

LIMITATIONS OF LIABILITY-CCIT PRESENTATION 090318

Example 1. Software Agreement

NEITHER VENDOR NOR IHE WILL BE LIABLE FOR ANY CONSEQUENTIAL, INCIDENTAL, SPECIAL, INDIRECT, PUNITIVE OR EXEMPLARY DAMAGES, OR FOR ANY LOST PROFITS OR LOST SAVINGS ARISING OUT OF OR RELATED TO THIS AGREEMENT, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES OR LOSS AND WHETHER OR NOT SUCH DAMAGES OR LOSS WERE FORESEEABLE.

Discussion Points:

- What does having it all in caps accomplish?
- Actual and direct damages not covered.
- Limits types of damages, but not amount, funding source, or actions for which parties are liable.
- Mutuality. Good, bad or neutral?

Example 2. Real Property Lease

Notwithstanding anything to the contrary contained in this Lease, the Liability of Landlord (and of any successor Landlord) to Tenant shall be limited to the amount of any proceeds from Landlord's commercial general liability carrier (but only to the extent that such proceeds are not subject to the terms of any mortgage on the Building) plus Landlord's interest in the property. Tenant shall look solely to Landlord's interest in the property and the insurance proceeds of Landlord's commercial general liability insurance policy for the recovery of any judgment or award against Landlord or any Landlord related party. In no event shall Landlord or any Landlord related party be liable to Tenant for any lost profit, damage to or loss of business or any form of special, indirect or consequential damages, except that for purposes of this exclusion, consequential damages shall not include damages arising out of bodily injury (including death) or damage to tangible property.

Discussion Points (comments from AG's office):

1. Landlord liability limited to proceeds from any commercial general liability insurance policy, minus the payoff of any mortgage on the property, plus landlord's interest in the property. This is troublesome for three reasons:
 - a) Recovery is limited to what insurance pays. Insurance may not pay any particular claim, in which case recovery is zero.
 - b) Recovery is limited by the amount of any mortgage. While I am not aware of a mortgage or the amount of any mortgage, this could be substantial, which would substantially limit recovery.
 - c) "Landlord's interest in the property" is an ambiguous term. The landlord's interest in the property is not clear. This landlord may have no monetary interest in the property and may be a shell company. In that case, there would be no recovery.

2. Direct damages exclude damage to the business or loss of business. I am unclear what type of operations the State plans to conduct under this lease, but if damage to the State's business were to occur, the State would be unable to recover.

3. Special, indirect, and consequential damages disclaimed (except for consequential that leads to bodily injury or death). Again, I am unaware of the type of operations for which the State is using the leased space, but this could expose the State to liability. This is especially true if the general public will frequent the premises.

Example 3. Construction Contract-Amendment.

Anything herein notwithstanding, in no event shall either Contractor or the State be liable to the other for any consequential, incidental, special, or indirect damages, including commercial loss, loss of use, or lost profits, even if the other party has been advised of the possibility of such damages and, in any event, Contractor's aggregate liability for any and all claims, losses, or expenses arising out of this Agreement, or out of any goods or services furnished under this Agreement, whether based in contract, negligence, strict liability, agency, warranty, trespass, indemnity, or any other theory of liability, shall be limited to the lesser of \$5,000,000 or the total compensation received by Contractor from the State hereunder. This limitation of liability provision and any other limitation or exclusion of damages in the contract does not limit or exclude Contractor's liability for death or bodily injury or property damage arising out of contract performance and caused the Contractor, its employees, agents, or subcontractors.

Discussion Points:

- Actual and direct damages not covered.
- Limits types of damages, amount of damages, actions for which parties are liable, but not source of payments of damages.
- Mutuality. Good, bad or neutral?
- Notice the change from using term Agreement to a contract. Poor drafting.

Example 4. 10. Software License

LIMITED LIABILITY. The State must comply with all the terms and conditions stated herein. Any breach of the terms and conditions by The State may result in the suspension or termination of its license, without any liability to Contractor. Contractor's liability that arises out of the use of its products by The State shall not exceed the License Fee as stated in Exhibit C reduced by a proration over 60 months from the date of this agreement. In no event shall Contractor be liable for any lost profits, or other special, consequential or punitive damages, even if Contractor has been advised of this possibility of such damages, or for any claim against The State by any other party except with regard to an action for infringement of an intellectual property right, for which Contractor shall indemnify and hold harmless to The State.

Discussion Points:

- Actual and direct damages not excluded, but amount payable limited.
- Limits types of damages and amount of damages but not actions for which parties are liable or source of payments of damages.
- Amount of damages limited to License Fee and declines over term of the K.
- Notice blending of breach of contract, limitation of liability and indemnification.

Example 5. Personal Services-No Cost K.

Limitation of Liability. The State shall not be liable for and Company hereby waives all claims against the State for injury to Contractor or Contractor's employees or subcontractors or for loss of or damage to any of its other property in or about a State location by or from any cause whatsoever, except to the extent cause by or arising from the gross negligence or willful misconduct of the State or its agents, employees or contractors.

Discussion Points:

- Starts off as a limited protection for the State, but then turns into an indemnity from the State to the Contractor, which is not permissible.
- Limits types of damages incurred for injury and property damage that occurs on State property. Interesting drafting as the injury limits applies to Contractor, Contractor's employees or subcontractor but property limit only applies to Contractor. Also, assume injury means bodily injury, but it is unclear.
- Notice blending of limitation of liability and indemnification.
- Notice the change from using term Company to a Contractor. Poor drafting.