

# UPDATE THE “BOILERPLATE” PROVISIONS IN YOUR INVESTMENT AGREEMENTS

A recent decision from the United States District Court from the Southern District of New York underscores the importance that investors make sure provisions in their investment agreements – which are frequently considered “boilerplate” – are updated to reflect recent court decisions.

In the case *Blue Ridge Investments LLC v. Anderson-Tully Co.*, three “boilerplate” clauses in the investment agreements – a New York choice of law clause, a “no oral modifications” clause, and an attorneys’ fees clause – resulted in the investor recovering an additional \$784,000 on its investment plus attorneys’ fees.

Blue Ridge purchased voting cumulative participating mandatory redeemable preferred shares of Anderson-Tully Co. (“ATCO”). The preferred was redeemable by ATCO, provided ATCO paid not only the principal and accrued dividends but also a “make whole amount” – discounted excess dividends. ATCO elected its option to redeem Blue Ridge’s preferred shares. However, an ATCO senior executive

claimed that a Blue Ridge senior executive verbally waived the make whole amount if ATCO redeemed Blue Ridge’s preferred shares. Blue Ridge denied making such waiver.

The judge in the case cited a clause in the investment agreement which prohibited oral modifications as follows:

“No amendment, modification or waiver of any provision of this subscription agreement and no consent by any party to departure herefrom shall be effective unless and until such amendment, modification or waiver shall be in writing and duly executed by both of the parties hereto.”

The judge, applying New York state law, ruled that because of the “no oral modifications” clause and because there was no written waiver of the make whole amount, Blue Ridge was entitled to the make whole amount of \$784,000.

In addition, the judge awarded Blue Ridge its attorneys fees associated with the litigation as a result of the provision in the investment agreement providing for attorneys fees.