MISCELLANEOUS SECTIONS OF A CONTRACT

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Education

B.A. Economics, Political Science and Managerial Studies, Rice University (TX) J.D.,
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Experience

C. Elaine Howard is a trial attorney focusing on commercial litigation, real estate disputes and employment law. Ms. Howard distinguishes herself by partnering with clients to determine their goals for litigation up front, to re-evaluate those goals as the litigation progresses, and to advise, inform, and counsel clients to obtain those goals. Ms. Howard frequently becomes involved in disputes at the pre-litigation stage, advising clients on economical workout strategies to resolve the issue, as well as reduce time and expense.

In the real estate context, she has handled hundreds of landlord/tenant disputes primarily but not exclusively on the landlord's side. She has represented lenders and loan servicers in matters involving foreclosures and lending practices. She has one of the few reported cases on the landlord's duty to mitigate damages, and has successfully first chaired two jury trials involving landlord/tenant issues. Ms. Howard advises individuals seeking to acquire property about their possible liabilities and consults on the closing documents and indemnification agreements. She has also handled evictions, lockouts, title and lien priority disputes, foreclosure on real and personal property, Fair Housing Act violations, enforcement of deed restrictions, discrimination by homeowners' associations, ad valorem taxes, easements, and disputes arising out of the acquisition of real property.

Memberships

Previously served as Treasurer, Programs Co-Chair, Membership Co-Chair, Commercial Real Estate Women
Previously served as Past Chair, Chair, Chair Elect, Vice Chair, and Secretary of the Litigation Section of the Houston Bar Association

Publications and Speaking Engagements

The Most Heavily Litigated Deal Provisions: Trial Lawyer's Perspective," Advanced Real Estate Law Course, July 2014

"Collections Jeopardy," 29th Annual Real Estate Conference, South Texas College of Law, June 2014

"Those Paragraphs at the Bottom You Don't Really Read: Trial Attorneys Discuss the Boilerplate," 28th Annual Real Estate Conference, South Texas College of Law, June 2013

"Problems with Foreclosures: A Legal Analysis of Current Events," Advanced Real Estate Seminar, State Bar of Texas, July 2012

"The Benefit of Hindsight: A Trial Attorney's Tips to Transactional Attorneys on the Election of Lease Remedies," 27th Annual Real Estate Conference, South Texas College of Law, June 2012

"Landlord and Tenant Drama and Trauma," speech given at the 44th Annual William W. Gibson, Jr. Mortgage Lending Institute, September 2010

"Allocating risk: Make sure buck stops in the least damaging place," 38 *Houston Business Journal* (August 10, 2007)

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I. INTRODUCTION

In this day of computers, forms, electronic drafting assistants, and Google searches, there are likely no attorneys who start a contract from scratch each time. This paper presents certain issues that can arise in connection with the miscellaneous sections of a contract from a trial attorneys' perspective. What are some of the red flags for when the miscellaneous sections of a contract should be treated as "deal points" and when are they just "belt and suspenders"? When are these clauses merely boilerplate, and require no variation from the prior version, form or sample used?

II. DISCUSSION OF CONTRACT SECTIONS.

A. Merger clause/No reliance clause

1. Merger Clause

A merger and a no reliance clause are often used together, although they have somewhat different purposes. In a merger clause, the parties agree that the contract, as written, supersedes all other agreements and writings between them. This avoids the problem of a dispute later over whether there are other preliminary writings that constitute part of the agreement. Second, the parties agree that there are no discussions between them that vary the terms of the agreement, *i.e.*, the parol evidence rule.[1] This lessens the risk of the discussions and negotiations leading up to the execution of the contract being used to vary the written terms of the agreement.

A typical merger clause could provide:

> This agreement contains the entire agreement and understanding of the parties with respect to the subject matter and supersedes all prior agreements and understandings relating to the subject matter, regardless of whether they are written or oral. There are no other agreements between the parties other than those set forth in this agreement.

The merger clause therefore focuses on establishing that the written agreement constitutes the entirety of the parties' agreements, and there is no "side deal" or other agreement between them.

Ask yourself when considering a merger clause:

- Were there long and detailed negotiations?
- Was there a letter of intent or term sheet?
- Were there prior business dealings between the parties?
- Did they start to do business together before the contract was finalized?
- Was there a significant variation between the deal as originally contemplated and as executed?

Remember that, without a merger clause, one of the parties to the contract can claim that there are other agreements between them. Your hard work in drafting a contract that identifies the parties as in an "arm's length transaction" or "independent contractors" can be undone by prior discussions between the parties referencing themselves as "partners" or "joint venturers." Similarly, terms for delivery, the description of the services, and any other material term can be ripe for litigation if the parties have exchanged prior writings that could constitute an agreement. Proving or disproving such a prior agreement may also be a fact question that precludes summary judgment. For example, email exchanges between parties can constitute a written agreement under the Texas Electronic Transactions Act.[2] There are many ways to enter into an enforceable contract, and a lengthy, negotiated document prepared by counsel is only one of them. Although a court can construe the terms of an unambiguous contract as a matter of law (*i.e.*, in a summary judgment hearing), a judge cannot decide if the parties have entered into a contract if that is a disputed fact. The existence of a contract and the terms of a contract, if disputed, are a question for the trier of fact (*i.e.*, the jury).[3]

Another important concept for merger clauses is the parol evidence rule. The parol evidence rule is not a rule of evidence at all, but a rule of substantive law.[4] The parol evidence rule exists under both the common law of Texas and Article 2 of the Uniform Commercial Code ("UCC").[5] The parol evidence rule generally prohibits the enforcement of and/or the introduction of extrinsic evidence regarding any inconsistent agreement that occurred prior to or contemporaneously with a subsequent writing intended as the parties' final written expression of their agreement with respect to the transaction.[6]

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[1] *See Burleson State Bank v. Plunkett,* 27 S.W.3d 605, 615 (Tex. App.-Waco 2000, pet. denied).
[2] Tex. Bus. & Comm. Code § 322.01 *et seq.*
[3] Texas Pattern Jury Charge 101.1.
[4] *Marantha Temple v. Enterprise Products*, 893 S.W.2d 92, 101 (Tex. App.-Houston [1st Dist.] 1994, writ denied). *See also* TEX. BUS. & COMM. CODE § 2.202 (Vernon's 2000).
[5] Article 2 of the UCC governs domestic contracts for the purchase and sale of "goods." TEX. BUS. &COMM. CODE § 2.102. *Marantha Temple,* 893 S.W.2d at 101; TEX. BUS. & COMM. CODE § 2.202.
[6] *See Marantha Temple,* 893 S.W.2d at 101; *Massey v. Massey*, 807 S.W.2d 391, 405 (Tex. App.-Houston [1st Dist.] 1991, writ denied). *See also* TEX. BUS & COMM. CODE § 2.202.

The absence of a merger clause in a written agreement does not preclude the application of the parol evidence rule. However, by failing to include a merger clause in a written agreement, the parties leave it to a judge to decide if the parties to a contract intended the subject writing to be a final, integrated expression of their agreement, sufficient to invoke the parol evidence rule. By including a sufficient merger clause in all contracts, each party to the contract can much more effectively guard against another party's attempt to vary, contradict or add to the terms of the contract through the use of extrinsic evidence.[7]

2. No reliance clause

A no reliance clause is often used together with a merger clause. In a no reliance clause, the parties disclaim reliance on any oral or written statement not expressly set forth in the written agreement.

A typical no reliance clause states:

> All understandings, discussions, and agreements previously made between the parties, written or oral, are superseded by this contract, and neither party is relying upon any warranty, statement or representation not contained in this contract.

Ask yourself when considering a no reliance clause:

- Is there unequal bargaining power between the parties? Is one side represented by counsel and the other is not?
- Do they have unequal access to important facts that form part of the basis for entering the contract?
- Were there long and detailed negotiations?
- Were there issues that arose in due diligence?
- Is it a settlement agreement after a long negotiation?

Unlike a merger clause, the no reliance clause essentially states that there are no representations relied on by either party other than those set forth in the agreement. Thus, any material representation made by one of the parties on which the other party has relied on in deciding to enter into the agreement should be stated in the body of the contract.

3. Relevant cases.

The obvious question, presented a number of times to the Texas Supreme Court, is whether and to what extent this clause will protect a party from claims of fraudulent inducement. The frequently cited case of *Italian Cowboy Partners v. Prudential Ins. Co.,* 341 S.W.3d 323 (Tex. 2011) addresses that issue. Also, in *Italian Cowboy*, the court addressed a clause which blended the concepts of merger and no reliance.

In *Italian Cowboy*, the Texas Supreme Court stated:

> We recognized decades ago that agreeing to a merger clause does not waive the right to sue for fraud should a party later discover that the representations it relied upon before signing the contract were fraudulent ....The principal issue in this case is whether a lease contract amounts to a standard merger clause, or also disclaims reliance on representations, thus negating an element of the petitioner's claim for fraudulent inducement of that contract. We conclude that the contract language in this case does not disclaim reliance or bar a claim based on fraudulent inducement.[8]

In *Italian Cowboy*, the plaintiff, a restaurant, entered into lease negotiations with a commercial landlord, who made several representations that the building was "in perfect condition" with no problems whatsoever. The lease entered by the parties contained a standard merger clause and a disclaimer that the tenant had not relied on any representations except as specifically set forth in the lease. Specifically, the clause stated: "Tenant acknowledges that neither Landlord nor Landlord's agents, employees or contracts have made any representations or promises with respect to the Site, the Shopping Center or this lease except as expressly set forth herein."

As the restaurant was finishing the build-out prior to opening, the owners started to notice a horrible odor, which persisted despite lengthy efforts to locate the cause and repair it. After having discussions with the former tenant and others, the restaurant owners discovered that the landlord had long known of problems with odors, which had, in fact, caused the demise of the former tenant, another restaurant. The tenant sued for fraudulent inducement, and the landlord defended the case, pointing to both the merger clause and the disclaimer of representations.

The Texas Supreme Court strongly rejected the idea that these "boilerplate" clauses suffice to excuse fraud that induced the execution of a contract. The court cited with approval language from a 1957 case, stating:

> The same public policy that in general sanctions the avoidance of a promise

[7] *See Ragland v. Curtis Matthews Sales Company,* 446 S.W.2d 577, 578 (Tex. Civ. App.-Waco 1969, no writ).

[8] *Italian Cowboy Partners v. Prudential Ins. Co.,* 341 S.W.3d 323 (Tex. 2011).

> obtained by deceit strikes down all attempts to circumvent that policy by means of contractual devices....To refuse relief would result in opening the door to a multitude of frauds and in thwarting the general policy of the law.[9]

The court acknowledged a limited exception to this rule: in certain circumstances, it may be possible for a contract's terms to preclude a claim for fraudulent inducement by a clear and specific disclaimer-of-reliance clause. For example, parties should be able to negotiate settlements in a lawsuit barring all further litigation on a matter if there is a specific and clear intent to negate a fraudulent inducement claim.[10]

The court stated that the factors to consider in determining whether a no reliance clause precluded a fraudulent inducement claim would include whether the terms of the contract were negotiated, rather than boilerplate, whether the parties specifically discussed the issue that because the topic of dispute, whether the complaining party was represented by counsel, whether the transaction was arms' length, and whether the parties were knowledgeable in business.[11]

The court discussed that the purpose of a standard merger clause is not to preclude a fraudulent inducement claim; it is to ensure that the contract at issue invalidates or supersedes any previous agreements. However, boilerplate merger clauses, without an expressed clear and unequivocal intent to disclaim reliance or waive claims for fraudulent inducement, have never had the effect of precluding claims for fraudulent inducement. The court held that the merger clause and the representations clause did not "as a matter of law" disclaim reliance, and did not defeat Italian Cowboy's claim for fraudulent inducement.[12]

It is not clear if or how much the *Italian Cowboy* case would have been different if the clause had expressly included language specifically disclaiming reliance on any statement not included in the lease. A later court of appeals decision addresses this issue. In *Fazio v. Cypress/GR Houston I, L.P.*, 403 S.W.3d 390, 407 (Tex. App.—Houston [1st Dist.] 2013, no pet.), the court's opinion drew both concurring and dissenting opinions. In Judge Massengale's concurring opinion, he states "it is a misunderstanding of *Italian Cowboy* to suggest that the Supreme Court allowed a claim of fraudulent inducement to proceed despite a disclaimer of reliance…The critical distinguishing factor in *Italian Cowboy* was the absence of a disclaimer of reliance." The dissent describes that, in *Fazio*, one side asked for "every scrap of paper" to perform due diligence, and that other side "knowingly suppressed" some of the documentation. Citing *Italian Cowboy,* the dissent was ready to recognize an affirmative duty to disclose under these circumstances, and the failure to disclose was actionable fraudulent inducement. *Id.* at 418-19.

An earlier Texas Supreme Court case also struggled with the applicability of a no reliance/merger clause on a claim of fraudulent inducement. In *Schlumberger Tech. Corp. v. Swanson,* 959 S.W.2d 171, 180-81 (Tex. 1997), a party released claims related to a dispute over the commercial viability of a project and then tried to argue that the release was invalid because of representations that had been made concerning commercial viability. In *Schlumberger*, the parties had for years disputed the value of and commercial feasibility of a diamond and offshore mining venture. After protracted arms-length negotiations between sophisticated parties represented by counsel, the parties agreed to settle and release their disputes, which primarily revolved around whether the project was technologically feasible or commercially viable.[13]

Later, one party sought to challenge the release, claiming that the other party had fraudulently induced the execution of the release by falsely stating matters pertaining to the feasibility and viability of the project. The other party asserted that certain disclaimer language in the release barred the claim for fraudulent inducement. The language at issue in the release stated:

> [E]ach of us [the Swansons] expressly warrants and represents and does hereby state...and represent ...that no promise or agreement which is not herein expressed has been made to him or her in executing this release, and that none of us is relying upon any statement or representation of any agent of the parties been released hereby. Each of us is relying on his or her own judgment and each has been represented by Hubert Johnson as legal counsel in this matter.[14]

Based on this language and the factual circumstances of the settlement of the lengthy dispute over value, the court held that a "release that clearly expresses the parties' intent to waive fraudulent inducement claims, or one that disclaims reliance on representations about specific matters in dispute, can preclude a claim of

[9] *Id.* at 332 (citing *Dallas Farm Mach. Co. v. Reaves,* 307 S.W.2d 233, 239 (Tex. 1957)).
[10] *Id.*
[11] *Id*. at 337 n. 8.
[12] *Id.* at 336.
[13] *Schlumberger Tech. Corp. v. Swanson,* 959 S.W.2d 171, 180-81 (Tex. 1997)
[14] *Id.* at 180.

fraudulent inducement."[15] Part of the basis for the court's decision was the strong public policy encouraging resolving disputes and providing those parties with some assurances of finality.

In other cases, courts have discussed the ability of parties to vary the terms of an agreement based on oral discussions prior to the date of a written contract with a merger clause. For example, in *Springs Window Fashions Div., Inc. v. Blind Maker, Inc.,* 184 S.W.2d 840, 869 (Tex. App.-Austin 2006, pet. granted and remanded by agr.), the appellate court found that, "under the unique circumstances of this case," the merger clause in the parties' contract precluded a claim for fraudulent inducement based on representations that were within the scope of the actual agreement between the parties. These alleged fraudulent representations were addressed or even squarely contradicted by the contract's clear terms, and the plaintiffs' fraud claims had been considered and rejected by the jury.[16]

Thus, the point of these provisions should be to clarify that the signed contract between the parties is the sole embodiment of the parties' agreement, and no other writings or discussions before execution vary its terms. Relying on that provision to limit in advance claims for fraudulent inducement is dubious under Texas law.

There are risks to being overly inclusive with either a merger or no reliance clause. Sometimes counsel will include a merger clause in an agreement either without knowing or without connecting the dots to recognize that the parties do, in fact, have other agreements that they want to survive the execution of the agreement. For example, parties may settle a dispute between them, while still having an ongoing contract. The parties may have a separate confidentiality agreement they want to survive an agreement. Assuming counsel is aware of such ongoing contractual agreements, counsel can include a clause like the following:

> This agreement, together with the Sample Agreement attached as Exhibit A, contain the entire agreement and understanding of the parties with respect to the subject matter and supersedes all prior agreements and understandings relating to the subject matter, regardless of whether they are written or oral. There are no other agreements between the parties other than those set forth in this agreement and in the Sample Agreement.

Similarly, if the parties include a no reliance clause, any material representation should be expressly set forth in the agreement. If it is not, the party seeking to enforce an agreement in reliance on that representation may face a difficult challenge, and may not be entitled to claim reliance on the agreement, barring an argument of fraudulent inducement.

B. Assignment

Contracts are generally assignable except where specifically prohibited by statutes and where the contract expressly and specifically restricts or prohibits assignment.[17] Another exception is for contracts that require personal trust, confidence, skill or character of the parties.[18] Accordingly, it may be advisable to specify that no assignment shall be valid without the prior written consent of the other party.

Ask yourself when considering an assignment clause:

- How likely is a change in corporate form?
- Do you want to retain control over the form of the other party?
- How important is continuity of ownership, expertise, financial stability?
- Does your contract require services you do not want performed by anyone else?

A corporate change can dramatically affect the terms of a contract. In a lease, a corporate change by the tenant could result in a less financially viable tenant without the knowledge to run the business. Alternatively, it could lead to a change in the type of business by the tenant, which could change the mix of tenants, an important factor in a retail setting.

In a sale of real property, a seller may not care who the buyer is as long as the buyer is financially able to fund the purchase. However, if the seller is retaining nearby properties, the seller may want to maintain some control over the buyer to limit the types of business or use of the property following the sale.

Also, in a non-compete agreement with an employee, the assignment of that agreement to a new corporate owner could dramatically change the scope of the non-competition prohibition. If the "Protected Territory" is defined as "anywhere the Company does

[15] *Id.* at 181. *See also De los Santos v. Coastal Oil & Gas Corp.,* No. 05-97-0029-CV, 1999 WL 619639 (Tex. App.-Dallas August 17, 1999, pet. denied) (finding that the parties' settlement agreement of a suit concerning a royalty dispute, which included a disclaimer of reliance, negated the claim for fraudulent inducement).

[16] *Id.* at 873-74.

[17] *Pagosa Oil & Gas v. Marrs & Smith*, 323 S.W.3d 203, 211 (Tex. App.—El Paso 201, pet. denied).

[18] *Crim Truck & Tractor v. Navistar Internat'l*, 823 S.W.2d 591, 596 (Tex. 1992).

business," a merger with a much larger company could substantially restrict a former employee's job choices.

A typical assignment clause would be:

> This Agreement and the various rights and obligations arising hereunder shall inure to the benefit of and be binding upon Seller, its successors and permitted assigns, and Buyer and their successors and permitted assigns. Neither this Agreement nor any of the rights, interests or obligations hereunder shall be transferred or assigned (by operation of law or otherwise) by either of the parties hereto without the prior written consent of the other party.

C. Severance

A concern in drafting a contract, particularly one which is designed to govern the relationship for a long period of time, is a change in the law or facts that would make one provision of a contract illegal. With some provisions, striking them from the contract may not substantially change the nature of the agreement. For example, many older leases contain language stating that the landlord has no duty to mitigate damages. However, in 2001, the Texas Legislature added a duty to mitigate damages to the Property Code.[19] That provision states that a provision of a lease agreement that purports to waive a right or to exempt a landlord from a liability or duty under this section is void.[20] Thus, the legislature effectively forced the severance of any non-compliant lease term. Also, the disclaimer of a duty to mitigate is hardly a material lease term, and the landlord/tenant relationship can operate without reference to that provision.

However, what if a material term of an agreement is severed from the contract? How does the court handle continuing compliance with an agreement if the agreement no longer covers the object of the transaction?

Ask yourself when considering a severability clause:

- Does the contract involve a changing area of law?
- How material to the contract performance is any likely legal change?

A typical severability clause is:

> If any term of this agreement becomes or is held to be invalid, illegal or unenforceable, such term or provision shall be excluded and the remainder of this agreement shall remain in full force and effect.

In a quickly changing area of law, you may want to consider a severance clause that includes a mechanism to require the parties to attempt to agree on a substitute provision:

> If any term of this agreement becomes or is held to be invalid, illegal or unenforceable, such term or provision shall be excluded and the remainder of this agreement shall remain in full force and effect; provided, however, the parties hereto shall negotiate in good faith to modify this agreement so as to replace the invalid, illegal or unenforceable provision with a substitute provision that comes as close as possible to the term that is invalid, illegal or unenforceable.

A related provision may allow one or more of the parties to terminate the agreement if there is a material change in the law or in regulations. A clause of this nature may be advisable in a quickly changing regulatory environment.

D. No waiver/Amendments in writing

Many contracts include a no waiver and no amendment clause, such as the following: "This agreement may be amended or modified only by an agreement in writing signed by all of the parties." Or "No waiver of any provision is binding unless executed in writing by the parties."

Although these clauses provide some protection from waivers, they likely do not provide much protection. Unless the contract is required to be in writing under Texas law, the courts may enforce an oral modification regardless of the clause.[21] Similarly, a contract term may be waived or modified by the course of performance of the parties.[22]

Also, the Uniform Electronic Transactions Act may have simplified (perhaps overly) the way the parties can enter into an agreement. That statute allowed electronic signatures, as well as electronic agreements. In this day of pervasive email communications, the parties may be able to "agree" and "sign" a contract amendment merely by emailing about a change.[23]

[19] Tex. Prop. Code § 94.202.

[20] Tex. Prop. Code § 94.202 (b).

[21] *Mar-Lan Indus., Inc. v. Nelson,* 635 S.W.2d 853, 855 (Tex. App.-El Paso 1982, no writ)

[22] *Carpet Servs. v. George A. Fuller Co.,* 802 S.W.2d 343, 346 (Tex. App.-Dallas 1990), *aff'd,* 823 S.W.2d 603 (Tex. 1992).

[23] Tex. Bus. & Comm. Code § 322.01 *et seq.*

E. Notice

Contracts often include a provision for notice, which is helpful later in determining who should receive a notice. It can be helpful to provide an address, particularly for a very large company, to avoid a notice being sent to the wrong office. Some litigants will intentionally send a notice to a company address they know is an unlikely address to forward a legal notice, such as a drop box for payment. If sending the notice (even to an incorrect address) triggers any periods for cure or compliance, this can present problems for the company. Although this problem may not be completely remedied by providing a designated address for notice, it certainly gives a company an additional argument if receipt of the notice becomes disputed. To avoid the "lost in the mailroom" problem, the drafter may consider having certain designated company employees receive some notices or require that counsel receive a copy. It can similarly be helpful to specify a form that the notice should take, such as fax, overnight mail, or email.

F. Time is of the essence

When no time of performance is specified in the contract, the court will presume that the parties intended a reasonable time for performance. *Rusk County Elec. Co-op, Inc. v. Flanagan,* 538 S.W.2d 498, 499-500 (Tex. Civ. App.-Tyler 1976, ref. n.r.e.). However, failing to specify a time or date for performance leaves uncertainty that exposes both parties to misunderstanding. Additionally, the failure to specify a time leaves the determination of a "reasonable time" open to the fact finder.

Although many contracts require performance by specific dates, a party may not breach the contract by failing to tender performance on or before that date without a "time is of the essence" clause. Without such a clause, the claimant would be required to prove that the failure to perform by a date certain was a material breach of the agreement, which requires a finding of the following:

> a) The extent to which the injured party will be deprived of the benefit which he reasonably expected;
> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of the circumstances including any reasonable assurances; and
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.[24]

However, a finding of materiality is not required with a time is of the essence clause.[25]

Similarly, many contracts contain a "best efforts" clause, such as the following:

> Best efforts. The parties will use the efforts of a reasonably prudent person to achieve the result in an expeditious a manner as is reasonably possible.

Although this clause may be helpful to demonstrate the intent of the parties in quickly getting certain matters to a conclusion, it is not a clear cut standard. In *CKB & Assocs., Inc. v. Moore McCormack Petroleum,* the court stated:

> [T]o be enforceable, a best efforts contract must set some kind of goal or guideline against which best efforts may be measured. A contracting party that performs within the guidelines fulfills the contract regardless of the quality of its efforts. When a party misses the guidelines, courts measure the quality of its efforts by the circumstances of the case and by comparing the party's performance with that of an average, prudent, comparable operator.[26]

G. Attorneys' fees.

Contracts often provide that the prevailing party on any claim are entitled to reasonable and necessary costs and attorneys' fees. This provision supplements the normal procedural rule in Texas provided by Civil Practice and Remedies Code Section 38.001, which states:

> A person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for:
>
> (1) rendered services;
> (2) performed labor;
> (3) furnished material;
> (4) freight or express overcharges;
> (5) lost or damaged freight or express;

[24] *Mustang Pipeline Co. v. Driver Petroleum Co.*, 134 S.W.3d 195, 199 (Tex. 2004).
[25] *Id.*
[26] 809 S.W.2d 577, 581-82 (Tex. App.—Dallas 1991, writ den.).

(6) killed or injured stock;
(7) a sworn account; or
(8) an oral or written contract.

However, this statutory provision is somewhat limited. It only applies to "claimants," so prevailing defendants are not entitled to attorneys' fees. Also, it may only allow individuals and corporations to recover fees, not limited partnerships or other types of business entities.[27] A number of cases have recently decided that limited partnerships and limited liability companies cannot obtain fees under Section 38.001.[28] Having a contractual provision governing the award of attorneys' fees is very important if the parties to the agreement are not an individual or a corporation.

A sample attorney's fee provision would be as follows:

> The term "*Prevailing Party*" is defined to mean the party who obtains a determination of wrongful conduct by the other party regardless of whether actual damages are awarded.
>
> *Fees*. The prevailing party in any legal proceeding based on this Contract may recover reasonable attorneys' fees, investigation costs, and other costs incurred in connection with such legal proceeding from the non-prevailing party in addition to any other relief to which such prevailing party is entitled. The reasonableness of such costs and attorneys' fees shall be determined by the court and not the jury. Prevailing party shall mean and is hereby defined by the parties to mean that party which the court finds and/or declares is the prevailing party, whether or not that party obtains monetary, declaratory, injunctive, equitable or nominal relief. With respect to any monetary claim, no award of damages shall be necessary in order for a party to be found by the court to have prevailed. With respect to any non-monetary claim, no equitable relief shall be necessary in order for a party to be found by the court to have prevailed. This Section [ ] shall survive Closing or earlier termination of this Contract

III. CONCLUSION

Although the terms of a deal are often fully fleshed out in negotiations, the miscellaneous provisions are often left to a more cursory review. As this article demonstrates, the miscellaneous provisions can prove to be a source of litigation if certain red flags are ignored.

[27] *Ganz v. Lyons Partnership, L.P.*, 173 F.R.D 173 (N.D. Tex. 1997) (stating: "the legislature changed the phrase 'person or corporation' to 'individual or corporation.' The natural and logical explanation is that the legislature, knowing that the Code Construction Act defined 'person' to include 'partnerships,' among others, thereby intended to exclude those who by definition are not "individuals" or "corporations." It excluded "partnerships." To now read "partnerships" back in would defy the ordinary expectation of the legislative act).

[28] *Fleming & Associates, L.L.P. v. Barton*, 425 S.W.3d 560, 574-75 (Tex. App.—Houston [14th Dist.] 2014, pet denied), was the original case in which the 14th COA held that Texas CPRC Chapter 38 did not apply to limited partnerships and attorney's fees could not be assessed against them in a breach of contract case under Chapter 38.