

# Top Ways to Mitigate Risk in Commercial Litigation

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# Assuming you have a contract . . .

## ► Basics of contract formation

- 1. Intent to be bound
- 2. Definiteness – reasonable certainty in material terms (price, timing, etc.)
- 3. Consideration
- 4. Who is bound to contract?

## ► Agreements to agree/agreements in principle/“Letters of Intent”

- Intent is usually, but not always, a fact question, so can make litigation more expensive
- “Agreements in principle” or “letters of intent” can be made to reflect parties’ intent
- ❖ **Practice Pointer - Reservation of Rights language evidencing intent *not* to be bound**





And depending on what the contract is for . . .

- ▶ Goods?
- ▶ Services?
- ▶ Both?

. . . these are ways to mitigate risk in commercial litigation.



# 1. Definitions

- ▶ Necessary to prevent ambiguity (ambiguity = litigation and expense)
- ▶ Maintain consistency
  - ▶ Throughout a document or set of documents that reference each other, a transaction, or over time
- ▶ Explanations of terms – where do they come from?

## 2. Termination

- ▶ How long is the contractual relationship?
  - ▶ Is it limited by time, project, or a related contract?
  - ▶ Renewal - conditions precedent or automatic?
- ❖ **Practice Pointer – Docketing renewal decision dates far enough in advance with different peoples' calendars**
- ▶ When is termination proper?
  - ▶ For cause or at-will
  - ▶ At a minimum, contract should include (1) events that trigger right to terminate and (2) termination procedure, including required notice period and method
- ❖ **Practice Pointer – But beware of limitations like operation of law (e.g., WFDL) and rights and obligations after termination**



# 3. Representations and Warranties

➤ Do they survive closing? Should they?

➤ Disclaimers

## ❖ Practice Pointers

### ❖ Limit the effect of reps and warranties by:

❖ Narrowing scope, disclosing exceptions, adding materiality and knowledge qualifiers, non-reliance on extra-contractual reps and warranties, and making indemnification sole remedy for inaccuracy

### ❖ Expand reps and warranties by:

❖ Keeping them as broadly worded as possible and ensure they survive as long as possible



## 4. Terms and Conditions

- ▶ How are they communicated?
  - ▶ When? Using which method? Proof of delivery/acceptance?
- ▶ Ensuring agreement on same set of terms and conditions
- ▶ Must haves – or non-starters?
  - ▶ *Force majeure* – Our thinking about unforeseen events must evolve
  - ▶ Indemnification – Mutual or one-way?
  - ▶ Length of term – The longer, the riskier?
  - ▶ Assignment – How to foreclose it (and its effect on jurisdiction for litigation)
  - ▶ Amendments – Do they require consideration? How are they executed?





## 5. Liability

- ▶ Sandbagging
  - ▶ Generally, when one party sues for breach of a contractual rep or warranty, even when it had such knowledge of the breach before execution
  - ▶ What is the applicable state's law?
- ▶ Anti-reliance provisions
  - ▶ Generally, when parties seek to avoid claims based on extra-contractual representations
  - ▶ Again, state laws differ here



## 5. Liability Cont'd

- ▶ Exculpatory clauses/liability waivers
  - ▶ Wisconsin law disfavors them, and courts will not enforce them if the clause/waiver:
    - ▶ Is overly broad
    - ▶ Does not convey what exactly is being waived
    - ▶ Is not conspicuously placed
    - ▶ Does not give the other party the opportunity to bargain
- ▶ Liability caps
  - ▶ Limits a party's maximum liability for all damages relating to the contract
  - ▶ Could be a flat dollar amount, multiple fees, or percentage of fees payable under the contract
  - ▶ Could be subject to several carve-outs (e.g., indemnity)

# 6. Remedies

- ▶ Choice of law
  - ▶ 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, don't agree to an international forum
  - ▶ Possibly specify state and/or federal court
  - ▶ May depend on where company, legal department, or outside counsel is located
- ▶ Arbitration
  - ▶ Pros and Cons
  - ▶ Who is the arbitrating entity, and does it have experience with specialized law
- ❖ **Practice Pointers**
  - ❖ **Consider location of arbitration panel, number of arbitrations, how selected**
  - ❖ **Consider notice, exhaustion, and other conditions precedent**
  - ❖ **Availability of appeal**

## 6. Remedies Cont'd

- ▶ Types of damages
  - ▶ Equitable
    - ▶ When legal remedies are insufficient and irreparable harm would result without the remedy
    - ▶ Remedies could be rescission, injunction, or 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 (consequential, incidental, special, punitive)



# 7. 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



## 8. Indemnification

- ▶ One party should compensate another for agreed upon costs
- ▶ Duty to defend and hold the indemnified party harmless
- ▶ Direct claims or third-party claims, or both?
- ❖ **Practice Pointers**
  - ❖ **If you promise it, make sure insurance covers it**
  - ❖ **Define indemnifiers and indemnified appropriately**
  - ❖ **Be careful about rights of indemnitee if indemnifier assumes defense and has right to settle**



## 9. Internet

- ▶ Entering forums for jurisdictional purposes
  - ▶ General
  - ▶ Specific
- ❖ **Practice Pointer - Complying with state privacy and internet laws and protecting yourself**



# Questions?

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