

A grayscale background image of the Golden Gate Bridge in San Francisco, viewed from a low angle looking across the water towards the towers.

# The Fine Print: A Litigator's Perspective on Boilerplate Contract and Insurance Provisions

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*This presentation is provided for informational purposes and does not constitute legal advice.*

# Introduction - Discussion Topics

- **What is the scope of exposure (i.e. what damages will be available)?** *Limitations of Liability, LDs, Attorneys' Fees*
- **Who may have to pay?** *Indemnity, Insurance, Waiver of Subrogation*
- **Where will the dispute be heard?** *Forum Selection and Arbitration Clauses*
- **Which rules will govern the dispute?** *Dispute and Notice Provisions, ADR Clauses, Jury Waivers, Choice of Law*
- **Do any provisions impact the merits?** *Recitals, Merger & Integration Clauses*

# Scope of Exposure

- Critical provision(s) for allocation of risk, and for defining what damages are available for a breach
- Examples of different types of LOLs
  - Liability caps
  - Exclusive/sole remedy (*i.e.*, limited warranty)
  - Waiver of consequential damages
- Other provisions that impact scope of exposure
  - Liquidated damages clauses
  - Attorneys' fees provisions

# Limitation of Liability- Liability Caps

- **Liability caps**
  - “In any dispute between X and Y, the total liability of X arising from or related to this Agreement **shall be limited to the compensation under this Agreement.**”

# Limitation of Liability- Liability Caps

- Limited circumstances where cap will not be enforced
  - Express carve out (often gross negligence or fraud)
  - Statutory rule in CA: “All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.” Cal. Civil Code §1668.
    - Does not apply where contract provisions simply limit economic damages.

# Limitation of Liability- Exclusive Remedies

- **Exclusive, sole, or limited remedies**
  - “In the event of a default by X in the performance of its obligations under this Agreement, **Y shall have the following exclusive remedies** set forth below...”

# Limitation of Liability – Waiver of Certain Damages

- **Waiver of consequential (or other) damages**
  - “In no event shall either party be liable for any indirect, incidental, special, or consequential damages arising out of or relating to this Agreement.”

# Limitation of Liability – Waiver of Certain Damages

- **Waiver of consequential (or other) damages**
  - What do these terms cover?
  - **Direct damages:** “The necessary and usual result of the defendant’s wrongful act; they flow naturally and necessarily from the wrong.”
  - **Consequential damages:** “Those damages which, though they do not always or even usually flow from the breach of contract are, at the time of making the contract, recognized by the parties as those which in the particular case may result from a breach.”
  - **Incidental damages:** Limited category of costs incurred by nonbreaching party



## Scope of Exposure – Liquidated Damages

- **Commercial:** LDs are **generally enforceable** unless one side can show provision was “unreasonable under the circumstances existing at the time the contract was made”
- **Personal/consumer:** In certain types of contracts LDs are **generally void**, unless you can show “from nature of the case, it would be impracticable or extremely difficult to fix the actual damage”

## Scope of Exposure – Attorneys' Fees

- Attorneys' fees are not recoverable, unless provided for by statute or contract
- May impact calculus of pursuing dispute due to significant expense of litigation
- As a practical matter, recoverable with final award or judgment (i.e., not as part of a settlement)

# Who Will Pay – Indemnification Provisions

- “Defend, Indemnify and Hold Harmless” – Is there a difference?
- **Duty to Defend**
  - Indemnitor’s responsibility, upon tender, to defend the indemnity against certain claims.
  - It does not matter if the party is ultimately not liable.
    - *But see California’s anti-indemnity statutes (Cal. Civil Code §2782.05)*
- **Duty to Indemnify**
  - “Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person.” (Cal. Civil Code §2772)
  - Reimbursement
  - Includes attorney’s fees and costs where duty to defend owed (“An indemnity against claims, or demands, or liability, expressly, or in other equivalent terms, **embraces the costs of defense** ...”)

# Who Will Pay – Indemnification Provisions

- **Hold Harmless**
  - No liability for risk/harm caused by indemnitor
  - Limitation of liability
- Indemnity generally does not apply to direct claims between the parties for breach of contract.
  - But there are exceptions

# Who Will Pay – Insurance Provisions

- Insurance requirements
  - Types
    - First party – property, builder’s risk, auto
    - Third party – general liability, professional liability, auto, worker’s comp
  - Limits - How much is enough?
  - Additional Insured requirements
  - Deductible/retentions – Who pays?
  - Certificate of Insurance
  - Waivers of subrogation

# Where Will the Dispute Be Heard?

## Forum Selection Clauses

- **Forum selection – where a dispute will be resolved**
  - Differences between forum selection and jurisdiction/venue
  - Courts vs Arbitration
- In most commercial contexts parties can select arbitration
  - Under both federal and California law, arbitration agreements are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. (9 U.S.C. § 2; see also, Code Civ. Proc., § 1281.)
  - Employment contracts – Mandatory arbitration agreements are enforceable, except cannot mandate arbitration of sexual harassment claims

# Where Will the Dispute Be Heard?

## Forum Selection Clauses

- **Mandatory vs Permissive**
  - Mandatory means just that – it is mandatory and will be enforced so long as it is not unreasonable. Burden on party opposing enforcement.
  - Permissive clause, in contrast, just submits to jurisdiction in a particular forum but does not rule out other forums.
- Benefits of mandatory clause

# What Rules Will Govern the Dispute?

- Other rules that will govern a dispute
  - Dispute and Notice Provisions
  - ADR clauses
  - Jury waivers
  - Class action waivers
  - Discovery limitations
  - Other rules governing the dispute
  - Choice of Law



# What Rules Will Govern the Dispute?

- Dispute and Notice Provisions
  - **How to give notice regarding and/or initiate a dispute**
    - “With respect to any Claim, prompt notice thereof shall be given in accordance with Section XX of the Agreement and within fifteen (15) days of the event giving rise to the Claim.”
  - **Waiver/Potential consequences**
    - “Failure to comply with the provisions of the ADR Procedures shall be in contravention of the parties’ express intention to implement this alternative means of dispute resolution and **shall constitute a waiver by such party of any Claim with respect to which it fails to comply with the provisions of the ADR Procedures in any material respect.**”
  - **Contractual SOL**
    - “Parties agree that no claim arising out of services rendered pursuant to this Agreement shall be filed more than two years after the date of the report issued by X or the date of this letter if no report has been issued.”

# What Rules Will Govern the Dispute?

- **ADR Clauses** – Common example
  - First Stage: Direct negotiations for a period of 30 days.
  - Second Stage: Mediation, before a mutually acceptable mediator at a location to be agreed and to be conducted within 60 days thereafter.
  - Third Stage: Binding arbitration pursuant to the JAMS/AAA Commercial Rules (or proceed to lawsuit)

# What Rules Will Govern the Dispute?

- **Jury Waivers**

- “Each Party hereby waives any right it may have to a trial by jury in respect of any claim based upon, arising out of or in connection with this Agreement and the transactions contemplated hereby.”
- Not enforceable in California
  - Unless you have arbitration agreement or agree to judicial order of reference under CCP section 638
- Generally enforceable in other states

# What Rules Will Govern the Dispute?

- **Class Action Waivers**
  - Generally enforceable as part of arbitration provisions
  - Likely not enforceable in CA outside arbitration provisions

# What Rules Will Govern the Dispute?

- **Discovery Limitations**

- Contractual limitations

- “The Parties agree that the scope of discovery in arbitration proceedings hereunder shall be determined by the panel subject to the following limitations ... (b) Each party shall be entitled to take no more than three (3) fact depositions, (c) Each party shall be entitled to depose expert witnesses designated by the other Party, (d) No deposition shall be longer than eight (8) hours.”

- Arbitration rules

- JAMS Streamlined Rules do not allow for discovery

# What Rules Will Govern the Dispute?

- Other rules controlling the dispute
  - **Conduct of arbitration**, i.e., baseball arbitration
  - **Timing**
    - “Arbitration. . . . Within thirty (30) days of his or her appointment, the arbitrator shall hear and decide the dispute submitted to arbitration hereunder and shall promptly prepare a written decision on the merits of the matters in dispute, which decision shall state the facts and law relied upon and the reason for the arbitrator’s decision.”
  - **Confidentiality**
    - “All arbitration proceedings shall be confidential, and neither the parties nor the arbitrator may disclose the content or the results of any arbitration hereunder without the written consent of all parties to the dispute.”

# What Rules Will Govern the Dispute?

- **Choice of Law**
- Parties agree upon which state's law applies to disputes arising out of the contract
- Important to include because:
  - Parties less likely to argue over which law to apply if conflict arises later
  - Greater certainty regarding how conflict will resolve

# What Rules Will Govern the Dispute?

- Can you choose *any* state's laws? It depends
- California has held that to be effective:
  - 1) must be rational nexus to chosen state;
  - 2) other state's laws cannot deprive CA citizens of important rights or impugn significant CA public policy;
  - 3) CA cannot have a "materially greater interest" in enforcing its laws over that of another state



# Provisions That Impact the Merits

- **Recitals**

- Evidence Code Section 622: “The facts recited in a written instrument are conclusively presumed to be true as between the parties thereto, or their successors in interest; but this rule does not apply to the recital of a consideration.”

- **Merger and Integration Clauses**

- ‘This is the final, complete and entire agreement between the parties and it supersedes any and all prior or contemporaneous agreements, communications, statements or representations between the parties, either oral or in writing, relating to the subject matter of this Agreement. Any amendment to this Agreement must be in writing and signed by both parties.’

# Conclusion

## **Boilerplate provisions matter!**

- They often govern what happens if something goes wrong (risk, exposure, disputes, remedies)

## **Read and understand the contract.**

- Specific language governs

# Contact Information



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