Endgame Provisions



- Endgame provisions (also known as *termination provisions*) *establish* the terms on which the parties' contractual relationship ends.
- The endgame provisions define default, provide remedies, detail continuing obligations, establish the financial terms of exit strategies, and tie up all loose ends of the contract.

Termination vs. Expiration vs. Cancellation

- A contract *terminates* if it ends prematurely because a specified event occurs.
- A contract *expires* on the last day of its term.
- In U.C.C. §2-106, *termination* occurs when a party ends a contract *other than for breach*, while *cancellation* occurs when a party ends a contract *because of a breach*.

Endgame Provisions



Friendly Termination Examples:

- The successful consummation of a transaction (parties close an acquisition)
- Conclusion of a multiyear relationship (lease term ends)
- Parties agree that a specific *event* triggers the contract's termination. (employment agreement for a Senior Executive provides that the company's sale terminates the executive's employment—here, the executive may be getting a bonus compensation package).
- The parties simply agree to terminate the contract.

Unfriendly Termination Examples:

- Misrepresentation
- Breach of Warranty
- Breach of Covenant
- Failure to Satisfy a Condition
- Cross-Default (a party is in default under another agreement)
- Violation of Law
- Failure to obtain governmental approval
- Death
- Bankruptcy
- Merger or change of control
- Business Dispute
- Occurrence of Specified Event
- Failure to Maintain Corporate Existence

(***This list is not exhaustive!)***

Endgame Provisions



DRAFTING ENDGAME PROVISIONS:

- Endgame Provisions are *almost always* found at the end of the contract.

- Conceptually, Endgame Provisions are a series of *if/then* propositions.
  EX: *If* this event happens, *then* this is the consequence.
  If this bad event happens, *then* this is the consequence.

- The consequences will vary from contract to contract, but they will generally fall into 1 of 3 categories:
  1. An obligation to perform (The Borrower shall pay default interest).
  2. The grant of discretionary authority (The Bank may foreclose).
  3. A declaration. (The contract terminates upon a party's delegation of its performance without the other party's consent).

Endgame Provisions



REMEDIES

- The types of contractual remedies will vary depending upon how the ending of the contract arose.

- Contractual remedies can include: damages (money); contractual termination; and indemnification (an agreement between two parties not to hold one of them responsible for future legal action or fines).

- Additionally, injunctive relief (equitable/non-monetary/to stop a certain action from happening) may be available.

- A party may be obligated to return money that it previously received.

- Remedies can also be “transaction specific.” EX: an employment agreement might provide an employee with a severance package if the company is bought out by a larger company or because of a merger.

QUIZ TIME!

Endgame Provisions



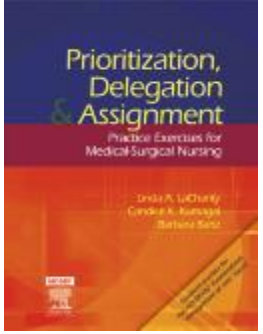
Dispute Resolution Provisions:

- In anticipation of litigation, dispute resolution provisions will govern some of the procedural and substantive aspects of the litigation.

- The parties may choose to go through an adjudication process. **Adjudication is** where a neutral person (qualified as a judge), usually empowered by an agency to make binding decisions, is given the tasks of examining facts and rendering a decision or judgment.

- The parties may choose to go through an arbitration process. **Arbitration is** where the parties work out a deal through an independent, third party body without using a judge or the courts.

Assignment and Delegation



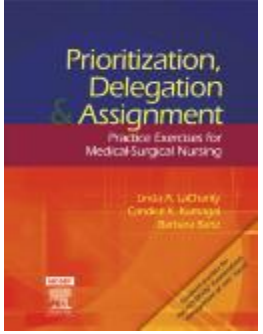
- **Assignment**- A transfer of rights to a third party.

  EX: Bart owes Lisa $1,000. Lisa has a right to be paid. Lisa may *transfer* her right to be paid and tell Bart to pay the $1,000 to Maggie instead. Lisa would be the ***assignor*** (the person holding the right) and Maggie would be the ***assignee*** (the person receiving the right). The contract for the payment of money is between Bart and Lisa.

- **Delegation-** appointing someone else to perform on your behalf.

  EX: Lisa is supposed to mow Smithers' lawn. She has changed her mind as the temperature in Springfield is 98 degrees. Bart agrees to mow it for her. Lisa would be the **delegating party** (the original person having the duty to perform). Bart would be the **delegate** (the person chosen to do the work in the original parties' place).

Assignment and Delegation



Anti-assignment Provisions-

- prohibits a party from assigning its rights under a contract
- Parties insert these provisions to prevent assignments that would *materially change* the non-assigning party's duties or materially increase its risks.
- **NOTE:** The magic language to use with this provision is *"prohibit an assignment of rights under the agreement."*

Anti-delegation Provisions-

- If a duty is personal in nature or requires the delegating party's unique skills, it cannot be delegated.
- A party's obligation to pay under a promissory note is non-delegable.
- The delegate must be creditworthy.
- **NOTE:** If a duty is delegated to a third-party, the delegating party should obtain a **novation** from the party to which the duty is owed, so that they are no longer obligated to perform under the contract.

General Provisions



SUCCESSORS AND ASSIGNS

- These provisions deal with the consequences of an assignment or delegation.
- This provision eliminates the necessity for an express assumption, binding the assignee to perform as it is also a delegate; and
- Restates the common law that the non-assigning party must give the benefit of its performance to the assignee.

GOVERNING LAW (ALSO KNOWN AS: CHOICE OF LAW)

- Establishes the law that governs a dispute arising from an agreement.
- In its absence, common law conflicts of law principles govern. If this is the case, the state with the most substantial relationship to the transaction is the governing law.

General Provisions



Drafting Guidelines for Waiver of Jury Trial Provisions:

1. Place this Provision immediately above the signature lines
2. Use **bold** font and a **larger font size**.
3. Conspicuous caption EX: **WAIVER OF RIGHT TO JURY TRIAL**
4. List the provision in the table of contents (with same caption as #3)
5. Make the provision bilateral (applies to both sides).
6. If the other party is a natural person:
    a) have them initial the provision
    b) include a statement that the provision is knowing, voluntary, and
    intentional
    c) have that person initial that a lawyer explained the provision
    d) have the lawyer sign a form saying that he explained the provision to the party and its consequences.

General Provisions



NOTICE PROVISIONS

- List the addresses to which the parties should send their notices.
- Allocate the risk of a non-receipt of a notice by a party.
- Traditional notices provisions state that a notice is effective 3 days after its deposit in the U.S.P.S. mailbox.
- State the methods by which the parties will give and receive notices (mail, fax, email, telephone) .

SEVERABILITY

- Courts will not enforce obligations arising out of illegal agreements. EX: drug dealer was not paid his money from a drug sale.
- **BLUE PENCIL RULE-** a court will delete portions of an otherwise unenforceable provision if the deleted portions can be clearly and grammatically separated from the rest of the provision.
- **RULE OF REASONABLENESS-** A court may reform an unenforceable provision to the extent reasonable under the circumstances and then enforce it as so reformed.
- **NOTE:** States using the rule of reasonableness include: DE, FL, NJ, NY, PA, TN.

General Provisions



Amendments

- The *no oral amendments provision* is generally unenforceable under the common law.
- Some states have enacted laws providing that *no oral amendment provisions* are enforceable.
- Under U.C.C. §2-209(2) no *oral* amendments are enforceable in contracts.

Merger (also known as an *integration provision* or a *zipper clause*)

- The best way to make sure that a contract will not be altered or supplemented through parol evidence.
- The merger provision should describe the agreement as the *final and exclusive* agreement of the parties.

Counterparts

- This is a duplicate or *second* original of the contract that the parties sign.
- Should state that the counterparts constitute only ***one*** agreement.