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Staying Out of Court: Contract Clauses to Help Avoid (or Win) Lawsuits

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Top 10 Clauses

- 1. Notification / Administrative Steps in event of alleged breach**
- 2. Alternative Dispute Resolution**
- 3. Class Action Waiver**
- 4. Release**
 - With Waiver, Covenant Not to Sue, Indemnity
- 5. Disclaimer / Exclusion**
 - Of Implied Warranties, Third Party Beneficiaries, etc.



Top 10 Clauses

- 6. Merger-Integration / No Modification**
- 7. Choice of Law / Venue**
- 8. Attorneys' Fees to Prevailing Party**
- 9. Damage Limitation / Liquidation**
- 10. Successors & Assigns**
 - Limiting who can sue and be sued



1. Notification / Admin Steps

- Idea is to set up preconditions to the bringing of suit
- Example 1: for a product defect, consumer must notify the manufacturer and follow steps for attempting to resolve
- Example 2: before bringing suit, the heads of the two companies involved must meet and make good faith attempt to resolve
- How it helps:
 - The other side may not meet the precondition, resulting in dismissal if s/he tries to sue
 - You might actually resolve the dispute



1. Notification / Admin Steps

■ Example 1:

Before warranty service is provided, you must take the following steps:

- follow the service request procedures specified by the Service Provider
- backup or secure all programs and data contained in the product
- provide the Service Provider with all system keys or passwords
- provide the Service Provider with sufficient, free, and safe access to your facilities to perform service
- remove all data, including confidential information, proprietary information and personal information, from the product
- remove all features, parts, options, alterations, and attachments not covered by the warranty
- ensure that the product or part is free of any legal restrictions that prevent its replacement



1. Notification / Admin Steps

■ Example 2:

In the event of a dispute arising under this Agreement, each party agrees to notify the other party of the specific complaints or points of disagreement, and to use its good faith efforts to resolve such dispute, without legal action. If the dispute is not resolved at lower levels, the CEOs of each party shall meet and confer in a final attempt to resolve the dispute before legal action.



1. Notification / Admin Steps

- Under the U.C.C. chapter on sales of goods, pre-suit notification of breach of warranty, plus an opportunity to repair, is required; if not given, suit is subject to dismissal
 - *Alvarez v. Chevron Corp.*, 656 F.3d 925, 932 (9th Cir. 2011)



2. Alternative Dispute Resolution

- **The primary ADR method is arbitration**

- Agreed pre-suit mediation is less common

- **There are pros and cons to arbitration**

- Cost
- Control
- Confidentiality



- **It is a tried-and-true method for staying out of court**

- It replaces litigation, at least in most cases

- **Might include:**

- Waiver of jury trial
- Class Action waiver (see below)



2. Alternative Dispute Resolution

■ Example:

Any controversy, dispute or claim arising out of or relating to this Agreement, or its interpretation, application, implementation, breach or enforcement which the parties are unable to resolve by mutual agreement, shall be settled by submission by either party of the controversy, claim or dispute to binding arbitration in Los Angeles County, California (unless the parties agree in writing to a different location), before a single arbitrator in accordance with the rules of the American Arbitration Association then in effect. The decision and award made by the arbitrator shall be final, binding and conclusive on all parties hereto for all purposes, and judgment may be entered thereon in any court having jurisdiction thereof.



2. Alternative Dispute Resolution

- **The Federal Arbitration Act provides for private dispute resolution via arbitration; awards are enforceable in court**
 - 9 U.S.C. § 1 ff
- **Applies in federal and state courts**
 - *Southland Corp. v. Keating*, 465 U.S. 1 (1984)
- **The U.S. Supreme Court (Court) has recognized the FAA as evidencing “a national policy favoring arbitration.”**
 - *Id.*
- **FAA reflects a "liberal federal policy favoring arbitration agreements."**
 - *Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983)



3. Class action waiver

- May not be applicable to your situation
- If it is, then removing the class action option can keep you out of court altogether
 - Without a class action option, individual claims may be too small to pursue economically or for plaintiffs' lawyers to want to handle
- Most commonly seen as part of ADR clause



3. Class action waiver

■ Example:

Class Action Waiver. Each party waives the right to litigate in court or arbitrate any claim or dispute as a class action, either as a member of a class or as a representative, or to act as a private attorney general.



3. Class action waiver

- **Class action waivers have been upheld repeatedly, in a variety of contexts**
 - ***Epic Sys. Corp. v. Lewis***, 138 S. Ct. 1612 (2018) (employment)
 - ***Dorman v. Charles Schwab Corp.***, No. 18-15281 (9th Cir. 2019) (ERISA claims)



4. Release

- Typically entered into after a dispute arises
- Commonly includes:
 - Indemnification
 - Covenant not to sue
 - Waiver of trial / jury trial rights



4. Release

■ Example:

Buyer hereby releases, remises, acquits and forever discharges Seller and its employees, agents, representatives, consultants, attorneys, fiduciaries, servants, officers, directors, partners, predecessors, successors and assigns, subsidiary corporations, parent corporations, and related corporate divisions (all of the foregoing hereinafter called the “Released Parties”), from any and all actions and causes of action, judgments, executions, suits, debts, claims, demands, liabilities, obligations, damages and expenses of any and every character, known or unknown, direct and/or indirect, at law or in equity, of whatsoever kind or nature, whether heretofore or hereafter arising, for or because of any matter or things done, omitted or suffered to be done by any of the Released Parties prior to and including the date of execution hereof, and in any way directly or indirectly arising out of or in any way connected to this Agreement or the Purchased Assets conveyed hereby.



4. Release

■ Release Language – California:

After reviewing the provisions of Section 1542 of the California Civil Code set out below, Plaintiff hereby expressly waives any rights or protections provided by said Section 1542, and expressly acknowledges that this Release of Claims includes claims both known and unknown as of the time of the execution of this Agreement. Section 1542 of the California Civil Code provides as follows:

“A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.”



4. Release

■ The Question of Consideration:

- **“An obligation is extinguished by a release . . . upon a new consideration, or in writing, with or without new consideration.”**
 - Cal. Civ. Code § 1541.
- **No consideration required if there is a writing that is (1) plain, (2) explicit, and (3) given for the express purpose of effecting a complete release of the obligation.**
 - See *Crow v. P.E.G. Constr. Co.*, 156 Cal. App. 2d 271, 277 (1957).
- **Consideration is required, however, if there is a release by oral agreement without evidence of the agreement being executed.**
 - See *Piercy v. De Fillipes*, 215 Cal. App. 2d 284, 290-91 (1963)
 - No extra consideration is necessary if the oral agreement has been executed. See *Newman v. Albert*, 170 Cal. App. 2d 678, 683 (1959).



5. Disclaimers / Exclusions

■ Things that can be disclaimed / excluded

- Implied warranties
- Incidental, consequential, punitive damages
- Third-party beneficiaries

■ Disclaimers and exclusions can significantly narrow a dispute or prevent it from getting out of hand



■ In some cases, effective disclaimers can get you completely out of a lawsuit



5. Disclaimers / Exclusions

■ Example:

This warranty is your exclusive warranty and replaces all other warranties or conditions, express or implied, including, but not limited to, any implied warranties or conditions of merchantability or fitness for a particular purpose. As some states or jurisdictions do not allow the exclusion of express or implied warranties, the above exclusion may not apply to you. In that event, such warranties apply only to the extent and for such duration as required by law and are limited in duration to the warranty period.



5. Disclaimers / Exclusions

- Under the U.C.C. and most states' laws, disclaimers of implied warranties are effective if they are conspicuous and specifically mention the type of warranty excluded
- Some states have enacted warranty laws that dial back the ability to exclude implied warranties (California Song-Beverly Act)



6. Merger-Integration / No Modification

- **Merger-Integration:** says that the writing is the full and final expression of the parties' agreement
 - Oral statements or other writings are not part of the agreement and do not influence its interpretation
- **No Modification:** says that the agreement can only be amended by a writing signed by both parties
- **Effect of both:** limits contract interpretation and disputes to the “4 corners”
 - Keeps someone from arguing “... but you told me X”



6. Merger-Integration / No Modification

■ Example:

- *Modifications.* Neither any change nor modification of this Agreement nor any waiver of any term or condition will be valid and binding upon the parties hereto unless such change, modification or waiver is in writing and signed by both parties.
- *Entire Agreement.* This Agreement is intended by the parties to be the final expression of their agreement with respect to the subject matter hereof and is the complete and exclusive statement of the terms thereof notwithstanding any representation or statement to the contrary heretofore made.



6. Merger-Integration / No Modification

- **“When parties enter an integrated written agreement, extrinsic evidence may not be relied upon to alter or add to the terms of the writing.”**
 - *Riverisland Cold Storage, Inc. v. Fresno-Madera Prod. Credit Ass’n*, 55 Cal. 4th 1169, 1174 (2013).
- **“Because a contract’s written terms supersede statements made during the negotiations, evidence other than those written terms is irrelevant, and cannot be relied upon.”**
 - *Copart, Inc. v. Sparta Consulting, Inc.*, 339 F. Supp. 3d 959, 977 (E.D. Cal. 2018) (internal quotations omitted).
- **Extrinsic evidence can come in to “explain[]” or “supplement[]” the document, however.**
 - See Civ. Proc. Code § 1856(b).



7. Choice of Law / Venue

- Choose a venue that makes sense and is convenient for you, and the law of a state that is favorable to you
- In some cases, if the venue is inconvenient for the opponent, it may dissuade him/her from suing
- Choosing a favorable state law may preclude some potential claims
 - E.g., some states do not have punitive damages
 - Some states are known to be business-friendly or defendant-friendly



7. Choice of Law / Venue

■ Example 1 – Law:

This agreement shall be construed in accordance with the laws of the State of Delaware, without reference to its conflict of law provisions, and the obligations, rights and remedies of the parties hereunder shall be determined in accordance with such laws.



7. Choice of Law / Venue

■ Example 2 – Venue:

No Claim may be commenced, prosecuted or continued in any court other than the courts of the State of New York located in the City and County of New York or in the United States District Court for the Southern District of New York, which courts shall have jurisdiction over the adjudication of such matters, and the Parties hereby consent to the jurisdiction of such courts and personal service with respect thereto.



7. Choice of Law / Venue

■ Law/Venue jurisdiction chosen must have some relationship to parties or dispute

- *Chavez v. Blue Sky Nat. Bev. Co.*, 268 F.R.D. 365, 379 (N.D. Cal. 2010) (applying California law where “Defendants are headquartered in California and their misconduct allegedly originated in California”).

■ For Law/Venue provision to be effective, the dispute must arise from the contract

- *Frenzel v. Aliphcom*, 2015 WL 4110811, at *8 (N.D. Cal. July 7, 2015) (refusing to apply choice-of-law provision where “[n]one of [plaintiff]’s claims arise from the Website Terms of Use”)
- *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 903 F. Supp. 2d 942, 965 (S.D. Cal. 2012) (provision did not apply to Plaintiffs’ *non-contractual claims*)



7. Choice of Law / Venue (cont.)

- **Cal. Labor Code § 925** – prohibits non-California choice of law or venue in employment agreements involving individuals who primarily reside and work in California
 - Applies to contracts entered into, modified, or extended on or after January 1, 2017.



8. Attorneys' fees to prevailing party

- In general, the “American Rule” is that each party absorbs its own legal expenses
- This can be varied by contract – most states allow, if it is reciprocal
- The prospect of paying the other side’s attorneys’ fees can dissuade the opponent from filing
 - Especially a claim that has borderline merit



8. Attorneys' fees to prevailing party

■ Example:

Attorneys' Fees and Expenses. The prevailing party in any action or proceeding between Manager and Owner seeking to enforce this Agreement, or in connection with the Property, shall be awarded its reasonable costs and expenses including reasonable attorneys' fees and expenses.



8. Attorneys' fees to prevailing party

■ Example requiring reciprocity: North Carolina G.S. § 6-21.6

- “Reciprocal attorneys' fees provisions in business contracts are valid and enforceable for the recovery of reasonable attorneys' fees and expenses only if all of the parties to the business contract sign by hand the business contract.”
- The award of reasonable attorneys' fees may not exceed the amount in controversy

■ California Civ. Proc. Code § 1033.5(10)

- Attorneys' fees may be authorized only by contract, statute, or law.



9. Damage limitation / liquidation

- If correctly phrased, these clauses can preclude incidental, consequential, and punitive/exemplary damages
- A common limitation: remedies limited to repair or replacement of affected product – or return of purchase price
- Limiting damages can reduce the amount in controversy to the point that it is economically unfeasible to bring a lawsuit



9. Damage limitation / liquidation

■ Example 1:

Neither party shall be liable to the other for any special, consequential, incidental, punitive, or indirect damages arising from or relating to any breach of this agreement, regardless of any notice of the possibility of such damages, including but not limited to lost profits, business revenue, goodwill or anticipated savings.



9. Damage limitation / liquidation

■ Example 2:

In the event of a breach of this Agreement or any alleged defect in the products or services provided, the sole remedies shall be (a) repair, (b) replacement, or (c) refund of the purchase price, at Seller's option. In any action related to this Agreement or the products and services provided hereunder, in no event shall Buyer recover damages in excess of the purchase price paid hereunder.



9. Damage limitation / liquidation

■ Damages exclusions:

- *SOLIDFX, LLC v. Jeppesen Sanderson, Inc.*, 841 F.3d 827 (10th Cir. 2016) (enforcing damages limitation clause that precluded award of lost profits)
- *Moore & Associates, Inc. v. Jones & Carter, Inc.*, No. 06-5232 (6th Cir. 2007) (enforcing clause limiting damages for breach of engineering design contract to amount paid to engineering firm for its services)



9. Damage limitation / liquidation

■ In California:

- “[A]bsent a violation of public policy, a statute, or a constitutional provision, the parties to a private agreement may allocate risks *in any manner they choose.*”
 - *Reserve Ins. Co. v. Pisciotto*, 30 Cal. 3d 800, 914 (1982) (emphasis added).
- **Cannot exempt responsibility for fraud or willful injury to another’s person or property**
 - Civ. Code § 1668



10. Successors & Assigns

- **Successors/assigns clauses are common**
 - Often, they expand the universe of “parties” who might sue or be sued
- **But these clauses can also be used to limit the universe of who can sue and be sued**
- **Sometimes, cutting off someone from being able to sue can avoid litigation altogether**
- **Also, limiting who can be sued can protect a “deep pockets” party and dissuade the opponent from suing**



10. Successors & Assigns

■ Example:

Assignment, Binding Effect. Neither party may assign its interest in this Agreement, whether voluntarily or by operation of law, without the prior written consent of the other party. This Agreement will be binding upon and will inure to the benefit of the parties hereto and their permitted successors and assigns only. This Agreement is intended for the benefit of the parties hereto and their respective permitted successors and assigns, and is not for the benefit of, nor may any provision hereof be enforced by, any other person.



10. Successors & Assigns

- **California Civil Code §1559: “A contract, made *expressly* for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it”**
- **The agreement must “clearly manifest” the intent to make the obligation in question inure to the benefit of the third party.**
 - *Jones v. Aetna Cas. & Sur. Co.*, 26 Cal. App. 4th 1717, 1725 (1994)
- **An incidental beneficiary is not a successor or assignee**
 - *Arista Films, Inc. v. Gilford Sec.*, 43 Cal. App. 4th 495 (1996)





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