



# TRAPS FOR THE UNWARY: A DISCUSSION ABOUT **TRICKY** PROVISIONS IN COMMERCIAL CONTRACTS

PRESENTATION FOR MANUFACTURING LAW GROUP

Sandra Lautier Jessica Portela

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# Introduction and Scope



**Sandra Lautier**  
Attorney, Business  
Litigation



**Jessica Portela**  
Attorney, Business  
Transactions

Scope of Presentation → B2B, U.S. entities, governed by U.S. law, manufacturing, sale of goods

# Of Note

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We note that in this presentation we are only providing general information; the information contained in this presentation does not constitute legal advice. No attorney-client relationship has been created. If legal advice or other assistance is required, please contact us directly.

# Preliminary Considerations

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- This platform should not be used for activities prohibited by antitrust law.
- Avoid discussions leading to a restriction, or coordination, of competition between or among attendees.
- Attendees should not share information, have discussions, and/or make arrangements on, among other things, pricing, market conduct, terms of sale, individual manufacturing costs and costs of sale, output, or supplier or customer relations/allocation.

# Overview

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## Trap # 1

### Limitation of Liability



# True or False?

# True or False – Limitation of Liability

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**A company can contract out of all punitive damages.**  
**False in most jurisdictions.**

**A company can contract out of damages arising out of negligence under all circumstances.**  
**False in many jurisdictions.**

**Lost profits can constitute direct damages or indirect.**

**True.**

# Lost Profits (Cont.) - True or False?

True or False: The following language will shield my company from being liable for lost profits in all situations?

IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR, AND BOTH [TRANSUNION] AND [ENDLESS RIVER] HEREBY WAIVE AS TO THE OTHER PARTY, ANY CONSEQUENTIAL, INCIDENTAL, INDIRECT, SPECIAL OR PUNITIVE DAMAGES INCURRED BY THE OTHER PARTY AND ARISING OUT OF THE PERFORMANCE OF THIS CONTRACT, INCLUDING BUT NOT LIMITED TO LOSS OF GOOD WILL AND LOST PROFITS OR REVENUE, WHETHER OR NOT SUCH LOSS OF DAMAGES IS BASED IN CONTRACT, WARRANTY, TORT, NEGLIGENCE, STRICT LIABILITY, INDEMNITY, OR OTHERWISE EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THESE LIMITATIONS SHALL APPLY NOT WITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OR ANY LIMITED REMEDY.

# False. Why?

IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR, AND BOTH [TRANSUNION] AND [ENDLESS RIVER] HEREBY WAIVE AS TO THE OTHER PARTY, ANY CONSEQUENTIAL, INCIDENTAL, INDIRECT, SPECIAL OR PUNITIVE DAMAGES INCURRED BY THE OTHER PARTY AND ARISING OUT OF THE PERFORMANCE OF THIS CONTRACT, **INCLUDING BUT NOT LIMITED TO LOSS OF GOOD WILL AND LOST PROFITS** OR REVENUE, WHETHER OR NOT SUCH LOSS OF DAMAGES IS BASED IN CONTRACT, WARRANTY, TORT, NEGLIGENCE, STRICT LIABILITY, INDEMNITY, OR OTHERWISE EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THESE LIMITATIONS SHALL APPLY NOT WITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OR ANY LIMITED REMEDY.

- Jury found for Plaintiff for \$18.3MM in lost profits
- Judg. as matter of law – amended jury finding in favor of Defendant
- Appeal pending Endless River Techs LLC v. Trans Union LLC, No. 1:18 CV 936, 2023 WL 24101, at \*3 (N.D. Ohio Jan. 3, 2023)

# How would the defendant use the benefit of hindsight to revise this language?

IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR, AND BOTH [TRANSUNION] AND [ENDLESS RIVER] HEREBY WAIVE AS TO THE OTHER PARTY, ANY CONSEQUENTIAL, INCIDENTAL, INDIRECT, SPECIAL OR PUNITIVE DAMAGES INCURRED BY THE OTHER PARTY AND ARISING OUT OF THE PERFORMANCE OF THIS CONTRACT, INCLUDING BUT NOT LIMITED TO LOSS OF GOOD WILL AND LOST PROFITS OR REVENUE, WHETHER OR NOT SUCH LOSS OF DAMAGES IS BASED IN CONTRACT, WARRANTY, TORT, NEGLIGENCE, STRICT LIABILITY, INDEMNITY, OR OTHERWISE EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THESE LIMITATIONS SHALL APPLY NOT WITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OR ANY LIMITED REMEDY.

# ONE POTENTIAL ANSWER

IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR, AND BOTH [TRANSUNION] AND [ENDLESS RIVER] HEREBY WAIVE AS TO THE OTHER PARTY, ANY LOST PROFITS, LOST REVENUE, LOSS OF GOOD WILL, CONSEQUENTIAL, INCIDENTAL, INDIRECT, SPECIAL OR PUNITIVE DAMAGES INCURRED BY THE OTHER PARTY AND ARISING OUT OF, RELATING TO, OR CONNECTION WITH THE PERFORMANCE OF THIS CONTRACT, ~~INCLUDING BUT NOT LIMITED TO LOSS OF GOOD WILL AND LOST PROFITS OR REVENUE~~, WHETHER OR NOT SUCH LOSS OF DAMAGES IS BASED IN CONTRACT, WARRANTY, TORT, NEGLIGENCE, STRICT LIABILITY, INDEMNITY, OR OTHERWISE EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THESE LIMITATIONS SHALL APPLY NOT WITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OR ANY LIMITED REMEDY.

## Trap # 2

## Indemnification



# True or False?

# True or False - Indemnification

“Indemnify” and “Hold Harmless” are synonymous.

**True in some jurisdictions, false in others.**

Losses and liabilities are synonymous, and claims and causes of action are synonymous.

**False.**

Indemnification provisions only apply to third party claims.

**False.**

# Hypothetical - Indemnification

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Buyer and Seller enter into an agreement for the sale of goods under which the Seller agrees to indemnify Buyer for any third-party claims for bodily injury or death related to the product. The agreement included a limitation of liability clause that caps damages at \$1M. The limitation of liability clause did not contain any exceptions for indemnification.

The Buyer is sued by a third party for \$3M for a product liability claim and turned to the Seller for indemnification. Seller claimed it was only liable up to the \$1M limit. The Buyer sues the Seller for the difference of \$2M.

**Which party is likely to prevail?**

# Answer to Hypothetical

**Seller will likely prevail**

**Why?**



- \$1M limit applies to indemnification claims
- Cap generally limits a party's maximum liability for all damages
- No carve-out for indemnification.

# Have you properly carved out?



- Common carveouts
  - Third party indemnification
  - First party gross negligence & misconduct
  - First party IP infringement
  - Data breaches
  - Product recall
  - Breach of confidentiality

## Trap # 3

# Dispute Resolution



# Dispute Resolution – Issue spotting

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- Buyer and Seller enter into a contract for \$700k in goods.
- Parties have no connection to NY, contract not entered into in NY, and not performed in NY.
- Parties want disputes to be litigated in NY, and NY law to apply so they include a NY Choice of Law and NY Choice of Forum provision.
- Buyer sues Seller for breach of contract, and brings the case in a NY forum.
- Can a party challenge a NY forum?

# Dispute Resolution – Issue spotting - Answer

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Answer: Yes.

NY General Obligations Law § 5-1402

(1) \$1 million or more;

(2) NY choice-of-forum clause, **and**

(3) NY choice-of-law clause.

## Trap # 4

### Notice



# Hypothetical - Notice

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Consider the following:

“For a notice under this agreement to be valid, it must be in writing and delivered by email. It will be deemed to have been received when sent.”

**Any benefits?**

**Any problems?**

# Answer to Hypothetical

## Problematic



## Why?

- It doesn't take into account that delivery might fail or spam
  - Have a fallback mechanism (tracking mail) for delivery failures; or
  - require the intended recipient acknowledge that they received the email
- Carveouts?

## Trap # 5

### Confidentiality



## Hypothetical - Confidentiality

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Parties have an executed NDA with robust confidentiality obligations. Parties subsequently enter into a commercial agreement with a confidentiality clause. Are the parties bound by both agreements?

# Answer to Hypothetical

## Problematic

## Why?

- Probably NOT
- Why?
- It is important to carry over comprehensive confidentiality protections to subsequent commercial agreements.



## Trap # 6

Most Favored  
Nation



# MFN Considerations



Contract management

Litigation risks

Scope

Enforcement

# Two Examples - MFN

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1. Seller warrants that the price(s) are not less favorable than those extended to any other customer for the same or similar articles or services in similar quantities.

2. Seller certifies that the prices, warranties, conditions, benefits and terms are at least equal to or more favorable than the prices, warranties, conditions, benefits and terms quoted by the Seller to any customers for the same or a substantially similar quantity and type of service.

# Trap # 7

## Assignment



# Assignment

## **28.3 Assignment**

**Seller shall not assign any of its rights or interest in this Agreement or any Order, or subcontract all or substantially all of its performance of this Agreement or any Order, without ██████████ prior written consent. Seller shall not delegate any of its duties or obligations under this contract. Seller may assign its right to monies due or to become due. No assignment, delegation or subcontracting by Seller, with or without ██████████ consent, shall relieve Seller of any of its obligations under this Agreement or prejudice any rights of ██████████ against Seller whether arising before or after the date of any assignment. This article does not limit Seller's ability to purchase standard commercial supplies or raw material.**

**The prohibition set forth in this GTA Section 28.3 includes, without limitation (and the following shall be deemed to be "assignments"): (i) a consolidation or merger of Seller; (ii) a change in the ownership or voting rights of more than fifty percent (50%) of the issued and outstanding stock of any corporate Seller; (iii) any assignment or transfer which would otherwise occur by operation of law, merger, consolidation, reorganization, transfer or other significant change in corporate or proprietary structure; (iv) the sale, assignment or transfer of all or substantially all of the assets of Seller; and (v) where Seller is a partnership, a change in control in such partnership.**

# Assignment (cont.)

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- Issue Spotting:

- “Without prior consent” / No Reasonableness Language

- No language – “which shall not be unreasonably withheld”
- Absence of reasonableness standard
  - Split of authority
    - 14 states: Withhold consent unreasonably
    - 18 states: Read into contract

- Assume Reasonableness Is In Contract

- Party prohibited from withholding consent to obtain economic concessions. See *R.B. Robbins v. Hunts Food & Industries, Inc.*, 64 Wn.2d 289 (1964).
- But: Can withhold consent if economically prejudiced or harm. *Washington Wine & Bev. Co. v. Outlook Vineyards*, 1999 Wash. App. LEXIS 2058, at \*19 (Wash. Ct. App. 1999).

## Trap # 8

PMSI



# What is a PMSI?



PMSI stands for purchase money security interest

PMSI is a type of security interest where the secured party (seller) takes a security interest in the goods.

# What is a PMSI?

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*“As collateral security for the payment of the purchase price of the Goods, Buyer [shall grant / hereby grants] to Seller a lien on and security interest in and to all of the right, title, and interest of Buyer in, to, and under the Goods, wherever located, and whether now existing or hereafter arising or acquired from time to time...”*

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## Trap #9

## Force Majeure



# Force Majeure – Protections for Buyer

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- Degree of Control of Impacted Party
  - Strikes
  - Shortages/Delays
- Obligations of Impacted Party (seller)
  - Notice
  - Mitigate
- Rights for Non-Impacted Party
  - Terminate
  - Reimbursement for add'l cost to cover

# Questions & Discussion

