



Greater Delray Beach
Chamber of Commerce



KANIUK LAW OFFICE, P.A.

Webinar: Contract Clauses You Should Have

Presented by:
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**Tuesday, July 28
12:30pm • Via Zoom**

Free. Limited to the first 100.

RSVP Required:

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Agreements In General

Legal Agreements often seem complex to Outsiders and Non-Attorneys.

By looking at each provision, you can better understand how to structure terms to benefit You and Your Company, and what rights and obligations you have under each agreement that your business is a party to.

Agreements are Living Documents that need to be maintained and updated to keep pace with Changes in the Law, Customized Needs and Circumstances.

Contracts Amidst Coronavirus

Unfortunately, but not unsurprisingly, businesses are suffering significant side effects from the bitter pill of our societal shutdown.

Parties find themselves unable (and sometimes unwilling) to perform their obligations under a variety of Agreements (including, but not limited to, Mortgages, Leases, Service and Sales Contracts).

However, while circumstances have changed due to COVID-19, the law has not. The **Same Rules** that applied before COVID-19 are Equally Applicable Now. The Question is how the facts apply to your current contractual situation and what concessions each side is willing (and able) to make in order to salvage or reform a transaction.

Business Organizational Documents

- **For Your Company by and between owners (owners can be Individuals or Businesses). Examples include:**
 - **Operating Agreement (LLC);**
 - **Shareholder Agreement (Corporation);**
 - **Partnership Agreement (Partnership);**
 - **Joint Venture Agreements (between Your Company and Other Business(es))**

Inventory Existing Agreements

- **Identify the Types of Agreements Your Company is a Party to.**
Examples include: (1) Mortgage or Lease for Real Property; (2) Contract for Purchase and Sale of (a) Real Property or (b) Goods and Services; (3) Employment Contract; (4) Licensing, Distribution and More (e.g., Joint Ventures and Strategic Alliances, License Agreements, User Agreements and Privacy Policies, etc.);
- **Identify Parties to the Agreement: Your Company (**Never Use Your Individual Name**) and Other Party.**
- **Review Key Provisions of Each Agreement: Term; Fees to be Paid or Received; Timelines; Force Majeure Provisions and More.**

COVID-19 Implications

- **Conduct Special COVID-19 Analysis to Review Effect of:**
 - **Shutdown on Business Operations;**
 - **Present Travel Restrictions;**
 - **Group Gathering Regulations; and**
 - **Essential or Non-Essential Business Rules.**
- **Explore Best Ways to Mitigate Losses if Performance is Impossible.**
- **Review Enforcement and Penalty Options if you fear Other Party will Fail or Refuse to Perform.**

Parties to the Agreement

The most basic question to be addressed involves who is legally bound to the Agreement? Any Agreement should be signed by your Company and the party with whom you are making a deal with (either individual or their company). This is important for ensuring that you are protected from Personal Liability.

You can generally only sue the party that signed the agreement — so that makes a big difference. Connected to this is looking at the asset base of the person/entity bound by the agreement. Do they have assets, and will they be able to pay damages in event of default or dispute?

Personal Guarantee

Related to the question of which parties are bound is whether or not there is a Personal Guarantee, which provides that regardless of the protections of the Corporate Veil, the owner of the Company assumes Personal Liability for Default. Most contracting parties will want a personal guarantee from the other party to the agreement.

You should decide if you are willing to sign one (and try to limit timeframe and amount of enforceability) and decide if you want to ask for one (and what you are willing to accept). This provision has serious implications and requires careful consideration.

Prevailing Party Provision

In Florida, each party to a lawsuit must usually bear their own attorneys' fees and costs.

There are two exceptions to this rule: (1) Where a Plaintiff sues under a specific, applicable Florida Statute that provides for fees, and (2) Where attorneys' fees are provided for in the Agreement.

An attorneys' fees clause can prevent meritless lawsuits and will greatly aid in recovering what is lost by the Prevailing Party. This Clause can directly save you thousands of dollars, so make sure it's included in any Agreement.

Terms and Conditions

This Clause might seem obvious, and it should be obvious!

Many business owners fail to specifically describe the terms of service: what is specifically required - and not required - of each party, and the time frame for performance.

Including what your business is not responsible for is essential for clarity and peace of mind in case of a lawsuit.

A clear and unambiguous Terms of Service section puts each party on notice of the exact requirements, leaving no room for ambiguity.

Notice Provision

A Notice Clause states how the parties to an agreement communicate with each other in written form.

When communications are sent between parties, you don't want the other party to be able to claim that it was not received.

This clause avoids that situation.

Your Notice Clause **can** permit communications via Email and **should** provide for a copy to be sent to your Attorney.

Employment Issues

You should consider having Signed Employment Agreements with all types of Employees, regardless of whether they are:

- Full-Time Employees;
- Part-Time Employees; or
- Independent Contractors.

In addition, you should strongly consider having a **Written Employment Manual** which is distributed to all Employees, with a Signed Acknowledgement of Receipt. You may also want to prepare and distribute a **Return to Work Memo**.

Confidentiality (Non-Disclosure)

Many commercial agreements contain one or more clauses on confidentiality. It is standard that you want to keep sensitive information among the parties without leaking it out to Third Parties not party to the agreement.

It is important to consider the scope of the Confidentiality Provision. An overly broad provision may be an administrative burden, lead to unintended violations, and be difficult to enforce. A narrow provision may not protect the secrets for which it is intended.

Non-Compete / Non-Solicitation

Many agreements (particularly Partnership and/or Employment Agreements) will call for Non-Competition and/or Non-Solicitation Clauses. The Non-Competition Clause prevents a party from competing against the other using the information from their prior relationship for some period of time. The Non-Solicitation Clause typically prevents one party from taking the employees, customers or other commercial relationships of the other party for some period of time. Both are generally important clauses to include in an agreement and both have a lot of commercial protection for the parties. It is important to carefully tailor these provisions to be meaningful and enforceable.

Contractual Authority

You will want to make sure that the businesses (and the individuals signing on behalf of those businesses) have the authority to enter into the agreement, and that the agreement will not violate unrelated agreements with Third Parties.

You will want to get a Corporate Resolution as an Attachment to any Agreement to provide protection to show they had authority. Moreover, if Party A and Party B are entering into an agreement, it is not uncommon for Party B to want to be sure that Party A is not violating an agreement with Party C, who might sue Party B for breach of that agreement and might sue Party A for interference with it.

Assignment and Subletting 1 of 2

Often, there is a personal relationship between the parties to an agreement. This is often the case in a Residential Landlord/Tenant relationship, where the Landlord has conducted a background check on the particular tenant with whom they are renting the property to. But this is often the case with commercial relationships as well.

As a general rule, most agreements provide that the agreement cannot be assigned to a third-party without the consent of the other party. (In residential and commercial real estate, this is a bar to subletting without the Landlord's consent).

Assignment and Subletting 2 of 2

Such drafting is neutral and protects both parties from the eventuality discussed above.

However, it would not be unusual to see a one-way obligation to seek consent to assign, if the party seeking to impose that obligation on the other party has concerns as to who might end up occupying the property or providing it with services or products.

Merger (Integration) Clause

In most agreements, you will find a Merger (Integration) Clause which provides that all prior agreements among the parties are brought together in this agreement.

This is usually desirable because we want a contract that is complete and is the only document governing the relationship among the parties for that particular item.

Severability Clause

A Severability Clause upholds the sanctity of an entire agreement, even where the Court finds one clause to be illusory, unconscionable or otherwise unlawful.

Your agreements should be designed to give you the upper hand in case of any litigation, and many parties have lost their case because they failed to include a severability clause in their contract.

This is a simple addition that can make all the difference during a legal dispute.

Dispute Resolution Provisions

Usually buried towards the end of the agreement is the **Dispute Resolution Provision**, which provides for the procedure if you end up in a dispute with the other party:

- **Mediation;**
- **Arbitration; and/or**
- **Litigation.**

Forum Selection/Venue Provision

Especially when dealing with out-of-state customers, contractors or suppliers, being the home-party in any lawsuit has a great cost advantage.

Your agreement should clearly indicate that upon any dispute over its contents, “Venue is Proper” in the State of Florida and in your Specific County (Miami-Dade, Broward, Palm Beach or elsewhere).

You will also want Florida law to govern your dispute; this may sound redundant but leaving this element out can be disastrous in litigation.

Indemnification

The Indemnification Clause shifts risk from one party to another. It often kicks in when one party to the agreement violates the rights of another person or entity, typically a non-party to the agreement.

For instance, if both Party A and Party B sign an agreement, and Party A violates the rights of Party C, the Indemnification Clause will allow Party B to seek compensation from Party A if Party B is sued by Party C.

No Partnership or Agency

Agreements frequently contain boilerplate provisions stating that the relationship between the parties is not to be construed as a partnership or agency.

This is because both of those legal forms may arise implicitly, without the parties realizing that they have done so, and both have a range of legal and tax implications for the parties.

If the parties do not intend for them to arise, it may be safer to state expressly that the contract does not create either form of relationship, to ensure that no unintended consequences flow from the agreement.

Termination and Damages

Savvy business owners will include an Early Termination and Damages Clause in their agreements.

This clause gives business owners an out, just in case performance under the agreement becomes either impossible or financially detrimental to the business. A Termination Clause can be tricky to create and must be properly drafted, and should also state Specific Damages, if applicable, that each party is entitled to in case of Early Termination. Limiting your damages in case of breach can be a make-or-break difference in the viability of your business.

Event of Default

The phrase "Default" or "Event of Default" is a fixture primarily in loan agreements and real property leases, where one or more occurrences give the Lender or Landlord the opportunity to terminate the agreement. Examples include—

- Failure to Pay;
- Failure to Comply with Terms of Agreement; and/or
- Bankruptcy/Insolvency of Company (and sometimes of one or more principals of Company)

Waiver

In the absence of a Waiver Clause, where a party fails to take action in respect of a breach or default under the agreement, or delays in taking action, that party may lose its rights to take action in respect of that breach of default.

A Waiver Clause is designed to ensure that a party's rights, powers and remedies will not be lost as a result of any delay or omission in exercising or enforcing them and to expressly provide that any partial exercise and/or enforcement of a party's rights or remedies shall not thereby extinguish or otherwise reduce those rights and remedies.

Force Majeure

***Force majeure* is a common clause in agreements that essentially frees both parties from liability or obligation when an extraordinary event or circumstance beyond the control of the parties, such as Act of God, Act of Nature, or National Emergency, prevents one or both parties from fulfilling their obligations under the agreement.**

In practice, most force majeure clauses do not excuse a party's non-performance entirely, but only suspend it for the duration of the force majeure.

This topic is going to be heavily litigated in the months to come.

Refund Requests/Chargebacks 1/2

It is critical that you Implement a Strategy for Dealing with Refund Requests and Avoiding, Reducing, and Disputing Chargebacks.

This will help you ensure positive interactions with your customers and will put you in a position to recover disputed revenue and prevent future chargebacks, making a winning chargeback strategy an investment that will continue to pay off long after things return to normal.

Refund Requests/Chargebacks 2/2

Some suggestions:

- **Use Multi-Level Fraud Detection Systems;**
- **Optimize Your Response;**
- **Deploy Smarter Chat-Bots on Your Website;**
- **Adhere to Best Practices of Credit Card Companies/Merchant Services;**
- **Make Cancellations Easy (when possible) and Offer Alternatives**
 - **Rollover Registration to Future Events;**
 - **Redirect Fees to Other Programs/Benefits; and**
 - **Offer Optional Donations.**

Bankruptcy Overview

Bankruptcy could be the subject of an entirely separate webinar. The US Constitution gives Congress the authority to enact Bankruptcy Laws for the Entire Country:

- **Current Law: Bankruptcy Reform Act of 1978 (Codified in Title 11 of the U.S. Code – the “Bankruptcy Code”).**
- **Major Changes in 2005: Congress enacted the Bankruptcy Abuse Prevention And Consumer Protection Act (“BAPCPA”).**
- **Recent Changes: Small Business Reorganization Act of 2019.**
- **Technical Fixes: Congress included changes within the Coronavirus Aid, Relief, and Economic Security Act (“CARES”).**

Bankruptcy Code

Chapters 1, 3, and 5 are Procedural:

- **Chapter 1 includes Definitions and Rules.**
- **Chapter 3 governs Case Administration.**
- **Chapter 5 covers matters related to rights of Debtors and Creditors.**

Chapters 7, 9, 11, 12, 13 and 15 are Substantive:

- **Chapter 7 governs Personal Liquidation.**
- **Chapter 9 governs Municipal Bankruptcy.**
- **Chapter 11 governs Corporate Reorganization.**
- **Chapter 12 governs Family Farmers.**
- **Chapter 13 governs Individual Debt Adjustment.**
- **Chapter 15 governs Ancillary and Cross-Border Insolvency.**

Special Debtor Powers

- **Automatic Stay: Filing for Bankruptcy imposes an Automatic Stay on Any and All Litigation and Collection Efforts Against the Debtor.**
- **Power to Reject Leases and Contracts: The Bankruptcy Code gives Debtors the power to reject leases and executory contracts, thereby reducing obligations on a going-forward basis and giving Debtors a stronger hand in negotiating with Landlords and Vendors.**
- **DIP Financing: Debtors can obtain special financing from Lenders who can obtain priority over other creditors.**

Residential Mortgages and Evictions

- **Residential Mortgage Foreclosures and Landlord/Tenant Evictions have been suspended State-wide until July 1, 2020. (There have been multiple extensions of the deadline, and it is possible it may be extended again). This is a State-mandated change to any existing Mortgage or Lease Agreement.**
- **These rules do NOT apply to Commercial Properties.**

Concluding Thoughts

- **Despite the Significant Changes to our Lives Due to COVID-19, Many of the Issues Affecting Businesses and Business Owners Remain Unchanged.**
- **Successful Businesses Have Complete and Accurate Records, Especially as it Relates to Business Agreements with Other Parties.**
- **Identify, Organize and Inventory Your Business Records Now.**
- **Consulting with Professionals Can Save Time and Money.**

Questions?



Ronald Scott Kaniuk, Esq.

- Attorney with Nearly Twenty-Five (25) Years' Experience.
- Former Law Clerk to U.S. Bankruptcy Judge Marvin A. Holland.
- Licensed to Practice in State Courts of Florida, New York and New Jersey and Multiple U.S. Federal Courts.
- Double-Degree Graduate of **St. John's University School of Law** (Queens, NY): Law Degree (1996) and LL.M. (Master of Laws) in Bankruptcy (2002).
- Proud Graduate of **Northwestern University** (Evanston, IL).
- Member of Board of Directors for the **Greater Delray Beach Chamber of Commerce**.
- Former HOA Board Member and President.
- Married (18 Years) with Three (3) Children.

Kaniuk Law Office, P.A.

Kaniuk Law Office, P.A. is Law Firm Focused on Helping **Individuals** and **Small Businesses/Non-Profits**, with their **Legal Issues**, including, but not limited to, the following:

- Consumer Law.
- Bankruptcy—Debtor and Creditors' Rights.
- Business and Corporate Law.
- Real Estate (Residential and Commercial).
- Urgent Disaster Relief Issues.

Disclaimer

- **The Material contained herein was prepared by Ronald Scott Kaniuk, Esq. of Kaniuk Law Office, P.A.**
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For
Attending!**

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