

Risk Allocation Blind Spots – The Danger of Using Online Legal Services

By Matthew G. Vassil and Michael T. Regan

Amid a growing familiarity with emerging technologies and online legal services providers, many individuals and entities are opting to use these services to generate form legal documents in lieu of enlisting the help of their legal counsel. While the initial cost-saving benefit that these service alternatives offer may be attractive, clients should be cognizant of the potential harm that could result from the use of legally-binding documents created by an artificial intelligence technology or an online legal service provider. Even commercial agreements that appear to be straightforward, form documents can contain problematic language and provisions. Our clients are encouraged to use, and rely upon, their attorneys' expertise to understand their risk exposure and identify potential problems at the outset, rather than in a resulting dispute.

Our Priority Points

- I. Advise our clients who are navigating one particularly complex and important provision contained in most commercial contracts: the limitation of liability, or the "liability cap;" and
- II. Serve as a cautionary warning regarding the use of alternative legal service providers to draft commercial contracts in lieu of legal counsel.

In a commercial agreement, the limitation of liability provision caps the monetary amount a party may recover in a dispute resulting from the other party's breach of a contractual provision. Often, this liability cap is heavily negotiated in commercial contracts because it directly impacts the fees charged and the allocation of risk among the parties. In addition to negotiating the amount of the liability cap, parties often negotiate certain "carve-outs" to the limitation of liability provision.

By adding carve-outs, the parties essentially agree to remove certain claims and conduct from the limitation imposed by the liability cap. This means that the aggrieved party is free to seek recovery of the full amount of damages it suffered as a result of the breach. As a result, carve-outs to a limitation of liability provision fundamentally alter the contracting parties' risk.

The limitation of a liability provision in a commercial contract is also subject to the laws of the state or jurisdiction that governs the contract. Many states have excluded, as a matter of law, certain types of behavior and conduct from limitation of liability provisions. Often, these exclusions are based on public policy. The public policy supporting these exclusions is that liability caps should not serve to protect a party whose breach is caused by intentional, reckless, or other egregious conduct. The gray area involving conduct falling somewhere between ordinary negligence and intentional, reckless, or egregious conduct—which this article refers to as gross negligence, or grossly negligent conduct—is a common area in which litigation disputes arise. Further complicating these disputes is the fact that there is ambiguity as to what type of conduct constitutes grossly

negligent conduct as compared to reckless or egregious conduct, which could end up excluding the breach from the parties agreed-upon liability cap. As a result, a party entering into a commercial contract must ensure that its understanding of the risk involved mirrors not only the language contained in the agreement itself, but also the laws to which the agreement is subject.

One notable nuance in commercial agreements is whether a contract breach that stems from a party's gross negligence is sufficient to warrant the removal of the agreement's liability cap. The answer to this question depends, at least in part, on what jurisdiction governs the terms of the commercial contract, including the jurisdiction's definition of what constitutes gross negligence.

Pennsylvania Law

Under Pennsylvania law, gross negligence is defined as conduct that is more egregious than ordinary negligence but does not rise to the level of intentional conduct. Pennsylvania courts have recognized gross negligence as something more than mere negligence and requiring an extreme departure from ordinary care. Given Pennsylvania's standard, a limitation of liability provision that immunizes a party, or parties, from liability for their reckless or grossly negligent conduct will be considered to violate public policy and, therefore, is not enforceable because such protection would remove incentives for contracting parties to adhere to minimum standards of conduct.

New York Law

New York law, on the other hand, does not have such a rule that disregards liability caps for damages caused by gross negligence. Instead, New York law holds that only liability caps that bar any recovery or only permit nominal recovery are void in instances where such damages are caused by gross negligence.

Comparable Distinctions

This distinction in New York vs. Pennsylvania is just one example of how certain jurisdictions differ in not only the manner in which they approach liability caps in cases involving grossly negligent conduct, but also as to what type of conduct constitutes gross negligence. New York's law and definition appear to be more aligned with willful acts or conduct that evinces a reckless disregard for others, where Pennsylvania employs a lower standard by defining gross conduct as something more egregious than ordinary negligence. This difference can also affect the manner in which a case is litigated because Pennsylvania's seemingly lower standard is more likely to lead to a question of fact and, therefore, more likely to go to trial. As a result, determining the choice of law provision in the parties' agreement would therefore be crucial to understanding each party's risk.

Litigation Impacts

While some disputes are unavoidable, others can be avoided by engaging with legal counsel at an early stage in the contract negotiations to ensure that the right questions are being asked. Some of the key issues that are often discussed include how likely it is that a breach will occur, how the breach would impact the client's business, and what types of breaches are likely to occur. By understanding how a breach would impact our client's operations—which could range from a nuisance to catastrophic—our attorneys are able to appropriately

structure the agreement to protect the business from a breach, and resulting legal dispute, which could put our clients and their businesses in a precarious position.

As our clients know and understand, identifying and avoiding potential problems early-on in the negotiation process not only serves to protect their business but also their bottom-line. Even though contractual provisions can be easily and inexpensively generated using emerging technologies or online legal service providers, this option comes with significant risk. Courts possess the power to nullify agreed-to liability caps pursuant to liability limitation provision carve-outs, which could significantly alter the risk and liability of the parties. Eckert's clients and potential-clients, however, are in a unique position affording them the opportunity to ensure that the commercial contracts they enter into are properly structured from a risk standpoint—and, should the need arise, Eckert Seamans is equipped to fiercely represent our clients in contractual disputes, regardless of whether the underlying agreement was handled by Eckert Seamans.