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Executive Editor's Column:
Timing of Law Clauses—A Stitch in Time Saving Nine?
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Recently, this author was confronted with an issue while negotiating a marital settlement agreement that dealt with the timing of the law that would apply to provisions of the agreement. The urgency of this issue was clear because with the potential for new legislation, this author felt it imperative to reach a resolution with the adversary about whether the law in effect at the time an issue arose should apply or whether the law in effect at the time the agreement was signed should apply. This issue is one that this author does not see frequently when negotiating settlement agreements, even though as practitioners we know from changes to the palimony statute, the pre-nuptial statute, the alimony statute, and recent legislation addressing a termination of child support at age 19 in a presumptive fashion that the laws can change.[1]

Practitioners may be able to foresee changes in the law by following the developments in Trenton, but frequently there are changes in the law that cannot be anticipated. Often, change is inevitable. "Our laws are not frozen into immutable form, they are constantly in the process of revision in response to the needs of a changing society."[2]

New law might prevent the terms of an agreement from being followed, or may change what the parties thought the outcomes would be. Legal changes can hamper contracts and the follow-up arising out of them.

If there is a change in the law, parties have few retroactive remedies because retroactive relief under a new statute has been held to be unconstitutional in most cases.[3] Parties will likely not be able to stop the implementation of a new law on constitutional grounds under the contract clause.[4] So, the entry into a timing of law or freeze clause is apparent. Unanticipated changes in the law can render performance of an agreement impractical or impossible.

Practitioners need to be aware that the U.S. Supreme Court has interpreted the contract clause to mean it does not prohibit a state from enacting legislation with retroactive effects.[5] There are even instances when legislation expressly states that it will be retroactive, but if there is no legislative intent for retroactive relief the courts are generally inclined not to do so.[6]

There is a need for practitioners to think of ways to overcome unanticipated changes in the law. Even with existing laws there could be unforeseen problems in following through with contracts, but the parties should be able to choose the timing of the law that would apply to their agreements. Such clauses can include a provision that establishes that the laws of the state of New Jersey existing as of the entry of the agreement will apply, or a clause that limits the interpretation of the agreement to laws that are in effect at the time the issue arose. The purpose of a freeze clause is to allow the parties to understand which laws will apply, such as the laws in effect at the time the agreement was entered into, which are the laws their attorneys were familiar with, or future laws that may not have been anticipated or predicted.

This timing of the law clause is different than a choice in law clause because in a choice of law clause the parties are selecting which law would apply, but in a choice of timing clause the parties are discussing when to deal with the law that would apply to particular issues.

This author believes that parties should include a clause in their agreements to choose the timing of the applicable law to either limit the interpretation and execution of the agreement to the law existing as of the date of the execution of the agreement, or allow future law that is

unknown and unpredictable to apply. If the parties cannot agree on a freeze clause, it is highly doubtful a judge would render what would be an advisory opinion and determine the choice of timing of the law to apply. So, choosing the timing of the application of laws is one of those rare instances when a judge could not intervene or render a decision to resolve a dispute.

The desire to select the timing of the law to apply to the agreement does not appear to be an issue that has resulted in any published decisions in the state. Given that parties and their attorneys are presumed to be aware of the existing statutes and intend to incorporate them, freezing the timing of the law would appear to be an enforceable provision. It would also meet the parties' expectations of being able to predict the outcome of their agreement with accuracy by knowing the law that would apply at the time that there were any disputes regarding any provisions in the agreement.

As practitioners discuss the issue of timing of the law with their clients, there is one counterpoint that would potentially stand out among others as to why a freezing clause should not be agreed upon. Provisions that at one stage of a case may seem to be appropriate may, as public policy changes, conflict with the shifting public policy. All a practitioner needs to do is to look back at the *Dolce v. Dolce*[7] case to realize the potential pitfalls of freezing provisions in place that may actually conflict with how outcomes would otherwise be resolved under the law.

Practically speaking, a clause discussing the timing of law can be a useful tool to provide the parties with the ability to gain certainty and knowledge regarding how their agreements would be interpreted in the future by looking at the law in effect at the time of the agreement or the law in effect in the future. Parties should be able to enforce the timing of the law in their agreements because there would appear to be few reasons or obstacles not to do so. A skillful practitioner needs to give great thought to setting a freezing or timing of law clause, recognizing that future law may be more beneficial to a client than the current law.

Endnotes

1. P.L. 2015 (c) 223.
2. *Richardson v. Ramirez*, 418 U.S. 24, 82 (1974).
3. *Maeker v. Ross*, 219 N.J. 565, 581 (2014).
4. *Energy Reserves Group, Inc. v. Kansas Power & Light Company*, 459 U.S. 400, 416 (1983).
5. *United States Trust Company of New York v. New Jersey*, 431 U.S. 117 (1977).
6. *Spangenberg v. Kolawalski*, 442 N.J. Super. 529 (App. Div. 2015).
7. 383 N.J. Super. 11 (App. Div. 2006).