

Top Ways to Mitigate Risk in Commercial Litigation

- **Assuming you have a contract . . .**
 - **Basics of Contract Formation**
 - Intent to be bound
 - Definiteness – reasonable certainty in material terms (price, timing, etc.)
 - Consideration
 - Who is bound to contract?
 - **Agreements to Agree/Agreements in Principle/“Letters of Intent”**
 - Whether a preliminary agreement is enforceable as to ultimate contractual objective depends upon:
 - Under Wisconsin law, agreements to agree do not create binding obligations. *Skycom Corp.*, 813 F.2d at 814; *Witt v. Realist, Inc.*, 18 Wis. 2d 282, 298, 118 N.W.2d 85 (1962).
 - Even if the parties agree on all terms of a contract, there is no contract if the parties understand that the execution of a formal document is a prerequisite. However, if the parties agree that a formal document will be prepared merely to memorialize, the contract is enforceable. *Lambert Corp. v. Evans*, 575 F.2d 132, 135 (7th Cir. 1978) (applying Wisconsin law).
 - Limiting Risk
 - Reservation of rights language evidencing an intent not to be bound
 - The parties are masters of their affairs. *Skycom Corp.*, 813 F.2d at 814.
 - Intent to be Bound
 - Intent is usually, but not always, a fact question
 - Therefore, if litigation can’t be avoided, motion practice is generally not good to resolve a fact question, so it is more expensive

❖ **Practice Pointer – Reservation of Rights language evidencing intent *not* to be bound**

- **And depending on what the contract is for...**
 - **Goods?** UCC applies automatically; it’s uniform enough but don’t assume
 - **Services?**
 - **Both?**
- **Considerations to Mitigate Risk in Commercial Litigation**
 - **Definitions**
 - Necessary to prevent ambiguity (ambiguity = litigation and expense)

- Consistency of provisions
 - Throughout a particular document or transaction
 - Over time
 - Explanations
 - From whole cloth?
 - By reference to statute (e.g., UCC)?
 - From authoritative writings (e.g., industry publications)?
 - **Termination**
 - How long/what are the terms
 - Time limit, project-based, or dependent on a related contract
 - Renewal?
 - Any conditions precedent
 - Automatic or “evergreen” (but how might that affect the ability to re-negotiate?)
- ❖ **Practice Pointer – Docketing renewal decision dates far enough in advance with different people’s calendars**
- When
 - For cause or at-will?
 - At minimum, should include:
 - Events or actions that trigger a party’s right to terminate
 - The termination procedure, including any required notice
- ❖ **Practice Pointer – But beware of limitations like operation of law (e.g., WFDL) and rights and obligations after termination**
- **Representations and Warranties**
 - Survive closing – they usually do; should they?
 - Disclaimer
- ❖ **Practice Pointers**
- **Limit the effect of reps and warranties by**
 - ❖ **Narrowing scope**
 - ❖ **Disclosing exceptions**
 - ❖ **Adding materiality and knowledge qualifiers**
 - ❖ **Non-reliance on any extra-contractual reps and warranties**
 - ❖ **Make indemnification the sole remedy for inaccuracy**
 - **Expand reps and warranties by**
 - ❖ **Keeping them as broadly worded as possible**
 - ❖ **Ensure they survive as long as possible**
- **Terms and Conditions**
 - How communicated
 - Time – at formation? Delivery of good/performance of service?
 - Method
 - Electronic (e-mail, website)

- Print
 - Proof of delivery/acceptance
 - For example, link in email with read receipt and affirmative action acknowledging reception
 - Delivery and/or acceptance of terms is a big problem that litigators come across and think should be given on the front end about how to show a court that your terms and conditions control
- Ensuring agreement on same set of terms and conditions
- Non-starters/must-haves
 - *Force majeure* – always a standard, but COVID-19 has shown us that our thinking about risk and unforeseen events must evolve
 - Mutual indemnification or one-way indemnification
 - Length of term – more than one year is risky for various reasons
 - Assignment
 - Commonly, parties agree not to assign rights and obligations (but party wishing to foreclose possibility should insist on language stating that any assignment will be void and that the parties lack power to assign)
 - Assignment could affect jurisdiction in litigation/collection
 - Amendments
 - Consider your jurisdiction and whether it requires consideration for amendments
 - You may want to limit unwanted amendments by requiring all amendments to be formalized, properly labeled, and/or signed by particular individuals
- **Liability**
 - Sandbagging
 - Generally, when a party sues for breach of contractual representation or warranty, even when it had knowledge of such breach before execution
 - Some states' laws differ on whether sandbagging is permissible (e.g., in Delaware, a party may recover for breach of representation or warranty regardless of whether the party knows the rep or warranty was false)
 - Anti-reliance provisions
 - Generally, when parties seek to avoid claims based on extra-contractual representations
 - Again, state laws differ here (e.g., in Delaware, courts will enforce provisions that say a party is only relying on something in particular and nothing else)
 - Exculpatory clauses/liability waivers
 - Wisconsin law disfavors them. *Atkins v. Swimwest Family Fitness Ctr.*, 2005 WI 4, ¶12, 277 Wis. 2d 303, 691 N.W.2d 334, and courts will not enforce them if the attempt:
 - Is overly broad (waiver for not only negligence, but reckless and intentional conduct)
 - Does not convey what exactly is being waived
 - Is not conspicuously placed
 - Does not give the other party an opportunity to bargain

- For more analysis, see Erik H. Monson, “Is Your Liability Waiver Enforceable? Probably Not,” available at <https://www.wisbar.org/NewsPublications/Pages/General-Article.aspx?ArticleID=27836>
 - Liability caps
 - Limits a party’s maximum liability for contract damages
 - Could be a flat dollar amount, multiple fees, or a percentage of fees payable under the contract
 - But could subject to several carve-outs (e.g., indemnity)
 - **Remedies**
 - Choice of law
 - The parties can specify the substantive law of a state to apply
 - What kind of company are you (cloud-based) and what do you do (contract concern or tort-based)?
- ❖ **Practice Pointer – Specify whether substantive or procedural law applies, or both**
- Choice of forum
 - At the very least, do not agree to an international forum
 - Possibly specify state and/or federal court
 - May depend on where company, legal department, or outside counsel are located
 - Arbitration
 - Pros/Cons
 - If there is one, who is the arbitrating entity? Industry-based (e.g., builders association) or arbitration association (e.g., JAMS or AAA)
 - Specialized-law like WFDL
- ❖ **Practice Pointers**
- ❖ **Consider location of arbitration panel, number of arbitrations, and how selected**
 - ❖ **Consider notice, exhaustion, and other conditions precedent**
 - ❖ **Availability of appeal**
 - Types of damages
 - Equitable (e.g., injunctive)
 - When legal remedies are insufficient and irreparable harm would result without the remedy
 - Remedies could be rescission, injunction, and specific performance
 - Defenses could be laches or unclean hands

❖ **Practice Pointer – Agreement could include provision that irreparable harm would result from breach, or that specific performance should be granted**

- Liquidated
- Indirect
 - For example, consequential, incidental, special, punitive
 - Can do carve-outs for fraud or other intentional conduct and for certain indemnification obligations

○ **Insurance**

- Coverage
 - Contract should contain covenant requiring parties to maintain specific levels of coverage
 - Kind of coverage
 - Period of time of coverage
- Notice – make claim/tender timely

○ **Indemnification**

- One party should compensate another for agreed upon costs
- Duty to defend and hold the identified party harmless
- Direct claims, third-party claims, or both?

❖ **Practice Pointers**

- ❖ **If you promise it, make sure insurance covers it**
- ❖ **Define indemnifiers and indemnify appropriately**
- ❖ **Be careful about rights of indemnitee if indemnifier assumes defense and has right to settle**

○ **Internet**

- Entering forums for jurisdictional purposes – general versus specific jurisdiction
- Complying with state privacy and internet laws and protecting yourself

❖ **Practice Pointer – Complying with state privacy and internet laws and protecting yourself**

