CHAPTER 2

Lessons Learned from Litigators: How to Avoid Litigation When Doing a Deal

Peter Antonelli, Esq.
McCarter & English LLP, Boston

Daniel J. Kelly, Esq.
McCarter & English LLP, Boston

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Scope Note

This chapter provides contract drafting tips from the perspective of a litigator. It outlines the specific issues that must be considered and addressed in order to ensure that the contracted is drafted in a manner that will avoid costly and unnecessary litigation.

§ 2.1 INTRODUCTION

Since the authors have been practicing, they have observed that both law firms that represent businesses and general counsels' offices within businesses are populated with lawyers who either draft the business contracts and assist in negotiating the deals or litigate (or oversee litigation) if the deals go sour. The ideal business lawyer is one who can take advantage of the skills and experience learned in both disciplines. That lawyer will craft better agreements, understand better the risks associated with accepting the terms proposed by the party on the other side of the transaction, and save his or her client a great deal of aggravation, expense, and lost opportunities by avoiding future litigation. This chapter attempts to take that vantage point—it provides guidance on drafting terms and conditions of a contract from the litigator's perspective so that litigation can be avoided and better deals can be struck by both parties. The authors have focused on general contract principles and drafting guidelines, as well as specific terms and conditions that deserve special attention and care in the drafting and negotiation process.

§ 2.2 GENERAL CONSIDERATIONS ABOUT CONTRACT DRAFTING

§ 2.2.1 Does the Contract Reflect a "Meeting of the Minds"?

The first question to ask when drafting a contract (or when litigating an apparent contract dispute) is whether the parties entered into a contract. The prerequisite to the formation of a contract is known colloquially as the "meeting of the minds." Absent this fundamental agreement of an exchange of promises to perform, no contract exists, and, in the case of a later dispute, the parties are left to seek recovery on an off-contract or quasi-contract theory, e.g., promissory estoppel or quantum meruit. Thus, to protect your client's rights in the event of litigation, you must ensure that any contractual instrument reflects the parties' bargained-for expectations.

The Appeals Court's opinion in *I & R Mechanical, Inc. v. Hazelton Manufacturing, Co.*, 62 Mass. App. Ct. 452 (2004) is an oft-cited exposition on basic contract principles. The court dealt with a dispute over whether an offer existed for the plaintiff to accept. The plaintiff was a heating contractor that supposedly relied on a price quotation for boilers from a distributor in bidding a construction job. The confusion and dispute arose because the distributor's price quotation was somewhat confusing and because the contractor did not pay close attention to the quote. The court enunciated the fundamental elements necessary to the formation of a contract that would be familiar to any first-year law student and bear repeating here:

> A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty. Contract formation requires a bargain in which there is a manifestation of mutual assent to the exchange. The manifestation of mutual assent between contracting parties generally consists of an offer by one and the acceptance of it by the other. . . .
>
> In contract formation, the element of agreement or mutual assent is often referred to as a "meeting of the minds." The parties must give their mutual assent by having "a meeting of the minds" on the same proposition on the same terms at the same time.

I & R Mech., Inc. v. Hazelton Mfg., Co., 62 Mass. App. Ct. at 455–56 (citations omitted).

The principles set forth in *I & R Mechanical, Inc.* apply to every contract case. Thus, to enforce a contract, it is imperative that the parties have a meeting of the minds, which requires an offer and acceptance by the parties of the same material terms. If one party later contends that it never agreed to one material term or another, a court may determine that no contract was formed, and therefore, a party's rights would not be enforceable on a contract theory. In short, when drafting a contract, be specific and comprehensive in articulating your client's contractual expectations.

§ 2.2.2 The Words of the Contract Must Precisely Reflect the Parties' Intentions

Attorneys are often criticized for "holding up" a deal struck by internal or external clients by obsessing over the "details" of a contract. Frequently, it is the case that those same clients approach attorneys to help enforce a contract that someone else less focused on the details drafted or to enforce a contract that the client entered into after knowingly disregarding the attorney's warnings. Ultimately, enforcement of the contract will depend on a court's interpretation of the contractual "details," and courts pay close attention to these details in order to ascertain the meaning of the agreement. The Supreme Judicial Court's decision in *Liss v. Studeny*, 450 Mass. 475 (2008) illustrates this point. In *Liss*, the plaintiff attorney sued his client, alleging that his client breached a contingent fee representation agreement in failing to advance funds necessary for the trial of the client's employment claim. The attorney argued that the engagement agreement obligated the client to advance funds for legal costs as necessary during the litigation. The court disagreed, and instead focused on the express terms of the contingent fee contract, which only required the client to advance additional funds to the lawyer once the client's existing account balance dropped below $500. Because the account had not dropped below that amount, the client's refusal to advance additional funds was not a breach of the parties' agreement.

The case is a reminder that counsel should draft a contract whose terms precisely articulate the client's expectations because a court will look to those terms when enforcing the agreement. If the terms are sufficiently detailed, the court will enforce them, even if they are unfavorable to your client. In *Liss*, if the attorney had anticipated that the client's decision whether or not to continue litigating a case versus settling it would depend on the amount of outlays the client would have to make, the attorney should have made the threshold higher. Thus, when faced with a demand for additional funds, even when a material amount of

funds was still escrowed, the client would have been forced to decide to proceed or cut bait at the prospect of incurring significant costs.

§ 2.2.3 Avoid Ambiguity

Ambiguity is the enemy of a business relationship. Ambiguous contracts create uncertainty for parties, which, more often than not, lead to disputes about whether the parties are meeting each other's precontract expectations. By eliminating ambiguity from contracts, each party, and its counsel, understands its contractual obligations and the consequences of a breach.

The issue of whether a contract is ambiguous presents a preliminary question of law for a judge, rather than a jury, to decide. *Suffolk Constr. Co. v. Ill. Union Ins. Co.*, 80 Mass. App. Ct. 90, 93–94 (2011). Although one party may claim that a certain term is ambiguous, "[t]he mere existence of a disputed interpretation by the parties does not create an ambiguity." *Suffolk Constr. Co. v. Ill. Union Ins. Co.*, 80 Mass. App. Ct. at 94. Rather, a term is ambiguous only if it is capable of more than one meaning and if "reasonably intelligent persons" would disagree about the proper meaning of the term. *Suffolk Constr. Co. v. Ill. Union Ins. Co.*, 80 Mass. App. Ct. at 94. If the language of the contract is free of ambiguity, the court must apply its clear terms. *Suffolk Constr. Co. v. Ill. Union Ins. Co.*, 80 Mass. App. Ct. at 94.

In *Suffolk Construction*, a dispute arose with respect to an insurance contract that purportedly covered the insured general contractor for a claim submitted by a crane subcontractor's worker who suffered an injury on the general contractor's work site. The general contractor sought defense and indemnity from the subcontractor's insurer as an additional insured on its commercial general liability policy. The insurer argued, however, that the additional insured endorsement expressly required an executed contract, prior to the loss, which had not been accomplished. The general contractor argued in response that the term "executed" was ambiguous enough to permit an oral agreement, which it claimed had occurred. *See Suffolk Constr. Co. v. Ill. Union Ins. Co.*, 80 Mass. App. Ct. at 92–93.

The court addressed the question of whether the term "executed" was ambiguous by resorting to several dictionaries, which in this case was appropriate in the absence of case law interpreting the disputed term. *Suffolk Constr. Co. v. Ill. Union Ins. Co.*, 80 Mass. App. Ct. at 94. The dictionary meanings uniformly defined "executed" to require writing. Additionally, by putting that definition in its contractual context, the court reasoned that the disputed endorsement phrase could only make sense if it depended on an endorsement executed by a writing. *Suffolk Constr. Co. v. Ill. Union Ins. Co.*, 80 Mass. App. Ct. at 95–96. The court then explained the importance of the requirement of a written instrument: "A

written and dated instrument furnishes certainty. Its definiteness should act as a safeguard against mistaken and fraudulent claims, and against the loss of time, effort, and expense consumed by litigation to resolve them." *Suffolk Constr. Co. v. Ill. Union Ins. Co.*, 80 Mass. App. Ct. at 97.

The court's holding in *Suffolk Construction* illustrates the importance of writing a contract that is free from ambiguity. Because the term "executed" was unambiguous, the trial court was able to resolve the claim at the summary judgment stage without the need for trial. Thus, by using plain, simple terms and/or including express definitions of terms within the contract itself, later disputes that turn on purported ambiguities can be avoided.

§ 2.2.4 Take the Writing Seriously

One of the scenarios we encounter as litigators goes something like the following. A client sits down and describes his contract problem once it has reached the point of acrimony. As we gather the facts and ask for a written document that is the subject contract, the client hands us a document with the caveat that he did not consider the subject document to be the "final" contract because he planned to hammer out a separate agreement with more detailed terms. The look of surprise on the client's face when he hears that the "draft" agreement he signed is an enforceable contract is not pleasant.

This is a recurring problem in the residential real estate context, where buyers and sellers enter into contracts at the self-interested direction of real estate brokers, without the advice of counsel. The dangers inherent in this practice were at issue in the case of *McCarthy v. Tobin*, 429 Mass. 84 (1999). In *McCarthy*, the plaintiff submitted an "offer to purchase" the seller defendant's real property on a form document used by the real estate brokerage industry. Although the form contained a notice that it was a legal document, the seller signed it without consulting counsel. When the seller attempted to renege on the agreement (after finding a buyer willing to pay more for the property), she argued that the signed offer was not a binding contract because it called for the execution of a separate, more detailed purchase and sale agreement. The court rejected this argument, ruling that the offer contained all of the essential contract terms and accurately reflected the intention of the parties to be bound in the transaction.

By now, a decade and a half after *McCarthy*, a lawyer reading this would expect that buyers and sellers would be on notice that they should never sign an offer to purchase real estate, typically for transactions involving hundreds of thousands if not millions of dollars, without first consulting with counsel. Nevertheless, they continue to disregard the dangers of entering into transactions without such advice at their own peril. The lesson from *McCarthy* is that any real estate offer

be carefully worded to reflect the myriad obstacles that arise in real estate transactions, such as timing the closing, performing inspections, obtaining mortgage financing, paying off current lienholders, and resolving other matters.

Another scenario where the problem of erroneously thinking that the need for an "official" contract document relieves a party of his or her contractual obligations is in the litigation settlement context. In *Basis Technology Corp. v. Amazon.com, Inc.*, 71 Mass. App. Ct. 29 (2008), the Appeals Court applied general contract principles to the enforcement of a litigation settlement agreement hammered out over e-mails between counsel during trial. When the parties could not agree on a final settlement document after reporting the case settled to the court, the defendant attempted to renege on the settlement. The court would have none of it. Instead, the court enforced the parties' settlement e-mail string as an agreement on all material terms and revised the terms set out in the e-mail using its own discretion. The court affirmed the proposition that a contract requires a "meeting of the minds," or as the court put it, "the intention to be bound by their agreement at the moment of its formation," regardless of whether the parties contemplated the execution of a subsequent document. *Basis Tech. Corp. v. Amazon.com, Inc.*, 71 Mass. App. Ct. at 39 (citing *McCarthy v. Tobin*, 429 Mass. 84 (1999)).

The lesson here again is that when drafting any contract, particularly a settlement agreement that is typically made in haste under pressure-packed circumstances, counsel must pay close attention to his or her client to confirm that the client understands what he or she is bargaining for. Where that settlement agreement, i.e., a contract, is being represented to the court as a basis for cancelling or stopping a trial, courts will likely enforce the agreement unless it is missing essential terms. Counsel should, therefore, be as detailed as possible, even if the agreement is struck over e-mails, in articulating all of the settlement terms that the parties have agreed on.

§ 2.3 SPECIFIC CONTRACT PROVISIONS

§ 2.3.1 The Limitations of Merger Clauses

A merger clause, also known as an integration or exculpatory clause, is an affirmation by the parties that their contract is a complete expression of their contractual agreement. A merger clause is usually included in a contract in order to later invoke the parol evidence rule, which provides that a fully integrated written agreement may not be varied or supplemented by evidence of prior or contemporaneous negotiations. *Sound Techniques, Inc. v. Hoffman*, 50 Mass. App. Ct. 425, 429 (2000). Thus, the merger clause is designed to avoid a later claim

by a party that a term not embodied in the agreement was actually agreed to by the parties and therefore should be enforced over the express terms of the contract.

Courts will generally enforce merger clauses, but "a contracting party cannot rely upon such a clause as protection against claims based upon fraud or deceit." *Sound Techniques, Inc. v. Hoffman*, 50 Mass. App. Ct. at 429. Thus, where a party claims that it was fraudulently induced into entering a contract, the parol evidence rule does not apply to bar the introduction of evidence of prior negotiations. *McEvoy Travel Bureau, Inc. v. Norton Co.*, 408 Mass. 704, 711 n.5 (1990). In *McEvoy*, a dispute arose after a travel vendor had executed a contract with a long-standing client company and committed its business to serving the company in reliance on its precontract execution representation to the travel vendor that the termination clause would not be enforced. Approximately two years into the agreement, the company exercised the clause and terminated the contract. The Supreme Judicial Court affirmed a jury's finding that the contract included the terms of the oral representation made by the company that it would not invoke the termination clause in the contract and that the company considered the clause ineffective. *See McEvoy Travel Bureau, Inc. v. Norton Co.*, 408 Mass. at 711–13. Accordingly, even though the agreement was integrated and contained an express clause permitting termination on short notice, the court reasoned that the superseding oral representation was part of the parties' contract and public policy did not permit a party to induce another party to enter into a contract by misrepresenting its future intentions with respect to enforcing a contract provision.

This fraud exception to the enforcement of a merger clause does not, however, extend to a claim of negligent misrepresentation. In *Sound Techniques, Inc.*, the plaintiff lessee successfully sued its commercial landlord on a claim of negligent misrepresentation based on alleged statements and omissions made by the landlord's agent to the lessee during lease negotiations. Over the landlord's objection, the jury found in favor of the tenant on the negligent misrepresentation claim, but the Appeals Court reversed, finding that the claim was barred by the lease's merger clause because the misrepresentation was merely negligent.

The lesson from *Sound Techniques, Inc.* is that a well-drafted contract should include a merger clause to prevent later claims that the parties' agreement encompassed terms not expressly included in the contract. Except where fraudulent inducement is alleged, as was the case in *McEvoy*, a merger clause will help ensure that the contract as drafted and agreed to by the parties is the one actually enforced by the court or arbitrator interpreting it.

§ 2.3.2 Choice-of-Law Clauses Can Prove Critical

A threshold question in construing or litigating a contract is which particular law applies. Contracts, particularly complex ones or those involving parties or subject matter from various states, should specify which substantive law applies to the interpretation and enforcement of the contract in order to avoid later ambiguity about which state law applies. Choice-of-law clauses, like forum selection clauses, are routinely enforced by Massachusetts courts, so long as enforcement is fair and reasonable. *Stagecoach Transp., Inc. v. Shuttle, Inc.*, 50 Mass. App. Ct. 812, 817–18 (2001). While a choice-of-law clause is often intended to secure rights more favorable to the drafting party, for example by selecting a jurisdiction that does not apply a G.L. c. 93A–type consumer protection law to commercial business transactions, if not carefully drafted, a party may still assert claims assumed to be excluded by the choice-of-law provision.

Although it is assumed that a party will sue its counterpart only under the terms of the contract, a party typically sues on theories other than mere breach of contract. In these circumstances, a choice-of-law provision may not be broad enough to determine the law applicable to the dispute. For example, "if a particular defendant's unfair conduct with respect to a contract sounds in tort, c. 93A will apply to that contract notwithstanding a contract provision that states that contractual claims will be interpreted under another State's law." *Kitner v. CTW Transp., Inc.*, 53 Mass. App. Ct. 741, 746–47 (2002). *Compare Worldwide Commodities, Inc. v. J. Amicone Co.*, 36 Mass. App. Ct. 304, 308 (1994) ("since the contract violations were at the core of Worldwide's c. 93A claims, the contract's choice-of-law clause bars application of the Massachusetts statute") *with Northeast Data Sys., Inc. v. McDonnell Douglas Computer Sys. Co.*, 986 F.2d 607, 608–10 (1st Cir. 1993) (choice-of-law provision held no bar to G.L. c. 93A claim because claim did not arise under contract). In *Kitner*, the Appeals Court held that the choice-of-law clause was "self-limiting" and did not apply to conduct that was tortious or that induced a breach of contract. *Kitner v. CTW Transp., Inc.*, 53 Mass. App. Ct. at 746–47.

This principle is critical for drafting a choice-of-law clause. Specifically, if a party intends that a certain state's law governs *all relations between the parties*, including any noncontract based claim, then the contract should be drafted to reflect that. *See, e.g.*, *Baby Furniture Warehouse Store, Inc. v. Muebles D & F Ltee.*, 75 Mass. App. Ct. 27, 30 (2009) (enforcing choice-of-law clause that governed "any disputes arising out of or related to this [contract] or the relationship between the [parties]"). A broadly drafted choice-of-law provision will, therefore, ensure that a chosen state's substantive law will apply to any dispute between the parties, not just a contract claim.

§ 2.3.3 All Forum Selection Clauses Are Not Created Equally

When litigating any dispute, one of the first questions that arises is where a party may commence an action. A forum selection clause contained in a contract, if enforced, will govern where a dispute over the contract can be brought. These clauses fall into two categories: permissive versus exclusive. Permissive forum selection clauses are permissive in the sense that they *allow* a case to be brought in a designated jurisdiction notwithstanding any personal jurisdictional defenses that a contracting party may assert in a case brought in a foreign locale. Exclusive forum selection clauses *require* that a dispute over the contract be brought in a certain forum. For a discussion of the differences between the two, see *Boland v. George S. May Int'l Co.*, 81 Mass. App. Ct. 817, 824–27 (2012).

Forum selection clauses are presumptively valid and can be challenged in only limited circumstances. *Boland v. George S. May Int'l Co.*, 81 Mass. App. Ct. at 821. To prevent the enforcement of a forum selection clause, a party must establish that trial in the designated forum will essentially deny him or her due process. *Boland v. George S. May Int'l Co.*, 81 Mass. App. Ct. at 820; *see also Melia v. Zenhire, Inc.*, 462 Mass. 164, 182 (2012) (citations omitted) ("Massachusetts courts enforce forum selection clauses so long as they are fair and reasonable. . . . The opponent of a forum selection clause bears the 'substantial burden' of showing that enforcement of a forum selection clause would be unfair and unreasonable."). Even an allegation of fraud in the inducement of the contract has been held to be an insufficient basis for denying enforcement of a forum selection clause. *Boland v. George S. May Int'l Co.*, 81 Mass. App. Ct. at 821. Although forum selection clauses will be enforced absent exceptional circumstances, the question often arises as to how the clause should be interpreted, i.e., whether the parties submit to a forum at the exclusion of all others (exclusive) or whether the contract merely provides that suit may—but not must—be brought in a particular forum (permissive).

In *Boland*, the Appeals Court considered a challenge to a forum selection clause that the defendant had, in the trial court, successfully argued conferred exclusive jurisdiction on the courts of Illinois to hear disputes arising under the contract. The court disagreed with the lower court and reasoned that the clause in question, which was, "[i]t is agreed by and between the parties that jurisdiction shall vest in the State of Illinois," was permissive, not exclusive. In interpreting the contractual provision, the court focused on the plain meaning of the contractual language used by the parties, which did not contain "a plain statement that [Illinois] jurisdiction should be exclusive." *Boland v. George S. May Int'l Co.*, 81 Mass. App. Ct. at 823–26. The court also considered significant the fact that the clause did not contain accompanying language that selected Illinois as the

choice-of-law applicable to the contract. *Boland v. George S. May Int'l Co.*, 81 Mass. App. Ct. at 825–27. Finally, the court reasoned that since the contract was one of adhesion and was to be construed against its drafter, the drafting party had "an appropriate burden of plain statement" as the author of the forum selection clause, which would give the less sophisticated nondrafting party "clear warning" that it could be required to litigate a dispute in a distant forum. *Boland v. George S. May Int'l Co.*, 81 Mass. App. Ct. at 827–28.

From a tactical litigation perspective, forum selection clauses can be outcome determinative in that they force a party to litigate a dispute in an inconvenient, costly, and/or burdensome forum. Thus, you must be careful in drafting and negotiating these clauses because absent a plain, express statement of exclusive jurisdiction that, where applicable, also provides clear warning to a less sophisticated party, a court or arbitrator may not enforce the forum selection clause as one conferring exclusive jurisdiction on a specified forum. *Boland* teaches that using the word "exclusive" and adding a choice-of-law provision that also selects the law of the exclusive forum as the law applicable to the contract may ensure that the clause is interpreted as an exclusive, rather than merely permissive, forum selection clause.

§ 2.3.4 Courts Will Enforce Jury Waiver Clauses

In a contract dispute, a party may consider a jury to be a litigation advantage for any number of reasons. Contract claims enjoy a right to trial by jury. Rule 38(a) of the Massachusetts Rules of Civil Procedure provides that "[t]he right of trial by jury as declared by Part 1, Article 15 of the Constitution of this Commonwealth or as given by a statute shall be preserved to the parties inviolate." The rule further provides, however, that a party must demand a jury trial in its initial pleading or the right is waived. Thus, when litigating a contract claim, counsel must assert its right to a jury trial in the complaint or answer.

A party's right to a jury trial may, however, be waived by contract. *Chase Commercial Corp. v. Owen*, 32 Mass. App. Ct. 248, 251 (1992). In a typical commercial setting, where both parties are on generally equal footing and have access to counsel, a court will likely enforce a jury waiver clause, even if the contractual document is one of adhesion, i.e., a form contract drafted by one party whose terms the parties did not negotiate. However, a court may consider a challenge to the waiver on the grounds that the waiver is allegedly unconscionable, against public policy, or unfair in the circumstances, as the court did in *Chase Commercial*. In *Chase Commercial*, the court noted that the jury waiver clause at issue was clear, legible, even if not conspicuous, and mutual, and therefore not unconscionable or unfair. The court also noted that a waiver of jury trial offers the potential "of somewhat less costly and complicated litigation in the event of a dispute."

Particularly in a contract dispute, where the legal and factual issues are typically straightforward, trying a case to a jury can increase the time, costs, and complexity of litigation. To avoid these issues, counsel should include a jury waiver clause that is drafted in bold print and in clear writing. The better practice is to insert the clause at the end of the document, adjacent to the parties' signature block, which should alert the signer to the importance of the clause and the necessity of reading it.

§ 2.3.5 Drafting Attorney Fee Provisions

Litigators will almost always review a contract to determine which party is responsible for the payment of fees incurred in litigating a claim under the contract. Absent a statute or rule or a provision in the contract identifying who pays the fees and costs incurred in enforcing contract rights, Massachusetts follows the American rule, which provides that each party is responsible for its own costs and attorney fees. *Hermanson v. Szafarowicz*, 457 Mass. 39, 51 (2010) ("The American rule dictates that in the absence of a fee-shifting statute or court rule, a successful party is not allowed to recover its attorney's fees or expenses.").

A negotiated contract, versus a form contract or contract of adhesion, typically provides that the prevailing party may recover its fees and costs incurred in enforcing its contract rights. The term "prevailing party" is interpreted in its ordinary popular sense and courts have construed it to mean the party in whose favor judgment entered, which includes both successful plaintiffs and defendants. Thus, a defendant who succeeds in dismissing the case, whether or not on the merits, is the prevailing party for purposes of a fee and cost recoupment provision. *See Bardon Trimount, Inc. v. Guyott*, 49 Mass. App. Ct. 764, 778–80 (2000); *Northern Assocs., Inc. v. Kiley*, 57 Mass. App. Ct. 874, 878–79 (2003).

Recoupment of fees and costs, even though specifically provided for in an agreement, still requires that the court determine whether the fee request is reasonable. Although there is no rigid formula for determining the reasonableness of fees recoverable under a contract's fee provision,

> courts typically analyze a variety of factors, including "ability and reputation of the attorney, the demand for his services by others, the amount and importance of the matter involved, the time spent, the prices usually charged for similar services by other attorneys in the same neighborhood, the amount of money or the value of the property affected by the controversy, and the results secured."

WHTR Real Estate Ltd. P'ship v. Venture Distrib., Inc., 63 Mass. App. Ct. 229, 236 (2005) (quoting *Northern Assocs., Inc. v. Kiley*, 57 Mass. App. Ct. at 882 n.17).

Thus, it is important to note when drafting a fee provision to use as broad language as possible to allow for recovery under virtually any circumstances involving the enforcement of contract rights.

§ 2.4 OTHER CONSIDERATIONS

§ 2.4.1 Contracts Need Not Be Written to Be Enforceable

One of the primary misconceptions is that a contract must be documented by a writing. This is not true. While the statute of frauds does apply to contracts involving the transfer of rights in real property and wills, agreements for performance in other contexts can be formed and enforced without a written contract. Moreover, an agreement can be enforced both on an equitable basis under the doctrines of promissory estoppel and quantum meruit. Thus, a party contemplating entering into a contract is well advised to get it in writing to avoid later disputes.

The dangers of not following this rule were evident in the case of *Twin Fires Investment, LLC v. Morgan Stanley Dean Witter Co.*, 445 Mass. 411 (2005). In *Twin Fires*, the plaintiffs brought suit against a stockbroker and his firm, claiming that the broker breached a contract to sell the plaintiffs shares of stock in an Internet company's initial public offering (IPO). When the broker did not receive his anticipated IPO share allotment, he could not deliver the shares to his client (the plaintiffs), who could not in turn flip the shares for a quick profit on the offering day. Notably, there was no written contract enforcing the broker's promise, which was a typical practice in the securities business at the time. While the court found that there was no breach of contract because a condition precedent had not occurred, the court did find that the parties had entered into an oral contract that would have been enforceable had the broker received his IPO share allotment. The defendants' victory on the contract claim was somewhat Pyrrhic given that the plaintiffs prevailed separately on their misrepresentation and G.L. c. 93A claims and were awarded treble damages and $1 million in attorney fees. Arguably, the damages sustained by the broker and his firm could have been avoided if the parties' agreement were spelled out in a clear writing.

Again, the dispute could have easily been avoided had the parties reduced their agreement to writing. By failing to do so, particularly in the context of attempting (unsuccessfully) to consummate a get rich quick transaction, they virtually guaranteed themselves a lawsuit.

§ 2.4.2 Contractual Strangers Should Not Expect to Enforce Contract Rights

Litigation sometimes involves a person or entity attempting to assert rights set forth in a contract to which the person was not a party. This implicates the concepts of a "third-party beneficiary" and intended, versus incidental, beneficiaries. The third-party beneficiary doctrine is actually quite simple, as it turns on the fundamental contract principle of enforcing the parties' intent as reflected in the words of the contract. Thus, to prevail on a third-party beneficiary theory, a nonparty to the contract must demonstrate that the contracting parties clearly intended that the third party was to benefit from the performances set forth in the contract. An oft-cited case for this proposition is *Miller v. Mooney*, 431 Mass. 57 (2000), in which the plaintiff heirs brought suit against their deceased mother's counsel, claiming that the attorney breached a duty owed to them under his legal agreement with the plaintiffs' mother. The court disagreed, noting that the plaintiffs failed to identify any contract term in which the attorney agreed to provide legal services to the plaintiffs. Moreover, as incidental beneficiaries, i.e., parties who incidentally benefited from the contract performance, the court held that the plaintiffs had no rights to enforce a contract under Massachusetts law. *See Miller v. Mooney*, 431 Mass. at 62–63.

Compare this outcome with the court's decision in *Choate, Hall & Stewart v. SCA Services, Inc.*, 378 Mass. 535 (1979), which, despite its vintage, continues to be cited by the Massachusetts bench. In *Choate, Hall & Stewart*, the plaintiff law firm sued the defendant company under the terms of a settlement agreement between the company and its ousted chairman, seeking payment of the legal fees for services rendered by the plaintiff to the chairman. The defendant argued that the law firm was only an incidental beneficiary of the contract, and, therefore, it was not entitled to payment for its legal services by the company. The court rejected this argument and focused on the express terms of the agreement, which provided that payment of the chairman's legal fees would be made "directly" to his counsel. *See Choate, Hall & Stewart v. SCA Servs., Inc.*, 378 Mass. at 547–48. In short, one word dictated the outcome of the case.

The lesson from this case is that the level of precision used by practitioners is often outcome determinative because judges will ascertain the meaning of the contract from the four corners of the document. In the case of a third-party beneficiary claim, precision is especially important because a nonparty is trying to enforce rights under a contract to which he or she is not a party. To ensure or prevent recovery by a third party, be precise in drafting third-party beneficiary clauses.

§ 2.4.3 The Battle of the Forms

You may recall the "battle of the forms" from your first-year law school contracts class, and you probably have not considered the issue since then. A battle of the forms arises in the sale of goods context and, therefore, is governed by Article 2 of the Uniform Commercial Code (UCC) as adopted by Massachusetts. The underlying sale at issue in a battle of the forms is one "in which a buyer and a seller each attempt to consummate a commercial transaction through the exchange of self-serving preprinted forms that clash, and contradict each other, on both material and minor terms." *Commerce & Indus. Ins. Co. v. Bayer Corp.*, 433 Mass. 388, 391–92 (2001).

Bayer was a classic battle of the forms case. In *Bayer*, the buyer purchased resin by sending to the seller purchase orders that contained a provision requiring arbitration of any dispute between the parties. After the resin was shipped directly from the third-party manufacturer to the buyer, the seller would send the buyer an invoice that contained language stating that the parties' relationship was governed by the seller's terms. When an explosion occurred at the buyer's plant that was traceable to the resin, the seller Bayer was sued in court. Bayer, however, invoked the buyer's form purchase order that contained an arbitration provision and demanded arbitration, but the buyer refused. To resolve the dispute over whether the claim was subject to arbitration, the court applied UCC Article 2-207, which governs a battle of the forms.

The court first recognized the murkiness and lack of clarity in Section 2-207. *See Commerce & Indus. Ins. Co. v. Bayer Corp.*, 433 Mass. at 392 ("This section has been characterized as an amphibious tank that was originally designed to fight in the swamps, but was sent to fight in the desert."). The court reasoned that, under Sections 207(1) and (2), a written contract had not formed because the parties' respective forms limited acceptance to adoption of the terms of their competing forms, which had not occurred. *See Commerce & Indus. Ins. Co. v. Bayer Corp.*, 433 Mass. at 393. Moreover, because the terms of the competing forms did not actually conflict, since the buyer's form had an arbitration provision but the seller's did not, Section 2-207(2) did not apply. *See Commerce & Indus. Ins. Co. v. Bayer Corp.*, 433 Mass. at 395. Thus, Section 2-207(3), the "fall-back" rule, applied to the resolve the question. Section 2-207(3) recognizes a contract based on the parties' *conduct* in the absence of a written contract. *See Commerce & Indus. Ins. Co. v. Bayer Corp.*, 433 Mass. at 393–95. Under Section 207(3), in the absence of a written contract, the parties' contractual terms become those that the parties agreed on through their conduct, together with any provisions incorporated under any of the UCC's gap-filling provisions. Because the parties had historically never arbitrated a dispute with one another, the court reasoned that the arbitration provision was not part of their contract. *Commerce & Indus. Ins. Co. v. Bayer Corp.*, 433 Mass. at 394–96.

In a more recent battle of the forms case, *Borden Chemical, Inc. v. Jahn Foundry Corp.*, 64 Mass. App. Ct. 638 (2005), a dispute arose over the enforceability of an indemnity provision contained in a seller's invoice after the seller was sued by victims of an explosion that occurred at the buyer's foundry. The court also applied Section 2-207 and reasoned that, unlike in *Bayer*, because the seller's invoice did not contain a clause limiting the buyer's acceptance of the goods to the terms of the seller's invoice, Section 207(2) applied. The court reasoned that because the indemnity provision was an additional material term and had not been accepted, it did not become part of the contract and was unenforceable.

The two cases make a simple point clear: in drafting form purchase orders or invoices that contain "boilerplate" terms on the bottom or back of the document, review UCC Article 2-207 to ensure that your client will have certainty if a battle of the forms arises. You should also review the forms used by your client's counterparties to ensure that your client is taking only the amount of legal and business risk it is comfortable taking.

§ 2.4.4 Be Wary of Quantum Meruit

Parties to a business relationship or transaction that do not share a formal contractual relationship may nonetheless be responsible for compensating one another for performance rendered under an unjust enrichment theory. Courts may fashion a quantum meruit remedy as a measure of services rendered by one party to another. The theory behind quantum meruit is to prevent the unjust enrichment of one party by another. A party may recover under a quantum meruit theory whether or not the parties share a contract. *See Liss v. Studeny*, 450 Mass. 475, 479 (2008) (quantum meruit is a claim "independent of an assertion for damages under the contract, although both claims have as a common basis the contract itself") (original quotes and citations omitted).

> To achieve recovery upon the theory of quantum meruit, the claimant must prove (1) that it conferred a measurable benefit upon the defendants; (2) that the claimant reasonably expected compensation from the defendants; and (3) that the defendants accepted the benefit with the knowledge, actual or chargeable, of the claimant's reasonable expectation.

Finard & Co., LLC v. Sitt Asset Mgmt., 79 Mass. App. Ct. 226, 229 (2011).

Quantum meruit has recently been applied in the unpaid broker commission context, but the remedy is applicable to any context where one party performs services for another with the expectation of being compensated and the receiving

party refuses to pay. In *Finard*, commercial real estate brokers successfully procured a tenant for a landlord's shopping mall. During the lease negotiations and shortly before the lease was executed, the landlord terminated its brokerage contract with its real estate broker. After the lease was executed, the broker submitted an invoice to the landlord for the brokerage services provided, but the landlord refused to pay. Litigation ensued and at trial the jury rejected the brokers' breach of contract claim, finding that the written contract was terminated and no oral contract existed. Nonetheless, the jury awarded the brokers money damages equivalent to the value of their services under a quantum meruit theory. *See Finard & Co., LLC v. Sitt Asset Mgmt.*, 79 Mass. App. Ct. at 228–31. The court recognized that the brokers reasonably expected to be paid a commission given the parties' e-mail, oral, and written communications.

The lesson from *Finard* is that under certain circumstances a court or jury is likely to award a remedy equivalent to a contractual bargain or benefit conferred even where no contract is found. Massachusetts courts have applied quantum meruit in a variety of contexts. To avoid this result, counsel must ensure that a client acts consistently with an expectation that it will *not* be the party ultimately responsible for payment of services rendered. Additionally, counsel must ensure that the performing party does not rely on any conduct by the receiving party that would create an expectation of payment by the receiving party.

By ensuring that these expectations on both sides of a transaction are met, the result in *Finard* can be avoided. This is what occurred in the cases of *Salmon v. Terra*, 394 Mass. 857 (1985) and *LaChance v. Rigoli*, 325 Mass. 425 (1950), two cases that continue to be cited by courts considering the issue of quantum meruit recovery. Both cases dealt with the issue of whether the builder plaintiffs could recover payment directly from owners of land on which homes were built. In both cases, the Supreme Judicial Court reasoned that the builder plaintiffs could not have reasonably expected to be paid by the landowner; rather, the parties expected that a third party would pay for the construction of the houses.

These cases reinforce the lesson that while contract drafting is key, ensuring that a client adheres to the contractual language is equally important in protecting the client's contractual expectations.

§ 2.4.5 A Note About Noncompetition Agreements

Although the practice of law has become exceedingly specialized, attorneys should be prepared to deal with contracts that involve restrictive covenants, whether representing an employer, employee, franchisor, or franchisee. Counsel may be called on to review these agreements in the context of a business sale or the hiring of an employee who is leaving the hiring client's direct or indirect

competitor. Noncompete provisions raise complex policy issues in that the contract at issue is preventing one party from working or selling its goods or services. Nonetheless, Massachusetts courts will enforce noncompete provisions so long as they are only as burdensome as is necessary to effectuate the contracting parties' expectations and they do not offend public policy.

In the employment context, noncompetition agreements are enforceable on the grounds that the continued employment of the employee is sufficient consideration for granting the employer the right to enforce the covenant. *See Slade Gorton & Co. v. O'Neil*, 355 Mass. 4, 9 (1968). The noncompete agreement must be designed to protect legitimate business interests such as trade secrets, goodwill, and confidential information. A noncompete cannot be used simply to restrain ordinary competition. *See Marine Contractors Co. v. Hurley*, 365 Mass. 280, 287–88 (1974). Moreover, even if generally enforceable, a court will not enforce an employment noncompete provision if it is too broad in time, in geographic area, or in any other respect and will instead modify the agreement to limit its reach to that reasonably necessary to enforce the company's legitimate business interests. *Marine Contractors Co., Inc. v. Hurley*, 365 Mass. at 289–90; *see also All Stainless, Inc. v. Colby*, 364 Mass. 773, 778 (1974) ("If the covenant is too broad in time, in space or in any other respect, it will be enforced only to the extent that is reasonable and to the extent that it is severable for the purposes of enforcement.").

Likewise, special considerations apply to franchise agreements, in which Massachusetts courts apply more deference to the enforcing party. In *Boulanger v. Dunkin' Donuts, Inc.*, 442 Mass. 635 (2004), the Supreme Judicial Court considered the issue of first impression, which was "whether covenants not to compete are enforceable where they stem from franchise agreements." In *Boulanger*, the court rejected the plaintiff donut franchisee's claim that the posttermination restrictive covenant in the franchise agreement was unenforceable after finding that the franchisee

- was an independent contractor and not an employee,
- paid to obtain the franchise,
- entered into the franchise agreement "with eyes wide open," and
- was represented by counsel.

The court rejected the franchisee's attempt to apply the law of employment contracts to franchise noncompete agreements on the grounds that franchise covenants do not limit an employee's right to employment to the same extent that employee agreements do and because franchisees typically do not have unequal

bargaining power as compared to employees. The court also found dispositive that the franchisee had the right to use the franchisor's confidential information and trademarks as well as to receive the profits from the business. *See Boulanger v. Dunkin' Donuts, Inc.*, 442 Mass. at 640–43.

Taken together, these cases demonstrate that when reviewing or drafting contracts that contain noncompetition covenants, counsel must consider whether the agreement is overly restrictive and/or whether it reflects the parties' recognition of the value the parties attribute to their respective rights, duties, and assets. If the agreement is not overly broad and is legitimately tailored to protect the employer or franchisor's business interests, then the covenant will likely be upheld.

§ 2.5 CONCLUSION

This chapter is written from a litigator's perspective. It is meant to identify and explain the concepts and issues that arise in contractual litigation so that lawyers will write contracts and similar agreements, not in a vacuum, but with an understanding of the importance of the provisions and terms used in the contracts. By understanding the consequences of poorly drafted contracts and the importance of well-drafted ones, the authors hope that this chapter contributes to better contract drafting by fellow members of the bar, which will serve our clients well.