

## **Do Actions Speak Louder than Words? Non-Waiver Provisions Under Attack**

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When two parties enter into an agreement they often rely upon a contractual provision known as a “non-waiver” clause in order to protect their interests. The non-waiver clause helps to prevent the parties from inadvertently waiving their contractual rights through their actions. Put another way, non-waiver clauses ensure that the terms and conditions of an agreement can’t be modified just by the actions of the parties. Rather, a non-waiver clause generally provides that the parties to a contract may not change or modify their agreement unless both parties agree to the proposed change or modification in writing.

In the recent case, *Hovnanian Land Investment Group, LLC v. Annapolis Towne Centre at Parole, LLC*, 415 Md. 337 (2010), the Maryland Court of Appeals examined the extent to which such non-waiver provisions are enforceable. The court concluded that, in certain circumstances, a contractual provision may be waived by actions, statements, or other conduct of the parties without a written waiver even when the contract in question contains a non-waiver clause. While the *Hovnanian* decision does not represent a new line of thinking in this area, it does further chip away at the protections provided by non-waiver clauses in the State of Maryland.

This article provides (i) a summary of the *Hovnanian* opinion, (ii) an examination of the future implications of the *Hovnanian* decision on the enforcement of non-waiver clauses in Maryland; and (iii) practical suggestions for preserving the enforceability of non-waiver provisions in existing and future commercial contracts.

i. The *Hovnanian* Case.

Annapolis Towne Centre at Parole, LLC (the “Seller”), owner and developer of a mixed-use development known as Annapolis Towne Center at Parole (the “Development”), entered into a Purchase and Development Agreement on March 3, 2005 (the “Agreement”), with Hovnanian Land Investment Group, LLC, a residential developer (the “Buyer”). The Agreement contained a non-waiver clause which stated:

No change or modification of this Agreement shall be valid unless same is in writing and signed by [Buyer] and Seller. No purported or alleged waiver of any of the provisions of this Agreement shall be binding or effective unless in writing and signed by the party against whom it is sought to be enforced.

After two years of negotiations between the parties, the Buyer terminated the Agreement and refused to close on the purchase of the property, alleging that the Seller failed to meet one of the closing conditions under the Agreement. Specifically, the Buyer argued that under the terms of the Agreement, the Seller was required to record a declaration addressing the payment of common area maintenance charges (“CAM

Charges”). The original declaration and the amended and restated declaration filed by the Seller each provided that annual assessments of the CAM Charges would be addressed in supplemental agreements. Both the original declaration and the amended and restated declaration were heavily negotiated by the parties prior to filing, and at no time did the Buyer raise any issue with respect to the CAM Charges provision as it did with other material provisions in the declaration and the amended declaration.

When the Buyer refused to complete the purchase due to the absence of a CAM Charges provision in the declaration, the Seller filed a complaint in the Circuit Court for Anne Arundel County, seeking a declaratory judgment that the Buyer had breached the Agreement. The Circuit Court ultimately sided with the Seller finding that the non-waiver provision and the CAM Charges provision were waived by the Buyer because both the declaration and amended declaration were heavily negotiated by the parties and at no time did the Buyer object to the provision stating that CAM Charges would be addressed in supplemental agreements. In fact, the court found that the Buyer acknowledged the applicable provision and its impact and still treated the Agreement as valid. The Circuit Court deemed these actions to be proof that the parties intended to waive *both* the non-waiver clause and the substantive CAM Charges provision. The Maryland Court of Special Appeals affirmed and the Maryland Court of Appeals (the “Court”) granted certiorari to address whether a waiver of a contract right may be inferred from a party’s conduct where the contract contains an express “non-waiver” provision requiring any waiver to be in writing.<sup>1</sup>

The Court affirmed the Court of Special Appeals’ holding that a party to a contract may waive a contractual condition through its actions or statements, even when that contract contains a non-waiver clause. In support of its holding, the Court cited various cases making it clear that, in Maryland, it has been universally accepted that, “even though a written contract stipulates that it may not be varied except by an agreement in writing, nevertheless, the parties, by a subsequent oral agreement, may modify it by mutual consent.”<sup>2</sup> According to the Court, precedent clearly instructs that courts should readily look beyond a non-modification clause and focus on the actions of the parties. Parties have the freedom of contract, which includes the freedom to alter their contractual agreements, provided that both parties have mutual knowledge of the alteration and mutually accept the non-conforming actions. Generally, a party alleging waiver must show the intent to waive both the contractual provision at issue and the non-waiver clause itself. Such waiver can be implied from the actions surrounding waiver of the disputed condition.

## ii. Implications for Future Non-Waiver Clause Enforcement in Maryland

Since the 1950s, it seems that Maryland courts have clearly followed the common law rule that a non-waiver clause can be subsequently waived by the conduct of the parties. Non-waiver provisions are treated the same as any other contractual

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<sup>1</sup> Three questions were presented to the Court of Appeals in the *Hovnanian* case. However, the non-waiver clause holding is the only relevant holding for purposes of this article. Accordingly, the Court’s additional holdings are not discussed herein.

<sup>2</sup> *Freeman v. Stanbern Const. Co.*, 205 Md. 71, 76 (1954).

provisions – parties have freedom of contract and therefore, can mutually agree to change their contractual agreements, even if they previously agreed that any such modifications need to be in writing. In *Hovnanian*, the Court acknowledged that the determination of whether waiver has occurred requires a highly fact-intensive investigation. Meaning that, in the event of a conflict, courts will heavily scrutinize the actions of the parties and look to see whether they acted in a way that waives both the substantive provision in question and the non-waiver clause itself.

While the *Hovnanian* decision is not revolutionary, it does demonstrate the continuing trend of reducing the effectiveness of non-waiver clauses under Maryland law and shows how these provisions are generally disfavored by Maryland courts.

iii. Maintaining the Validity of a Non-Waiver Clause.

Notwithstanding the continued erosion of the enforceability of non-waiver clauses, in practice, parties should continue to include them in their commercial agreements. However, if you are using contracts in your business that contain non-waiver clauses, the mere inclusion of a non-waiver clause does not mean that the only way to waive or amend the contract is in writing. Parties must be vigilant in observing the terms of their contract and remember that a court will scrutinize the actions of the parties and not merely the written words of their agreement. As the *Hovnanian* decision reminds us, under Maryland law, even with a non-waiver clause, the parties' behavior may waive or modify the terms of the agreement even without a written waiver or modification.

In order to avoid such a circumstance and to maintain the integrity of the non-waiver clause and the agreement as a whole we would recommend the following:

- Always act consistently with the terms and conditions of an existing contractual agreement;
- If you are taking actions that run contrary to a provision in your agreement, or could, in any way, be misconstrued or interpreted as a waiver of a provision in your agreement, request that the other party to the agreement sign an acknowledgment certifying that the actions in question do not constitute a waiver; and
- Contractual agreements can and should be amended if they run contrary to the intent of the parties. In other words, if contracting parties decide it is in their mutual interest to revisit the terms of their original business arrangement, be sure that the underlying written agreement is modified accordingly.

If you need assistance in drafting an agreement, reviewing an agreement, or with other business transactions, please contact one of our business transactions attorneys at (410) 727-6600 or by e-mail at:

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