracts* dealing with assignments of contractual rights. Section 322 addresses the effect of contract terms that prohibit assignment of rights under a contract. Section 317 recognizes the validity of assignments, but specifically identifies important exceptions that limit the assignability of contractual rights.[55]

Restatement Section 317 provides in pertinent part:

> (2) A contractual right can be assigned unless
> (a) the substitution of a right of the assignee for the right of the assignor would materially change the duty of the obligor, or materially increase the burden or risk imposed on him by his contract, or materially impair his chance of obtaining return performance, or materially reduce its value to him, or
> (b) the assignment is forbidden by statute or is otherwise inoperative on grounds of public policy, or
> (c) assignment is validly precluded by contract.[56]

Restatement Section 322 provides in pertinent part:

> (2) A contract term prohibiting assignment of rights under the contract, unless a different intention is manifested,...
> (b) gives the obligor a right to damages for breach of the terms forbidding assignment but does not render the assignment ineffective;
> (c) is for the benefit of the obligor, and does not prevent the assignee from acquiring rights against the assignor or the obligor from discharging his duty as if there were no such prohibition.[57]

With regard to Section 322, the Supreme Court has noted that it:

> embodies the general, now-majority rule that contractual provisions prohibiting or limiting assignments operate only to limit the parties' *right* to assign the contract, but not their *power* to assign, unless the parties manifest with specificity an intent to the contrary. In the absence of such a manifestation, a non-assignment provision is interpreted merely as a covenant not to assign, the breach of which renders the assigning party liable in damages. The assignment, however, remains valid and enforceable.[58]

The Appellate Division likewise previously noted that the Restatement distinguishes between a party's *power* to assign as opposed to its *right* to assign. A party's power to assign is limited to situations where the parties clearly manifest such an intention in the contract.[59] The Appellate Division noted that the parties' "different intention" may be manifested in the express language of the contract.[60] In other words:

> "[T]o reveal the intent necessary to preclude the power to assign, or cause an assignment violative of contractual provisions to be wholly void, such clause must contain express provisions that any assignment shall be void or invalid if not made in a certain specified way." Otherwise, the assignment is effective, and the obligor merely has the right to damages.[61]

The Third Circuit summarized the state of the law in New Jersey as it existed in 1999, which is consistent with the Supreme Court's decision in 2001:

> [C]ontractual provisions limiting or prohibiting assignments operate only to limit a parties' *right* to assign the contract, but not their *power* to do so, unless the parties' *[sic]* manifest an intent to the contrary with specificity.

> To meet this standard the assignment provision must generally state that nonconforming assignments (i) shall be "void" or "invalid," or (ii) that the assignee shall acquire no rights or the nonassigning party shall not recognize any such assignment. In the absence of such language, the provision limiting or prohibiting assignments will be interpreted merely as a covenant not to assign, or to follow specific procedures—typically obtaining the non-assigning party's prior written consent—before assigning. Breach of such a covenant may render the assigning party liable in damages to the non-assigning party. The assignment, however, remains valid and enforceable against both the assignor and the assignee.[62]

An examination of the anti-assignment contract provisions in these three cases is instructive. The contract language before the Third Circuit merely provided that the agreement, and the obligations and rights thereunder, would not be assignable by one party without the express prior written consent of the other party.[63] The Third Circuit noted that the contract language did not specifically state that an assignment without prior written consent would be void or invalid. Thus, the contract did not limit a party's power to assign and the assignment was valid and enforceable.[64]

Likewise, the contract provision before the Supreme Court provided: "To the extent provided by law, the aforesaid deferred lump sum payment shall not be subject to assignment, transfer, commutation, or encumbrance, except as provided herein."[65] Thus, the Court held that the language:

> merely constitutes a covenant not to assign. It contains no specific prohibition on the power to make an assignment, and it does not specifically state that the assignments are "void," "invalid" or "that the assignee shall acquire no rights or the nonassigning party shall not recognize any such assignment." Therefore, the non-assignment provision does not "reveal the intent necessary to preclude the power to assign, or cause an assignment violative of contractual provisions to be wholly void." Thus, because the language does not specifically restrict Owen's power of assignment, the assignment is not void under section 322(2) of the Restatement.[66]

However, in the Appellate Division, the contract provided:

> No party hereto shall assign this Letter Agreement (or assign any right or delegate any obligation contained herein) without the prior written consent of the other party hereto *and any such assignment without such consent shall be void.*[67]

The Appellate Division held that the foregoing "language evidences the parties' intent to render invalid any assignment that was not obtained with the consent of the other party."[68] As a result, the non-assigning party had the express power to void the assignment.[69]

As a result, in order for an anti-assignment/anti-delegation provision to invalidate an assignment or delegation without the consent of the other party, it must include language similar to the following: "and any assignment without the consent of the other party shall be void." This language restricts a party's *power* to assign contract rights or delegate contract duties. Without this language, a party has the power to assign contract rights or delegate contract duties; however, the party covenants not to do so. Thus, if an assignment is made, it is valid, but the other party has a cause of action for breach of contract against the assignor.

The following is an example of a good anti-assignment/anti-delegation provision:

> No party shall assign any of its rights or delegate any performance under this Agreement, voluntarily or involuntarily, whether by merger, consolidation, dissolution, operation of law, or any other manner, except with the prior written consent of the other party. Any purported assignment of rights or delegation of performance in violation of this provision is void.[70]

SEVERABILITY

If a contract has an illegal or unenforceable provision, the court may sever it and enforce the remaining valid provisions of the contract. "However, to enforce the valid provisions the illegal ones must in fact be severable. It follows that if the illegal provision is not severable, the entire contract is invalid and unenforceable."[71]

Obviously, when a court finds that a contract provision is unenforceable, it must determine whether it renders the remainder of the contract unenforceable. In other words, the court must determine whether to sever the offending provision and enforce the remainder of the contract.[72]

The court uses the following standard to make such a determination:

> If striking the illegal portion defeats the primary purpose of the contract, we must deem the entire contract unenforceable. However, if the illegal portion does not defeat the central purpose of the contract, we can sever it and enforce the rest of the contract.[73]

Whether a provision is severable depends upon the intention of the parties, which is determined from the language and subject matter of the agreement.[74] Said another way, whether a provision is essential to the contract, and thus not severable, depends upon the intention of the parties, which is determined from the language and subject matter of the agreement.

A typical factual scenario is an agreement containing a non-compete provision. The question in such cases is whether the non-compete provision is the primary purpose of the agreement. In a well-known case, the Supreme

Court concluded that the primary purpose of an agreement was to provide compensation to departing members of the law firm and, thus, the "non-compete" provision could be severed and the remainder of the agreement could be enforced."[5]

A severability provision in a contract expresses or evidences the parties' intention that illegal or unenforceable provisions should be severed and the remaining provisions enforced."[6] A typical severability provision states that any provision declared unenforceable or illegal by the court should be severed without affecting the validity of the remainder of the agreement. That is, the remainder of the agreement may be enforced by the court."[7] Severability provisions are enforceable and have been upheld by the courts."[8] Without a severability provision, there is a risk that a court may find that the entire contract must fail."[9]

The following is a good example of a severability provision:

> If any provision of this Agreement is determined to be invalid, illegal or unenforceable, the remainder of this Agreement shall remain in full force and effect if the essential terms and conditions of this Agreement for each party remain valid, legal and enforceable.[80]

INTEGRATION

The importance of an integration or merger provision is that it reduces the risk that extrinsic evidence of prior or contemporaneous negotiations or agreements will be used to vary the unambiguous terms of the parties' written agreement. Such extrinsic evidence may not be used when a contract is integrated; that is, when prior negotiations and agreements are integrated into a written contract that reflects the final and complete expression of the parties' agreement.

Where "the contract upon its face purports to contain the whole agreement between the parties[,] it supercedes all prior agreements ..."[81] A written contract nullifies and supercedes prior and contemporaneous oral and written agreements.[82] "An agreement is integrated where the parties thereto adopt a writing or writings as the final and complete expression of the agreement. An integration is the result of the writings so adopted."[83]

It has been noted that:

> [t]he only safe criterion of the completeness of a written contract as a full expression of the terms of the parties' agreement is the instrument itself. If it purports to contain the whole agreement, and it is not apparent from the writing itself that something is left out to be supplied by extrinsic evidence, parol evidence to vary or add to its terms is not admissible.[84]

An integration or merger provision is used to establish that a written contract is an integrated document; that is, one that contains the final and complete agreement of the parties.[85] Such a provision explicitly states that the contract is the final and complete (and perhaps even exclusive) expression of the parties' agreement.

It should be noted, however, that even when a standard integration provision is included in a contract, the terms of the contract may be explained or supplemented by course of dealing, usage of trade or course of performance.[86] Yet, the parties may well even preclude the introduction of such extrinsic evidence by addressing such matters in the integration provision.

The negotiations and agreements of the parties are merged or integrated into their written contract, which reflects the final and complete expression of their agreement. Parties should include an integration provision in their contract to prevent extrinsic evidence of prior or contemporaneous negotiations or agreements from being used to vary the unambiguous terms of their final and complete written contract.

The following is a good example of an integration provision:

> This Agreement constitutes the final agreement between the parties. It is the complete and exclusive expression of the parties' agreement on the matters contained in this Agreement. All prior and contemporaneous negotiations and agreements between the parties, whether oral or written, on the matters contained in this Agreement are expressly merged into and superseded by this Agreement. The provisions of this Agreement may not be explained, supplemented, or qualified through evidence of trade usage or a prior course of dealings. In entering into this Agreement, neither party has relied upon any statement, representation, warranty, or agreement of the other party except for those expressly contained in this Agreement.[87]

CONCLUSION

By knowing the case law, an attorney will have a better understanding of the importance of the typical boilerplate provisions found in contracts, which will enable an attorney to spot the relevant issues when drafting and negotiating these types of contract provisions. ■

ENDNOTES

1. *See, e.g., Petrolia v. Estate of Nova*, 284 N.J. Super. 585, 590 (App. Div. 1995) (constitutional right); *Ackerman v. The Money Store*, 321 N.J. Super. 308, 315 (Law Div. 1998) (waiver of trial by jury on a claim under the New Jersey Law Against Discrimination).
2. *Fairfield Leasing v. Techni-Graphics*, 256 N.J. Super. 538, 541-542 (Law Div. 1992).
3. *Quigley v. KPMG Peat Marwick*, 330 N.J. Super. 252, 267 (App. Div. 2000); *Ackerman v. The Money Store*, 321 N.J. Super. 308, 315 (Law Div. 1998); *Fairfield Leasing*, 256 N.J. Super. at 541-542. Indeed, one court has gone so far as saying that "waiver 'presupposes full knowledge of the right and an intentional surrender'" of the same. *See Quigley*, 330 N.J. Super. at 267.
4. *Fairfield Leasing*, 256 N.J. Super. at 543.

5. *Id.* at 542.
6. *See Allgor v. Travelers Ins. Co.*, 280 N.J. Super. 254, 263 (App. Div. 1995) (upholding contractual arbitration provision in insurance contract).
7. This example is inspired by Tina L. Stark's *Negotiating and Drafting Contract Boilerplate* (ALM Publishing), § 7.05 [hereinafter Stark]. A review of Stark's excellent text is available online at www.crelaw.com/misc_articles.shtml.
8. *See Gilbert Spruance v. Penn. Mfrs.*, 134 N.J. 96, 102 (1993).
9. *Id.* (*citing State Farm v. Estate of Simmons*, 84 N.J. 28, 34-37 (1980)).
10. *Black v. Walker*, 295 N.J. Super. 244, 253-254 (App. Div. 1996) (*citing Gilbert Spruance and State Farm*).
11. *Gilbert Spruance*, 134 N.J. at 102 (*citing State Farm*, 84 N.J. at 37); *Keil v. NatWest*, 311 N.J. Super. 473, 484-485 (App. Div. 1998) (*citing Gilbert Spruance*); *Nat'l Util. Serv., Inc. v. Chesapeake Corp.*, 45 F. Supp. 2d 438, 446 (D.N.J. 1999) (*citing Gilbert Spruance and Keil*).
12. *Nat'l Util. Serv.*, 45 F. Supp. 2d at 447.
13. *Gilbert Spruance*, 134 N.J. at 102-103 (*citing State Farm*, 84 N.J. at 34-35).
14. *Id.* at 103 (*citing* Restatement (Second) of Contracts § 188).
15. Restatement (Second) of Contracts § 6, reprinted in *Gilbert Spruance*, 134 N.J. at 103.
16. *Bell v. Merchants & Businessmen's Mutual Ins.*, 241 N.J. Super. 557, 562 (App. Div. 1990). *See also McCabe*, 222 N.J. Super. at 399.
17. *McCabe v. Great Pacific Century*, 222 N.J. Super. 397, 400 (App. Div. 1988).
18. *Winer Motors, Inc. v. Jaguar Rover Triumph, Inc.*, 208 N.J. Super. 666, 671-672 (App. Div. 1986) (*citing Turner v. Aldens, Inc.*, 179 N.J. Super. 596, 601 (App. Div. 1981)). *See also Kalman Floor Co., Inc. v. Jos. L. Muscarelle, Inc.*, 196 N.J. Super. 16, 21 (App. Div. 1984).
19. *Discover Bank v. Shea*, 362 N.J. Super. 200, 207 (Law Div. 2001).
20. *Black*, 295 N.J. Super. at 256 (*citing Blum v. Alder*, 279 N.J. Super. 1, 3-4 (App. Div. 1994)).
21. *Winer*, 208 N.J. Super. at 671-672.
22. *See* Restatement (Second) of Conflict of Laws § 187(2)(a).
23. *See, e.g.*, 6 Del. Code Ann. 2708; N.Y. Gen. Oblig. Law 5-1401.
24. *See Discover Bank*, 362 N.J. Super. at 207-208 (*citing Fairfield*, 256 N.J. Super. at 545). *See also Turner*, 179 N.J. Super. at 601 & 604 (court applied New Jersey law even though the parties' contract of adhesion specified another state's law).
25. *See* Stark at § 6.02[3].
26. *See Paradise Enterprises Ltd. v. Sapir*, 356 N.J. Super. 96, 103 (App. Div. 2002); *Wilfred MacDonald Inc. v. Cushman Inc.*, 256 N.J. Super. 58, 63 (App. Div. 1992).
27. *See Paradise Enterprises*, 356 N.J. Super. at 103 (*citing M/S Bremen v. Zapata Off-Shore Co.*, 92 S. Ct. 1907, 1913-16 (1972)); *Wilfred MacDonald*, 256 N.J. Super. at 63-64 (*citing Bremen*, 92 S. Ct. at 1914 and 1916).
28. *See, e.g., Earman Oil Co. v. Burroughs Corp.*, 625 F.2d 1291, 1300 (5th Cir. 1980).
29. *See, e.g., Spring Motors Distribution, Inc. v. Ford Motor Co.*, 98 N.J. 555, 576 (1985).
30. *Kubis & Perszyk Assoc., Inc. v. Sun Microsystems, Inc.*, 146 N.J. 176, 192-193 (1996). *See also Copelco Capital, Inc. v. Shapiro*, 331 N.J. Super. 1, 4-5 (App. Div. 2000) (*citing Kubis & Perszyk* and other cases involving the strong public policy exception).
31. *Copelco*, 331 N.J. Super. at 4 (*quoting Wilfred MacDonald*, 256 N.J. Super. at 65).
32. *Id.* at 5 (*citing Caspi v. Microsoft Network L.L.C.*, 323 N.J. Super. 118, 126 (App. Div. 1999)).
33. *Paradise Enterprises*, 356 N.J. Super. at 101 and 117.
34. *Caspi*, 323 N.J. Super. at 120-121.
35. *Id.* at 125.
36. *Wilfred MacDonald*, 256 N.J. Super. at 60-61.
37. *Id.* at 61.
38. *Shelter Systems Group Corp. v. Lanni Builders, Inc.*, 263 N.J. Super. 373, 375 (App. Div. 1993).
39. *Copelco Capital*, 331 N.J. Super. at 4-5.
40. *See* Stark at § 6.03 for more comprehensive forum selection provisions.
41. *N.J. Mfgrs. v. O'Connell*, 300 N.J. Super. 1, 7 (App. Div. 1997); Discover Bank, 362 N.J. Super. at 203.
42. *County of Morris v. Fauver*, 153 N.J. 80, 99-100 (1998) (citations omitted). *See also Id.* at 95; *DeAngelis v. Rose*, 320 N.J. Super. 263, 280 (App. Div. 1999). *But see* N.J.S.A. 12A:2-209(1) (agreement modifying contract needs no consideration to be binding).
43. *Estate of Connelly v. U.S.*, 398 F. Supp. 815, 827 (D.N.J. 1975) (*citing Headley v. Cavileer*, 82 N.J.L. 635 (E.&A. 1911)). *See also Frank Wirth, Inc. v. Essex Amusement Corp.*, 115 N.J.L. 228, 229 (E.&A. 1935) (*citing Headley*); *William Lewis v. Travelers Ins. Co.*, 51 N.J. 244, 253 (1968) (*citing Headley* and *Wirth*).
44. *Sodora v. Sodora*, 338 N.J. Super. 308, 312 (Ch. Div. 2000) (citations omitted). It should be noted that the Uniform Commercial Code provides that "[a] signed agreement which excludes modification...except by a signed writing cannot be otherwise modified..." N.J.S.A. 12A:2209(2).
45. *See* Stark at § 16.11[1] for alternate provisions.
46. *Aronshon v. Mandara*, 98 N.J. 92, 99 (1984); *Somerset Orthopedic Assoc. v. Horizon BC/BS*, 345 N.J. Super. 410, 415 & 418 (App. Div. 2001); *Sawhney v. Mobil Oil Corp.*, 970 F. Supp. 366, 372 (D.N.J. 1997).
47. *Aronshon*, 98 N.J. at 99; *Somerset Orthopedic*, 345 N.J. Super. at 418.
48. Sawhney, 970 F. Supp. at 372.
49. *Id.*
50. *Id.*
51. *See Aronshon*, 98 N.J. at 99.
52. *Owen v. CNA Ins.*, 167 N.J. 450 (2001).
53. *Garden State Bldgs. v. First Fidelity Bank*, 305 N.J. Super. 510 (App. Div. 1997).
54. *Bel-Ray Co., Inc. v. Chemrite (Pty) Ltd.*, 181 F.3d 435, 442 (3d Cir. 1999).
55. *Owen*, 167 N.J. at 467.
56. Restatement (Second) of Contracts § 322 (1981), reprinted in *Owen*, 167 N.J. at 462.
57. Restatement (Second) of Contracts § 322 (1981), reprinted in *Owen*, 167 N.J. at 460 and *Garden State*, 305 N.J. Super. at 521.
58. *Owen*, 167 N.J. at 467 (emphasis added).
59. *See Bel-Ray*, 181 F.3d at 442 (*discussing Garden State*).

60. *Garden State*, 305 N.J. Super. at 521.
61. *Id.* at 522 (citations omitted).
62. Bel-Ray, 181 F.3d at 442 (emphasis added).
63. *Id.* at 442-43.
64. *Id.* at 443.
65. *Id.*
66. *Id.* at 467-68 (citations omitted).
67. *Garden State*, 305 N.J. Super. at 516 (emphasis added).
68. *Id.* at 522 (citations omitted).
69. *Id.* at 522-23.
70. This example is inspired by Stark.
71. *Naseef v. Cord, Inc.*, 90 N.J. Super. 135, 143 (App. Div. 1966) (citations omitted).
72. *Jacob v. Norris, McLaughlin & Marcus*, 128 N.J. 10, 32 (1992).
73. *Id.* at 33. The case law also identifies a contract's "primary purpose" as its "central purpose" or "essential purpose." *See, e.g., Bryant v. City of Atlantic City*, 309 N.J. Super. 596, 629 (App. Div. 1998) ("a court can sever an illegal portion of a contract that does not defeat the agreement's central purpose").
74. *Riddlestorffer v. City of Rahway*, 82 N.J. Super. 423, 428 (Law Div. 1964) (citations omitted).
75. *Jacob*, 128 N.J. at 33.
76. *See Bryant*, 309 N.J. Super. at 629.
77. *Id.*
78. *See, e.g., Barbour v. Cigna*, 2003 WL 21026710 *5 (D.N.J.) (citations omitted).
79. *See, e.g., Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 606 (1981).
80. *See* Stark at § 17.05[1]. *See* Stark at § 17.05 for alternate and more comprehensive severability provisions.
81. *Montclair Distributing Co. v. Arnold Bakers, Inc.*, 1 N.J. Super. 568, 573 (Ch. Div. 1948) (citations omitted).
82. *See Inter-City Tire and Auto Center, Inc. v. Uniroyal, Inc.*, 701 F. Supp. 1120, 1126 (D.N.J. 1988).
83. *Graybar Electric Co., Inc. v. Continental Casualty Co.*, 50 N.J. Super. 289, 294 (App. Div. 1958).
84. *Flavorland Ind. Inc. v. Schnoll Packing Corp.*, 167 N.J. Super. 376, 381 (Essex Cty. 1979) (*citing Schlossman's Inc. v. Radcliffe*, 3 N.J. 430, 434 (1950)). *See Id.* at 380 (An integrated contract "may not be contradicted by any evidence of a prior agreement or of a contemporaneous oral agreement"). *See also Ross v. Orr*, 3 N.J. 277, 282 (1949) (citations omitted).
85. *See Inter-City Tire*, 701 F. Supp. at 1126.
86. *Flavorland*, 167 N.J. Super. at 380.
87. *See* Stark at § 18.05.

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