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- RISKVUE HOME
- FEATURE STORY
- INTERVIEW
- RISK BITES
- INDUSTRY WATCH
- LIGHTER SIDE
- WRITING TIPS
- USEFUL WEB TOOLS
- CALENDAR
- CONSULTING

Feature Story

Contractual Disclaimers And Limitations On Liability: Are They Worth The Paper They Are Written On?

By Jonathan M. Bye, Lindquist & Vennum P.L.L.P.

Although many often ignore the fine print terms in contracts as "a bunch of legalese," they do so at their peril. Contrary to what some believe, contractual disclaimers and limitations on liability, which are often contained in the fine print, are enforceable when properly drafted and implemented, shifting risk from one party to a contract, usually a seller of goods or services, to the other, usually a buyer of such goods or services. For example, in a recent unreported appellate decision, a real estate inspection firm obtained dismissal of claims for remediation costs in excess of \$1 million on the basis of a limitation of liability contained in the General Conditions attached to its proposal which it required its client to sign. This article briefly looks at issues concerning the drafting of such provisions and concerning whether such provisions become part of a contract.

Drafting of Disclaimers and Limitations on Liability

In the context of contracts for the sale of goods, which, generally, are governed by the Uniform Commercial Code ("UCC"), various warranties and remedies are implied as a matter of law even where the contract itself is silent. Accordingly, contrary to what one might expect, the usual purpose for providing a written warranty is to limit the seller's liability. Thus, many standard form terms and conditions of sale contain provisions purporting to disclaim any implied warranties and limiting liability to repair or replacement of the defective product. Careful drafting of such provisions is, however, essential to their enforceability. For example, under UCC Section 2-316, any disclaimer of implied warranties is not enforceable unless it is "conspicuous." Moreover, a "repair or replacement" limited remedy provision is generally unenforceable if the seller either does not or cannot perform the repair or replacement within reasonable time. In some jurisdictions, however, even in these circumstances a seller may be able to limit its liability for damages beyond the purchase price through a properly drafted damages exclusion, such as a provision stating that "under no circumstances shall seller be responsible for any incidental or consequential damages." A seller may also limit the period during which any lawsuit may be filed. For example, under UCC Section 2-725, a carefully drafted

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provision can preclude the bringing of any suit more than one year after a product is delivered, even where the alleged defect does not manifest itself until after that time.

Contracts involving the provision of services often contain similar limitations on liability and/or exculpatory clauses releasing the service provider from any liability. In many states, such exculpatory clauses in service contracts are enforceable, even as to damages for personal injury, if they are not overreaching (by, for example, purporting to release liability for intentional, willful or wanton acts) and if they are not in violation of public policy (by, for example, purporting to release liability where the service being provided is a public or essential service, such as that being provided by common carriers on hospitals).

Implementation of Disclaimers and Limitations on Liability

Even the most skillfully drafted disclaimer or limitation of liability will be of no effect if it is not made part of the parties' contract. The clearest way to make such terms part of a contract is for there to be a single written agreement signed by both parties incorporating such terms. Even then, issues can arise if the signed contract simply refers to attached terms and conditions, because in many cases disputes arise as to whether such terms were, in fact, ever attached. This situation frequently arises, for example, where the standard terms and conditions are on the reverse side of a document, the reverse side of which cannot be proven was faxed. Thus, where a contract incorporates standard terms and conditions, it is important to make sure that it can be documented after the fact that both sides received them.

A more complicated situation arises where there is not one document signed by both parties indicating the terms of the contract, but rather an exchange of each party's own forms, neither of which is signed by the other party. Determining whose terms apply in this situation, often known as the "battle of the forms," can be a law professor's dream and a lawyer's, and client's, nightmare. Although, depending on the jurisdiction, there may be some language that may be used to maximize the chances that a company will win the "battle of the forms," the surest approach to winning the battle is to have the desired terms contained in a single written agreement signed by both parties.

Concluding Tips

1. Pay attention to the "fine print." If properly drafted and implemented, provisions shifting the risk of something bad happening can be fully enforceable, with significant consequences. Not having bothered to read the fine print is not a defense.
2. If your company does not currently have standard terms and conditions of sale and standard terms and conditions of purchase, consider having counsel draft them and review how they are implemented in your contracting procedures. If you already have such terms and conditions but they have not been reviewed in a few years, consider having counsel review them again to make sure they take account of the latest applicable legal developments, including with respect to the "battle of the forms," consequential damages exclusions and statutes of limitation.
3. Consider establishing a policy that for contracts above a certain dollar value, there must be a single written agreement signed by both parties. At what level this policy takes effect may differ depending on whether the company is the seller or the buyer.

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4. Similarly, consider establishing a policy requiring various levels of review depending on the dollar value of the contract. For example, consider requiring that contracts of a certain size be reviewed by company executives. At some point, you may wish to have a policy requiring that certain contracts be reviewed by counsel.

Following these tips should help minimize the chances of your company unnecessarily assuming potentially costly risks. ❏

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