

Stronger by the Dozen: 12 Contract Clauses Borrowed from Real Estate

Presented by Smita Bhakta & Crystal Acker– Kruger Carson PLLC

Association of Corporate Counsel

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Kruger Carson PLLC



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CRYSTAL ACKER

A grayscale photograph of a city skyline, likely New York City, featuring several prominent skyscrapers. The image is partially obscured by a dark green horizontal band that serves as a background for the title.

Introduction

- 12 quick tips to help you write your next contract better, improve your forms, and respond thoughtfully to opposing counsel
- Some tips are minor things and will be refreshers for some, but are good reminders for all
- All tips are taken from a real estate perspective, but can be applied more generally

A grayscale photograph of a city skyline, likely New York City, featuring several prominent skyscrapers. The image is used as a background for the top portion of the slide.

Clauses We Will Cover Today

1. Entire Agreement
2. Indemnity
3. Express Negligence
4. No Third Party Beneficiaries
5. Assignment
6. Sole and Absolute Discretion
7. Liquidated Damages
8. Remedies – Sole & Exclusive
9. Waiver of Damages
10. Drafting an Effective Waiver
11. Time is of the Essence
12. Electronic Transactions

A grayscale photograph of a city skyline with various skyscrapers and buildings. The image is used as a background for the top portion of the slide.

One: Entire Agreement

This document constitutes the entire Agreement of the parties regarding the subject matter hereof.



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Except for _____[if applicable], this document, including all exhibits, addenda, and other materials that are expressly made a part hereof, and any recitals set forth above, constitutes the entire Agreement of the parties regarding the subject matter hereof.

A grayscale photograph of a city skyline, likely New York City, featuring several tall skyscrapers. The image is partially obscured by a semi-transparent dark green horizontal band that serves as a background for the title.

One: Entire Agreement

This document, including all exhibits, addenda, and other materials that are expressly made a part hereof, and any recitals set forth above, constitutes the entire Agreement of the parties regarding the subject matter hereof. All previous discussions, statements, dealings, or writings by or between the parties related to the subject matter of this document have been completely supplanted by the provisions set forth herein.

One: Entire Agreement

This document, including all exhibits, addenda, and other materials that are expressly made a part hereof, and any recitals set forth above, constitutes the entire Agreement of the parties regarding the subject matter hereof. All previous discussions, statements, dealings, or writings by or between the parties related to the subject matter of this document have been completely supplanted by the provisions set forth herein. **Each party agrees that in executing this Agreement they are relying solely on the provisions of this document and are not relying on any other factors.**



Two: Indemnity

Tenant shall be liable for and shall indemnify and hold Landlord harmless from and against, any and all claims, damages, judgments, suits, causes of action, losses, liabilities, and expenses, including reasonable attorneys' fees and court costs (collectively, "Indemnified Claims"), arising or resulting from _____.





Two: Indemnity

Tenant shall be liable for, and shall indemnify, defend, protect, and hold Landlord, any beneficiary of a mortgage or deed of trust encumbering all or any part of the Real Property (each “Landlord’s Mortgagee”), or any manager of the Real Property, or any of their respective shareholders, members, managers, partners, Affiliates, subsidiaries, directors, officers, employees, agents, representatives, licensees, contractors, successors, and assigns (collectively, the “Landlord Parties”) harmless from and against, any and all claims, damages, judgments, suits, causes of action, losses, liabilities, and expenses, including reasonable attorneys’ fees and court costs (collectively, “Indemnified Claims”), arising or resulting from _____. In case any action or proceeding is brought against any Landlord Party by reason of any of the items in the previous sentence, Tenant, on written notice from Landlord, shall defend the Landlord Party at Tenant’s expense by counsel approved in writing by the Landlord Party.

The provisions of this Section shall survive the expiration or sooner termination of this Lease with respect to any claims or liability occurring prior to such expiration or termination.



Three: Indemnity/Express Negligence

Tenant shall be liable for, and shall indemnify, defend, protect, and hold Landlord, any beneficiary of a mortgage or deed of trust encumbering all or any part of the Real Property (each “Landlord’s Mortgagee”), or any manager of the Real Property, or any of their respective shareholders, members, managers, partners, Affiliates, subsidiaries, directors, officers, employees, agents, representatives, licensees, contractors, successors, and assigns (collectively, the “Landlord Parties”) harmless from and against, any and all claims, damages, judgments, suits, causes of action, losses, liabilities, and expenses, including reasonable attorneys’ fees and court costs (collectively, “Indemnified Claims”), arising or resulting from (i) _____[list] **and the negligence of any Landlord Party (but not the gross negligence or willful misconduct of a Landlord Party). The foregoing indemnity and waiver may in some cases apply to claims involving Landlord’s negligence.** In case any action or proceeding is brought against any Landlord Party by reason of any of the items in the previous sentence, Tenant, on written notice from Landlord, shall defend the Landlord Party at Tenant’s expense by counsel approved in writing by the Landlord Party. The provisions of this Section shall survive the expiration or sooner termination of this Lease with respect to any claims or liability occurring prior to such expiration or termination.



Three: Indemnity/Express Negligence

TENANT SHALL BE LIABLE FOR, AND SHALL INDEMNIFY, DEFEND, PROTECT, AND HOLD LANDLORD, ANY BENEFICIARY OF A MORTGAGE OR DEED OF TRUST ENCUMBERING ALL OR ANY PART OF THE REAL PROPERTY (EACH "LANDLORD'S MORTGAGEE"), OR ANY MANAGER OF THE REAL PROPERTY, OR ANY OF THEIR RESPECTIVE SHAREHOLDERS, MEMBERS, MANAGERS, PARTNERS, AFFILIATES, SUBSIDIARIES, DIRECTORS, OFFICERS, EMPLOYEES, AGENTS, REPRESENTATIVES, LICENSEES, CONTRACTORS, SUCCESSORS, AND ASSIGNS (COLLECTIVELY, THE "LANDLORD PARTIES") HARMLESS FROM AND AGAINST, ANY AND ALL CLAIMS, DAMAGES, JUDGMENTS, SUITS, CAUSES OF ACTION, LOSSES, LIABILITIES, AND EXPENSES, INCLUDING REASONABLE ATTORNEYS' FEES AND COURT COSTS (COLLECTIVELY, "INDEMNIFIED CLAIMS"), ARISING OR RESULTING FROM (I) _____[LIST] **AND THE NEGLIGENCE OF ANY LANDLORD PARTY (BUT NOT THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF A LANDLORD PARTY). THE FOREGOING INDEMNITY AND WAIVER MAY IN SOME CASES APPLY TO CLAIMS INVOLVING LANDLORD'S NEGLIGENCE.** IN CASE ANY ACTION OR PROCEEDING IS BROUGHT AGAINST ANY LANDLORD PARTY BY REASON OF ANY OF THE ITEMS IN THE PREVIOUS SENTENCE, TENANT, ON WRITTEN NOTICE FROM LANDLORD, SHALL DEFEND THE LANDLORD PARTY AT TENANT'S EXPENSE BY COUNSEL APPROVED IN WRITING BY THE LANDLORD PARTY. THE PROVISIONS OF THIS SECTION SHALL SURVIVE THE EXPIRATION OR SOONER TERMINATION OF THIS LEASE WITH RESPECT TO ANY CLAIMS OR LIABILITY OCCURRING PRIOR TO SUCH EXPIRATION OR TERMINATION.

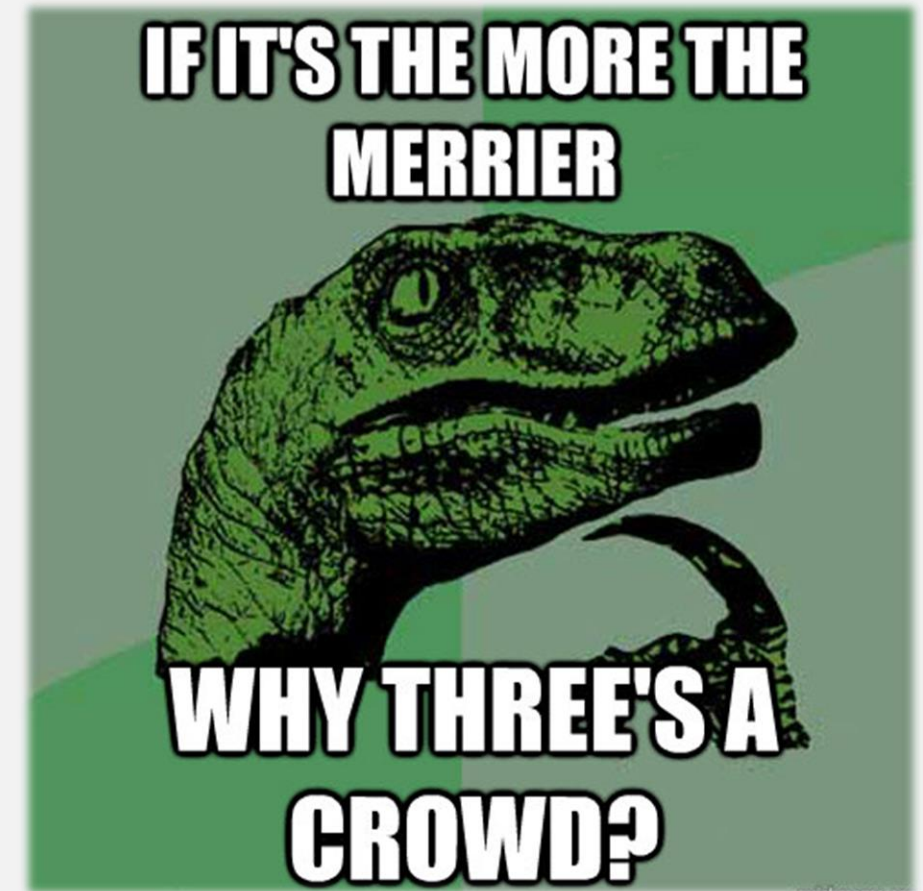
A grayscale photograph of a city skyline, likely New York City, featuring several tall skyscrapers. The image is used as a background for the title.

Three: Indemnity/Express Negligence

ALL INDEMNITIES, WAIVERS, AND OBLIGATIONS TO DEFEND IN THIS LEASE: (i) SHALL BE ENFORCED TO THE FULLEST EXTENT PERMITTED BY LAW FOR THE BENEFICIARY'S BENEFIT, **REGARDLESS OF ANY EXTRAORDINARY SHIFTING OF RISK, AND EVEN IF THE CLAIM IS CAUSED BY THE ACTIVE OR PASSIVE SOLE, JOINT, CONCURRENT, OR COMPARATIVE NEGLIGENCE OR TORT OF A LANDLORD PARTY, OR LIABILITY WITHOUT FAULT OR STRICT LIABILITY IS IMPOSED ON, OR ALLEGED AGAINST, THAT LANDLORD PARTY,** BUT NOT TO THE EXTENT THAT A COURT OF COMPETENT JURISDICTION'S FINAL AND UNAPPEALABLE JUDGMENT FINDS THAT THE LANDLORD PARTY'S GROSS NEGLIGENCE OR WILLFUL MISCONDUCT CAUSED THE CLAIM; AND (ii) ARE INDEPENDENT OF, AND SHALL NOT BE LIMITED BY, EACH OTHER OR ANY INSURANCE OBLIGATIONS IN THIS LEASE (WHETHER OR NOT COMPLIED WITH). LANDLORD AND TENANT EACH EXECUTED THIS LEASE IN **MATERIAL RELIANCE** ON THE INCLUSION OF EACH INDEMNITY AND WAIVER IN THIS LEASE, INCLUDING ANY EXTRAORDINARY SHIFTING OF RISK. **NOTWITHSTANDING ANYTHING TO THE CONTRARY HEREIN, TENANT AGREES TO PAY ALL COSTS, FEES (INCLUDING ATTORNEYS' FEES), AND EXPENSES OF DEFENDING ANY CLAIM DESCRIBED IN THIS SECTION UNTIL A FINAL, UNAPPEALABLE JUDGMENT IS ENTERED BY A COURT OF COMPETENT JURISDICTION.**

Four: No Third Party Beneficiaries

This Agreement is intended to be solely for the benefit of the parties whose names and representatives' signatures appear below and their respective successors and permitted assigns, if any. Nothing in this Agreement is intended to give, or should be construed to give, any other person or entity the ability as a third-party beneficiary or otherwise, to enforce any rights, or receive any benefits, related to this Agreement.



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Five: Assignment

No party may assign this Agreement or any of its rights hereunder without the prior written consent of the other party.





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No party may assign this Agreement or any of its rights hereunder without the prior written consent of the other party, and any assignment without the prior written consent of the other party will be null and void.




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No party may assign this Agreement or any of its rights, **interests or duties or obligations** hereunder without the prior written consent of the other party, and any assignment without the prior written consent of the other party will be null and void.



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No party may transfer or assign, whether directly or indirectly by merger, consolidation, reorganization, dissolution, operation of law or otherwise, this Agreement or any of its rights, interests or obligations hereunder without the prior written consent of the other party, and any transfer or assignment without the prior written consent of the other party will be null and void. For the purposes of this provision, any merger, consolidation, reorganization, dissolution, or significant change in ownership or management of one of the parties shall constitute an assignment.

A grayscale photograph of a city skyline with various skyscrapers and buildings, serving as a background for the title.

Six: Sole Discretion vs. Sole and Absolute Discretion

If, during the Inspection Period, Purchaser determines that the Property is not suitable for Purchaser's intended development and use of the Property (as determined by Purchaser in its **sole discretion**) or if Purchaser determines for any reason or no reason that it does not desire to purchase the Property, then Purchaser may terminate this Agreement by written notice to Seller ("Termination Notice") prior to the expiration of the Inspection Period and receive a full refund of the Earnest Money.

A grayscale background image of a city skyline with various skyscrapers and buildings.

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Seven: Liquidated Damages

If Purchaser fails to perform its obligations pursuant to this Agreement at or prior to Closing for any reason except failure by Seller to perform hereunder, or if, prior to Closing, any one or more of Purchaser's representations or warranties are breached in any material respect, and this failure or breach is not cured within three (3) Business Days after written notice from Seller to Purchaser, then Seller may terminate this Agreement and receive the Earnest Money, in full satisfaction of claims against Purchaser hereunder.



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If Purchaser fails to perform its obligations pursuant to this Agreement at or prior to Closing for any reason except failure by Seller to perform hereunder, or if, prior to Closing, any one or more of Purchaser's representations or warranties are breached in any material respect, and this failure or breach is not cured within three (3) Business Days after written notice from Seller to Purchaser, then Seller may terminate this Agreement and receive the Earnest Money **as liquidated damages and not as penalty**, in full satisfaction of claims against Purchaser hereunder. **Seller and Purchaser agree that Seller's damages resulting from Purchaser's default are difficult, if not impossible, to determine, and the Earnest Money is a fair and reasonable estimate of those damages and has been agreed to by the parties in an effort to cause the amount of Seller's damages to be certain.**

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Eight: Remedies: Sole + Exclusive

If Purchaser fails to perform its obligations pursuant to this Agreement at or prior to Closing for any reason except failure by Seller to perform hereunder, or if, prior to Closing, any one or more of Purchaser's representations or warranties are breached in any material respect, and this failure or breach is not cured within three (3) Business Days after written notice from Seller to Purchaser, then Seller, **as its SOLE and EXCLUSIVE remedy**, may terminate this Agreement and receive the Earnest Money as liquidated damages and not as penalty, in full satisfaction of claims against Purchaser hereunder. Seller and Purchaser agree that Seller's damages resulting from Purchaser's default are difficult, if not impossible, to determine, and the Earnest Money is a fair and reasonable estimate of those damages and has been agreed to by the parties in an effort to cause the amount of Seller's damages to be certain.

Nine: Waiver of Consequential and Punitive Damages



Notwithstanding anything to the contrary contained in this agreement or provided for under any applicable law, no party hereto shall be liable to any other person, for any consequential or punitive damages of such other person, relating to the breach or alleged breach hereof.

Nine: Waiver of Consequential and Punitive Damages

Notwithstanding anything to the contrary contained in this agreement or provided for under any applicable law, no party hereto shall be liable to any other person, either in contract or in tort, for any consequential, **incidental, indirect, special** or punitive damages of such other person, **or any loss of future revenue, income or profits, or any diminution of value or multiples of earnings damages** relating to the breach or alleged breach hereof, **whether or not the possibility of such damages has been disclosed to the other party in advance or could have been reasonably foreseen by such other party.**

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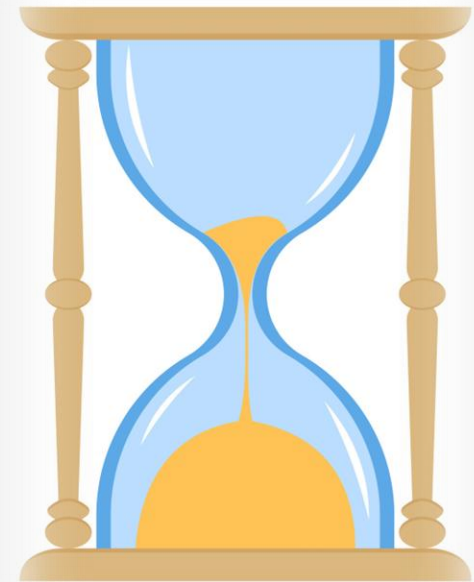
Ten: Drafting an Effective Waiver

Notwithstanding anything to the contrary contained in this agreement or provided for under any applicable law, no party hereto shall be liable to any other person, either in contract or in tort, for any consequential, incidental, indirect, special or punitive damages of such other person, or any loss of future revenue, income or profits, or any diminution of value or multiples of earnings damages relating to the breach or alleged breach hereof, whether or not the possibility of such damages has been disclosed to the other party in advance or could have been reasonably foreseen by such other party.

Each Party hereto acknowledges that: (i) each Party hereto is of equal bargaining strength; (ii) each such Party is sophisticated in real estate transactions; and (iii) each Party hereto ***voluntarily, knowingly, and irrevocably*** makes the foregoing waiver.

Eleven: Time is of the Essence

Time is of the essence with respect to all actions required to be taken by the respective parties under this Agreement.





Eleven: Time is of the Essence

Time is of the essence with respect to all actions required to be taken by the respective parties under this Agreement. **Any failure or refusal of a party to perform its obligations within the applicable time period set out in this Agreement, including any periods following notice that are allowed to rectify or cure such a failure or refusal, shall in the absence of contrary language constitute a material breach of this Agreement.**



Twelve: Electronic Transactions

Electronic Transaction. Communications, notices and transactions between the parties related to this Agreement may be carried out by electronic means pursuant to the Uniform Electronic Transactions Act, Tex. Bus. & Comm. Code, §322.001 et seq. or successor statutes (“**UETA**”).



Twelve: Electronic Transactions

Amendments and Waivers. The exclusive method of amending this Agreement, or waiving any of its provisions, shall be by inscribing the wording of the amendment or waiver on paper or other tangible medium that (i) expressly states in conspicuous text it is intended to modify this document and (ii) is executed by a duly authorized representative of each party. The exchange of an amendment or waiver may be carried out with counterparts in a pdf format and its execution may be accomplished by the actual signatures of the parties' duly authorized representatives or their electronic signatures pursuant to the UETA. Any attempt to amend this Agreement or waive its provisions in any other manner shall be void and of no force or effect whatsoever.

Electronic Transaction. Communications, notices and transactions between the parties related to this Agreement may be carried out by electronic means pursuant to the Uniform Electronic Transactions Act, Tex. Bus. & Comm. Code, §322.001 et seq. or successor statutes (“**UETA**”); **subject, however, to the following limitation: this document may not be amended, and its provisions may not be waived, orally or by electronic communications between the parties. Amendments to this document and waivers of its provisions may be effectuated only in the manner authorized by Section (____) of this Agreement.**

Questions?



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