

Drafting Contracts to Protect Your Company

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Overview

Key terms customary in commercial contracts:

- Limitations of Liability
- Confidentiality
- Indemnification

Boilerplate highlights:

- Notices
- Assignment
- Publicity

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Limitations of Liability

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Risk Allocation: Limitations of Liability and Damages Caps

Typically, two provisions:

- Exclusion of **entire categories of damages** (e.g., “consequential” damages and lost profits)
 - *“EXCEPT WITH RESPECT TO AMOUNTS PAYABLE TO A THIRD PARTY PURSUANT TO AN INDEMNITY OBLIGATION, IN NO EVENT WILL LICENSOR BE LIABLE TO LICENSEE FOR ANY INCIDENTAL, CONSEQUENTIAL, INDIRECT, EXEMPLARY, SPECIAL, OR PUNITIVE DAMAGES, INCLUDING WITHOUT LIMITATION LOST PROFITS, THE COST OF PROCURING SUBSTITUTE GOODS OR SERVICES, LOSS OF USE, OR LOSS OF DATA, WHETHER OR NOT LICENSOR HAD ADVANCE NOTICE OF THE POSSIBILITY OF SUCH DAMAGES.”*
- Cap on **monetary damages** (e.g., immediate and natural result of the breach).
 - *“EXCEPT FOR A BREACH OF CONFIDENTIALITY AND LIABILITY PURSUANT TO AN INDEMNITY OBLIGATION, LICENSOR WILL NOT IN ANY EVENT BE LIABLE TO LICENSEE FOR AGGREGATE TOTAL DAMAGES IN EXCESS OF THE AMOUNTS PAID OR PAYABLE TO PROVIDER HEREUNDER IN THE 12 MONTHS PRIOR TO THE EVENTS GIVING RISE TO A CLAIM. THESE LIMITS WILL APPLY NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY HEREIN.”*

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Risk Allocation: Limitations of Liability and Damages Caps

Relationship to indemnification

- If not excluded, can unintentionally limit ability to recover under indemnification clause

Common exclusions from caps – depends on parties' bargaining power and nature of agreement

- Indemnification obligations (especially infringement claims)
- Breach of confidentiality/data security obligations
- Violations of applicable law
- Damage to tangible property
- Personal injury/death
- Gross negligence (cannot be limited in certain states)
- Willful misconduct (cannot be limited in certain states)

Risk Allocation: Limitations of Liability and Damages Caps

Contracting with a governmental entity

- **Sovereign Immunity:** Common law doctrine that the government cannot be sued without its consent. Two parts: immunity from suit and immunity from liability.
- Many states have waived sovereign immunity as it applies to breach of contract claims.
- **Texas**
 - By contracting with a private party, the State waives immunity from liability. Absent a waiver of immunity from suit, other party will need to seek legislative consent to sue.
 - There is a limited waiver of immunity for breach of contract claims against local governmental entities, but not state entities.
 - Texas Tort Claims Act provides a waiver for certain claims for property damage, personal injury, and death proximately caused by the wrongful act or omission or negligence of an employee acting within the scope of their employment.
- Consideration when contracting with entities like hospitals and universities

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