

# 3 Contract Drafting Myths Debunked

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We all know that careful drafting is important. But implementing best-in-class drafting is challenging, especially when some of our assumptions about drafting are not regularly scrutinized. The recent [Delaware Court of Chancery](#) decision in *TA Operating LLC v. Comdata Inc.*, C.A. No. 12954-CB (Del. Ch. Sept. 11, 2017) (applying Tennessee law) provides an opportunity to debunk three drafting myths.

## Facts and Holding

TA Operating LLC operates travel centers along interstate highways selling fuel, food and other conveniences for truck drivers and other travelers. Comdata Inc. is one of the largest fuel card providers to the trucking industry. In early 2011, in response to competitive pressures, Comdata approached its existing customer TA about implementing a cardless fueling solution using radio frequency identification (RFID) technology. In December 2011, Comdata and TA executed two agreements. First, the parties entered into an RFID agreement for TA to pay for the RFID system with cooperation from Comdata. Notably, the RFID agreement required the implementation of the system “as soon as reasonably practical.” Second, the parties amended their merchant agreement to (1) reduce the transaction fees TA paid to Comdata and (2) extend the term of the agreement — both of these changes benefited only TA.

Implementation by TA of the RFID technology was delayed by several years, but Comdata never complained about this delay. However, this changed in 2016, when [FleetCor Technologies Inc.](#) acquired Comdata. In late 2016, Comdata sent notice to TA that TA had breached the RFID agreement. And Comdata alleged that since the RFID agreement was the consideration for the amendment to the merchant agreement, Comdata terminated the amendment to the merchant agreement.

Even though the court agreed with Comdata that the RFID agreement was partial consideration for the amendment to the merchant agreement, TA won the litigation because (1) the standard for rescission was not met (i.e., the purported breach by TA did not affect the very object of the amendment), (2) TA did not materially breach the RFID agreement (because the RFID agreement did not impose a specific deadline for completion) and (3) Comdata’s own material breach of the RFID agreement excused any purported failure to cure by TA (because Comdata had obligations to cooperate). The decision turned on very specific facts of the case, but what we want to explore in this article are some drafting assumptions that turn out to be untrue.

## Myth 1: Recitals Don’t Matter

Some transactional lawyers may believe that recitals in a contract provide context for an agreement and cannot be used to create binding legal obligations. However, the TA Operating case shows that recitals can have a large impact on litigation.

One problem for Comdata in the litigation was that the concessions in the amendment to the merchant agreement (which Comdata was trying to terminate) were not explicitly conditioned on compliance by TA with the RFID agreement. But fortunately for Comdata, the amendment to the merchant agreement had a recital that referenced the RFID agreement. This hook provided Comdata an opening. Without this recital and the change to the boilerplate (discussed in myth 2 below), the court would not have been able to examine extrinsic evidence, which is what shed light on the parties' intention at the time the amendment was executed.

To be clear, however, even though the court noted that recitals "may have a material influence in construing the contract and determining the intent of the parties," the court also noted some limitations on recitals. Specifically, the court cautioned that recitals (1) "should, so far as possible, be reconciled with the operative clauses ...," (2) "do not ordinarily form any part of the real agreement" and (3) "do not have the force of contractual stipulations." The lesson is that recitals should not be ignored (even if they cannot be fully relied upon).

## **Myth 2: Modifications to Boilerplate Don't Affect Outcome**

Boilerplate is often not given as much attention as "substantive" provisions, as some practitioners do not recognize the effect that boilerplate can have on the outcome of litigation. Moreover, boilerplate in the front of an agreement is probably given even less attention than boilerplate at the end. In the amendment to the merchant agreement in TA Operating, immediately after the recital about the RFID agreement was added (see myth 1 above), the following underlined change was made:

NOW, THEREFORE, in consideration of the foregoing and other mutual covenants and agreements described in this Amendment, the parties hereby agree as follows:

TA tried to downplay the change and its transaction counsel testified that this was "just a pretty standard way [to] draft agreements" and that "consideration" did not mean consideration in the legal sense but rather "in light of." However, the court discredited this testimony and instead relied on prior drafts of the agreements as evidence to determine that this "boilerplate" had substantive importance and reflected the understanding of the parties at the time the contract was formed.

## **Myth 3: Breach of One Contract Doesn't Impact a Separate Contract**

Another myth is that if parties enter into multiple agreements, each agreement is "siloed" so that breach of one contract does not impact the other (absent express provisions to the contrary). In other words, lawyers often rely on the fact that they do not have to look outside of the four corners of the document at hand. But the TA Operating case illustrates that this is not necessarily true. Because the amendment to the merchant agreement provided no benefit to Comdata, the only possible consideration was the entry by TA into the RFID agreement. And if Comdata had been successful in its argument that TA breached the RFID agreement and that the breach affected the very object of the amendment, then Comdata would have been able to rescind the amendment to the merchant agreement. This case illustrates that breach of one contract can affect a separate contract entered into at the

same time as the first contract.

This problem creates a troubling predicament for due diligence in merger and acquisition transactions. A potential acquirer that reviews an agreement might not understand its full obligations (or rights) if it does not have all the agreements between the parties. Of course, in this case, one key fact was that the recital referenced the other agreement. So, a lawyer reviewing the contract would have at least been put on notice of the other agreement, but this requires a very close read of the contract.

## Conclusion

Effective drafting is difficult. Fortunately, reported cases provide lawyers an opportunity to learn from the experience of others. The TA Operating opinion gives us a rare opportunity to debunk three common drafting myths and reminds us that the words we choose in our contracts matter.

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