



# Protecting Your Blind Side:

## A Lessons Learned Guide to Mitigating Contract Risk

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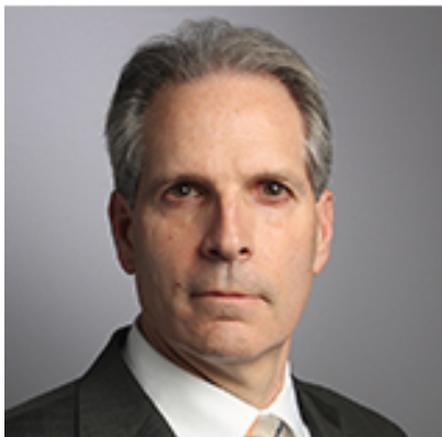
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## Overview

- The Trouble with B's: Boilerplate and Buzz Words
- The Not So Doctrinaire Economic Loss Doctrine
- ADR: An Alternative View



# **THE TROUBLE WITH B' S: BOILERPLATE AND BUZZ WORDS**



## The Trouble with B's: Boilerplate & Buzzwords

- Choice of Law
- Choice of Forum
- Limitation of Liability
- Period of Performance
- As Is
- Best Efforts
- Taxes
- Termination Notice



## Boilerplate – Choice of Law

- Agreement of parties relevant but not dispositive
  - Choice of Law: Express choice of law provision usually given effect subject to two limitations:
    - sufficient relationship between chosen law and the parties or transaction; and
    - does not offend state public policy
- Seller, VA corporation, negotiated for CA choice of law provision
  - Buyer, NY corporation, sued for breach of implied duty of good faith and fair dealing under CA law
  - VA does not recognize implied duty of good faith and fair dealing
  - Seller argued for VA law and won



## Boilerplate - Forum

- Deference normally given to forum identified in contract
- *Atlantic Marine Constr. Co. v. U. S. Dist. Court for the W. Dist. of Texas*, 134 S. Ct. 568 (2013)
  - Plaintiff’s choice of where to file irrelevant
  - Where contract contains valid forum-selection clause, that clause represents the parties’ agreement as to the most proper forum, “should be given controlling weight in all but the most exceptional cases”
- Question remains: is agreed upon forum clause mandatory or permissive?



## Boilerplate - Forum

- *BAE Sys. Tech. Sol. & Servs., Inc. v. Republic of Korea's Defense Acquisition Program Administration*
  - 884 F.3d 463 (4th Cir. 2018), *as amended* (Mar. 27, 2018), *cert. denied sub nom. Republic of Korea's Def. Acquisition Program Admin. v. BAE Sys. Sol. & Servs., Inc.*, No. 18-19, 2018 WL 3241795 (U.S. Oct. 1, 2018)
- Mandatory or permissive forum clause?
  - disputes “shall be resolved through litigation and the Seoul Central Court” in South Korea “shall hold jurisdiction”
- Fourth Circuit:
  - If the forum clause is permissive, no presumption in favor of enforceability
  - Clause deemed permissive because no “specific language of exclusion” – it *conferred* jurisdiction on a forum, but did not *limit* jurisdiction to that forum



## Boilerplate – Limitation of Liability

- Limits on consequential damages generally enforceable:  
UCC § 2-719(3)
- Back door to consequentials even if limited by contract:  
UCC § 2-719(2)
  - “Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.”
- *Cooley v. Big Horn Harvester Systems*, 813 P.2d 736 (Co. 1991)
  - Plaintiff purchased system to store and distribute grain that never worked, so agreed upon limitation to remedy of repair / replace ineffective



## Boilerplate – Limitation of Liability

- *BAE Systems v. SpaceKey Components*, 752 F.3d 72 (1st Cir. 2014)
  - Limited remedy of repair / replace / credit enforceable as plaintiff never attempted to invoke it – no showing it would have been futile
- *Brown v. Louisiana-Pac. Corp.*, 820 F.3d 339 (8th Cir. 2016)
  - Homeowner alleged limited warranty for cost of repair/replace of non-weather resistant trim for house inadequate
  - Court: limited remedy did not need to compensate plaintiff “for the entirety of his damages” to mean it “failed of its essential purpose”



## Boilerplate – Period of Performance

- How long is one year?
  - Middleweight boxer signed management contract on January 1
  - Term: “One year from date of execution”
  - On January 1 of the following year, boxer signed with new manager
  - New manager inked world championship fight at Madison Square Garden
  - Former manager sued for breach, arguing that one year from January 1 meant contract lasted until 11:59 on the following January 1



## Boilerplate – “As Is”

- Courts often reject “as is” clauses in face of “conflicting” provisions
  - *Luig v. N. Bay Enterprises, Inc.*, 55 F. Supp. 3d 942 (N.D. Tex. 2014), *rev’d and vacated in part on other grounds*, 817 F.3d 901 (5th Cir. 2016)
    - Contract for sale of used, 50-year-old helicopter
    - Buyer conducted pre-purchase inspection
    - Accepted helicopter in “as is, where is” condition
    - Seller provided certificate of airworthiness
    - Court held that “as is” clause disclaimed only implied warranties, not express warranty of airworthiness



## Boilerplate – “As Is”

- Purchase of real estate parcel “as is / where is”
  - Prospectus advised “legal access” available via roadway easement
  - Seller’s easement arguably did not include use of roadway by subsequent purchasers
- P&S Agreement for commercial property specified building to be sold in “as is” condition
  - Pre-closing discovery of mold led to side letter creating escrow account for mold remediation; cost exceeded escrow
  - Order of precedence clause in P&S stated it trumped all other agreements
  - Court held that “as is” clause not valid with respect to mold issues



## Boilerplate— “Best Efforts”

- Most courts treat “best efforts” as synonymous with “reasonable efforts”
  - Best efforts do not mean every conceivable effort
  - Differing standards may apply if both terms found in contract
  - Differing standards may apply depending on whether term is outward or inward focused
    - Defined by industry practice or party’s standard practice?
- Consider negotiating definition that excludes word “best” and uses some variant of “reasonable”
  - Mitigates jury risk



## Boilerplate – “Taxes”

- What is a “Tax”?
  - GOCO CERCLA cases turned on this question
    - WWII manufacturing contracts imposed duty on government to reimburse contractors for “taxes” incurred as a result of contract
  - Definition ambiguous enough to include environmental cleanup costs imposed by changes in the law
- P&S Agreement contained reps and warranties that survived closing, including one for paid and unpaid taxes
  - Local regulations required Buyer to pay fees to improve water treatment facility
  - Seller claimed charges did not constitute taxes – court disagreed



## Boilerplate – “Termination Notice”

- When can I terminate?
  - Parties agreed that contract term was for one year plus two one month option periods “exercised automatically unless terminated upon 10 days written notice”
  - Buyer issued termination notice halfway through base period
  - Seller sued for lost profits on remainder of base period, arguing that termination notice applied only to option period



## Boilerplate – Practice Tips

- Never assume common understanding of “standard” language
- Negotiate for clarity up-front to avoid disputes afterward, e.g., identify whether “lost profits” are direct or consequential damages
- Keep records of contract negotiations in the event court deems clause(s) ambiguous
- Substantiate choice of law / choice of forum selection – eliminate wiggle room



## Boilerplate – Practice Tips

- Ensure consistency with “as is” clause within the contract and in any ancillary documents
- Avoid, if possible, use of “best efforts” clause and substitute instead a variant of “reasonable,” e.g. “commercially reasonable”
- Draft with clarity in mind when dealing with terms or clauses capable of being read narrowly or broadly

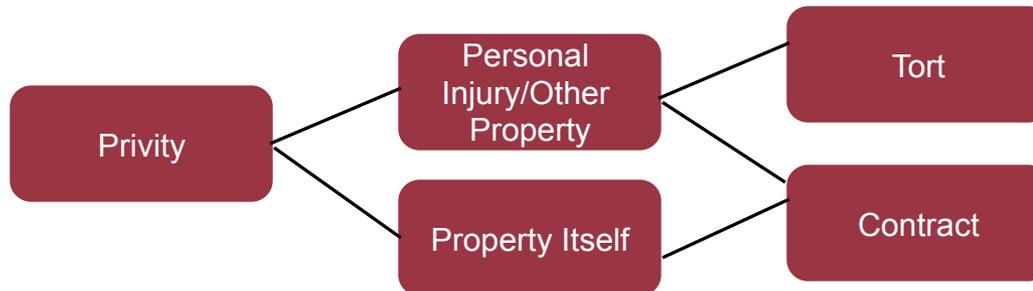


# **THE NOT SO DOCTRINAIRE ECONOMIC LOSS DOCTRINE**



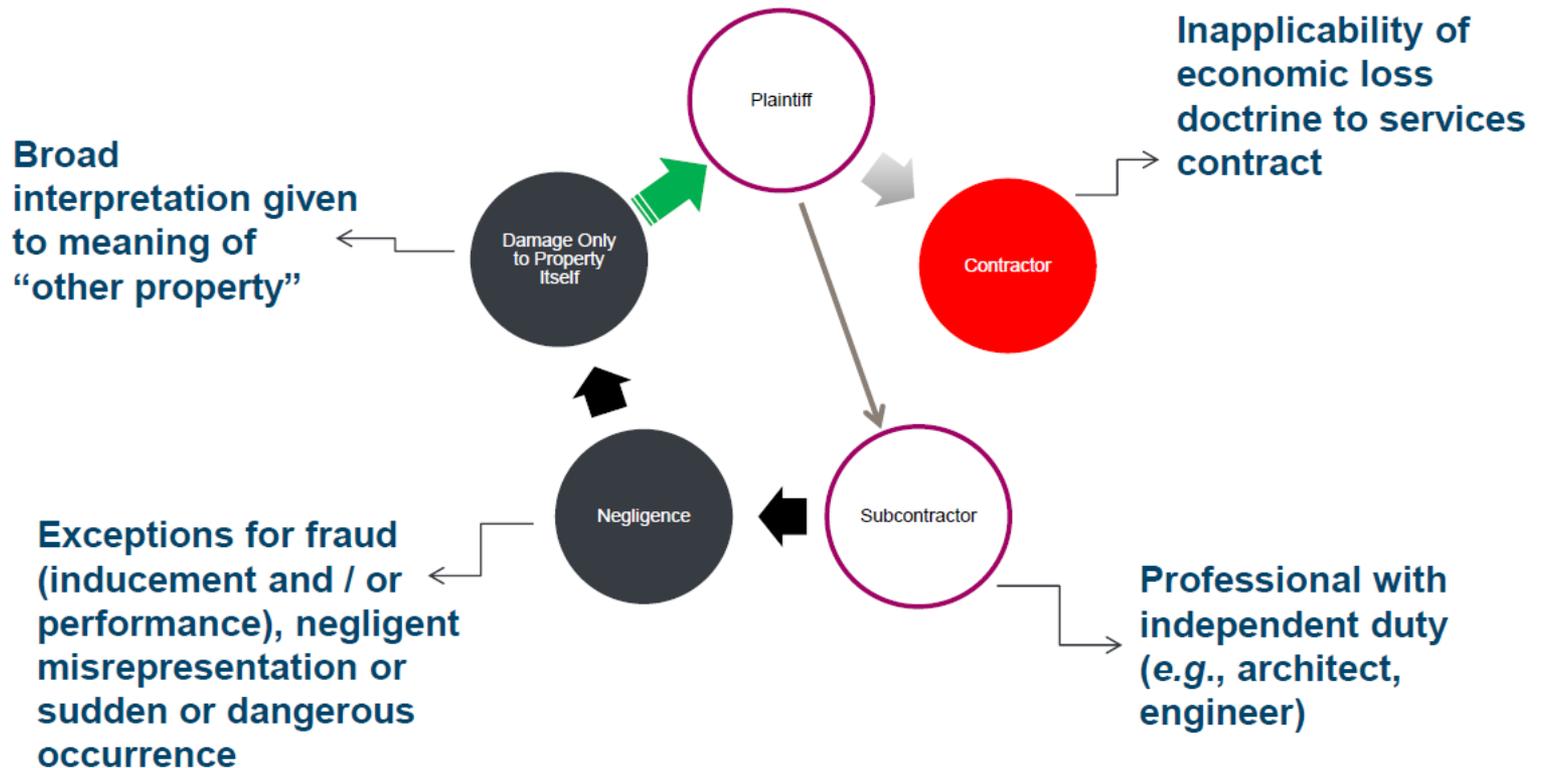
# The Privity Principle

- The Eroding Economic Loss Doctrine
  - The Economic Loss Doctrine seeks to draw a line between contracts and torts by precluding tort claims for risks that parties allocated by contract
  - Over time, negligence exposure has begun to intrude into breach of contract claims





# The Reappearing Tort Act – How Courts Limit the Scope of the Economic Loss Doctrine





## Economic Loss Doctrine – Practice Tips

- Identify any variations in the Economic Loss Doctrine among relevant states as part of your choice of law analysis



# **ADR: AN ALTERNATIVE VIEW**



## ADR: An Alternative View

- Non-Binding Arbitration
- Narrow Arbitration Clause
- Mediation
  - Misreading FRE 408
  - Non-Confidentiality under ADRA



## The Disputed Resolution Clause - Arbitration

- Non-binding Arbitration: When Teflon Gets Sticky
  - Statute of Limitations concerns
  - Lawsuit may be time-barred if filed after arbitration concludes and outside SoL (no equitable tolling)
    - *Shailendra Kumar, P.A. v. Dhanda*, 426 Md. 185, 43 A.3d 1029 (2012): “while non-binding arbitration may have constituted a condition precedent to litigation, pursuing arbitration neither postponed the accrual of the underlying breach of contract claims, nor otherwise tolled the statute of limitations...”



## The Disputed Resolution Clause - Arbitration

- Two ways to protect against SoL bar
  - Include contractual provision tolling limitations in event arbitration not concluded before limitations would have run,
  - File protective action and motion to stay pending arbitration



## The Disputed Resolution Clause - Arbitration

- Navigating the Narrow Arbitration Clause
  - Contracts often contain multiple dispute resolution procedures
    - Arbitration limited to specific class of disputes
  - “Narrow” arbitration clauses often fail to limit arbitrator’s power to decide scope of arbitration clause
    - Dispute resolution clauses tend to incorporate by reference entirety of AAA Commercial Rules
    - Rule 7 gives arbitrator power to decide breadth of “narrow” clause

## Disputed Resolution Clause – Practice Tips

- Avoid incorporating in whole any sponsoring body's arbitration rules unless you are certain you can live with them
  - E.g., Incorporate by reference AAA Commercial Rules of Arbitration except for Rule 7 and leave with the court the power to determine the arbitrator's jurisdiction

## The Disputed Resolution Clause - Mediation

- *Privilege? What privilege?*
  - FRE 408 is a rule concerning admissibility, NOT privilege
  - Privileges are covered in the next section of the Federal Rules of Evidence: “Article V. Privileges”
- *Say what?*
  - Statements covered by FRE 408 can be used against you
  - The rule precludes admissibility for certain purposes (to prove or disprove the validity or amount of a disputed claim or to impeach with prior inconsistent statement) but other uses are potentially fair game



## Mediation – Practice Tips

- Insert language broader than FRE 408:
  - The Parties agree that statements made and documents exchanged during the course and/or in furtherance of the Mediation are subject to FRE 408. The Parties further agree that none of the Parties shall use any statements made or documents (including information contained therein) exchanged during any Mediation-related meeting, discussion, correspondence or other communication (a) in any adversarial proceeding or as the basis for any adversarial proceeding in any forum; (b) in depositions; (c) in any collateral investigation or action; or (d) in any manner or for any purpose other than in connection with the settlement negotiations between them. This restriction shall not apply to any document or information (i) which is in the public domain, or (ii) which is properly obtained by a party, either in discovery or otherwise, from some source other than the settlement negotiations between them.



## Administrative Dispute Resolution Act (ADRA)

- Statutory Framework for ADR with Government Agencies
  - Confidentiality (5 USC 574)
    - Waives confidentiality for communications “provided to or . . . Available to all parties to the dispute resolution proceeding.” 5 USC 574(b)(7)
  - Federal ADR Council recommended use of separate confidentiality agreement between the parties
  - Unclear whether such side agreements are enforceable
  - Best practice: execute side agreement, limit agency note-taking to counsel, and direct especially sensitive communications to mediator in private session



Questions?

***Thank you.***