



Guarantees, Indemnities and Releases

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Indemnities



Indemnity

- ◆ An indemnity is the obligation of one party to make another whole for a loss that the other party has incurred. *American Jurisprudence 2nd, Indemnity, Sec. 1.*
 - ◆ *Reimbursement*
 - ◆ *For loss or damage*
 - ◆ *Based on the principal that everyone is responsible for his own wrongdoing*
 - ◆ *Duty to pay for another's loss or damage*



Contractual Indemnification

- ◆ Indemnification and hold harmless provisions included in various documents:
 - ◆ Articles of Incorporation
 - ◆ Partnership or joint venture
 - ◆ Purchase and Sale Agreement
 - ◆ Lease
 - ◆ Product Distribution Agreement



Indemnify, Defend and Hold Harmless

- ◆ **Indemnification:** Reimbursement or risk shifting
 - ◆ One party agrees to reimburse the other for damages or losses
 - ◆ Shifts the risk of loss from one party to the other

- ◆ **Defend**
 - ◆ Obligation to defend the indemnified party against relevant claims
 - ◆ Includes cost of defending a third party claim
 - ◆ Fully compensate the indemnified party for all loss and expense of defending the claim or litigation
 - ◆ Includes a claim, or risk of loss



Indemnify, Defend and Hold Harmless

◆ **Hold Harmless**

- ◆ Agreement not to seek recovery
- ◆ May include the duty to defend
- ◆ Typically includes the risk of loss



Types of Indemnification

◆ First Party Indemnification

- ◆ Indemnification for losses or claims by one party against the other party for incidents or circumstances arising out of the contract or relationship that are the subject matter of the agreement containing the indemnification
- ◆ **Example:** Collection of receivables

◆ Third Party Indemnification

- ◆ Indemnification against claims by third parties against the indemnified party or liabilities of the indemnified party to third parties
- ◆ **Example:** Employee harassment claim



Purchase and Sale Agreement

- ◆ Drafting - Elements:
 - ◆ Survival of Representations and Warranties
 - ◆ Disclosure Schedule
 - ◆ Indemnification for Buyer's Benefit
 - ◆ Indemnification for Seller's Benefit
 - ◆ Limitations: Bucket and Cap
 - ◆ Matters Involving Third Parties (Obligation to Defend)
 - ◆ Adjustments to Computation of Adverse Consequences
 - ◆ Offsets and Collection
 - ◆ Exclusive or Nonexclusive



Purchase and Sale Agreement

- ◆ Survival of Representations and Warranties
 - ◆ **Buyer:**
 - ◆ All representations and warranties survive closing and continue in full force and effect forever thereafter (subject to any applicable statute of limitations)
 - ◆ Even if the damaged party knew or had reason to know of any misrepresentation or breach of warranty or covenant at Closing
 - ◆ **Seller:**
 - ◆ Representations and warranties do not survive closing
 - ◆ Selected representations and warranties survive
 - ◆ One year period
 - ◆ Unless the damaged party knew or had reason to know of any misrepresentation or breach of warranty at Closing



Purchase and Sale Agreement

- ◆ Survival of Representations and Warranties
 - ◆ **Neutral**
 - ◆ Most representations and warranties survive for 2-3 years
 - ◆ Certain representations and warranties (taxes, environmental, other areas subject to government regulations) survive closing and continue in full force and effect forever (subject to any applicable statute of limitations)
 - ◆ Even if the damaged party knew or had reason to know of any misrepresentation or breach of warranty or covenant at Closing



Purchase and Sale Agreement

- ◆ Indemnification for Buyer's benefit
 - ◆ If Seller breaches [or in the event any third party alleges facts that, if true, would mean any Seller has breached] any of its representations, warranties, and covenants contained in the agreement
 - ◆ Determined with or without regard to the Disclosure Schedule
 - ◆ Provided that Buyer makes a written claim within the survival period [plus 60 days]
 - ◆ Each Seller *obligated jointly and severally*
 - ◆ **Alternatives:** cap on each Seller's liability; requirement that recovery be pro rata among Sellers



Purchase and Sale Agreement

- ◆ Indemnification for Buyer's benefit
 - ◆ Indemnify against the entirety of any “Adverse Consequences”
 - ◆ **“Adverse Consequences”** – all actions, suits, proceedings, hearings, investigations, charges, complaints, claims, demands, injunctions, judgments, orders, decrees, rulings, damages, dues, penalties, fines, costs, amounts paid in settlement, Liabilities, obligations, taxes, liens, losses, expenses and fees, including court costs and [reasonable] attorneys' fees
 - ◆ **“Liability”** – any liability or obligation of whatever kind or nature (whether known or unknown, whether asserted or unasserted, whether absolute or contingent, whether accrued or unaccrued, whether liquidated or unliquidated, and whether due or to become due), including any liability for taxes.



Purchase and Sale Agreement

- ◆ Indemnification for Buyer's benefit
 - ◆ Buyer *may* suffer resulting from arising out of, relating to, in the nature of, or cause by the breach (or the alleged breach)
 - ◆ **Alternative:** Buyer *shall* suffer caused [proximately] by the breach
 - ◆ Including [or specifically excluding] Adverse Consequences Buyer may suffer after the end of any applicable survival period



Purchase and Sale Agreement

◆ Indemnification for Seller's benefit

- ◆ Buyer breaches [or in the event any third party alleges facts that, if true, would mean any Seller has breached] any of its representations, warranties, and covenants contained in the agreement
- ◆ Seller makes written claim
- ◆ Within the survival period [plus 60 days]
- ◆ Buyer shall indemnify each Seller
- ◆ Adverse Consequences Seller *may* suffer resulting from arising out of, relating to, in the nature of, or cause by the breach (or the alleged breach)
- ◆ **Alternative:** Seller *shall* suffer caused [proximately] by the breach
- ◆ Including [or specifically excluding] Adverse Consequences Seller may suffer after the end of any applicable survival period



Purchase and Sale Agreement

◆ Limitations

- ◆ Buyer form may not have any limitations
- ◆ Bucket – tipping bucket or deductible
- ◆ Cap
- ◆ Typically, limitations only apply to certain of Seller's representations and warranties



Purchase and Sale Agreement

- ◆ Limitations – Tipping Bucket

- ◆ Tipping Bucket:

- ◆ No liability until all Adverse Consequences meet a certain threshold
 - ◆ After the threshold is met, Seller is liable for Adverse Consequences from the first dollar



Purchase and Sale Agreement

◆ Limitations

◆ Tipping bucket:

Seller shall not have any obligation to indemnify Buyer from and against any Adverse Consequences resulting from, arising out of, relating to, in the nature or, or caused by the breach [Seller form: by reason of all such breaches] of any representation or warranty of Sellers' contained in Sections ___ above [here Buyer can limit the limitation to certain specific representations] [or alleged breaches] in excess of a \$_____ aggregate threshold (at which point Sellers will be obligated to indemnify Buyer from and against all such Adverse Consequences relating back to the first dollar).



Purchase and Sale Agreement

- ◆ Limitations – Deductible

- ◆ Seller only liable for losses in excess of a certain amount:

Seller shall not have any obligation to indemnify Buyer from and against any Adverse Consequences resulting from, arising out of, relating to, in the nature or, or caused by the breach [Seller form: by reason of all such breaches] of any representation or warranty of Seller contained in Sections ___ above [here Buyer can limit the limitation to certain specific representations] [or alleged breaches] until Buyer has suffered Adverse Consequences by reason of all such breaches in excess of a \$_____ aggregate deductible (after which point Seller will be obligated only to indemnify Buyer from and against further such Adverse Consequences



Purchase and Sale Agreement

- ◆ Limitations – Cap
 - ◆ A total cap on liability under all or a subset of Indemnification Provisions
 - ◆ There is no “typical” cap
 - ◆ Range may depend on deal size
 - ◆ 10% to 100%
 - ◆ Typically limited to only certain representations and warranties, not including title, absence of liens, taxes, environmental, etc.



Purchase and Sale Agreement

◆ Limitations – Cap

There will be a \$_____ aggregate ceiling on the obligation of Sellers to indemnify Buyer from and against Adverse Consequences resulting from, arising out of, relating to, in the nature of, or cause by breaches of the representations and warranties of Sellers contained in Section ____ above.



Purchase and Sale Agreement

- ◆ Matters Involving Third Parties
 - ◆ The obligation to defend is a separate contractual commitment
 - ◆ Elements
 - ◆ Indemnified Party must give notice to Indemnifying Party promptly; delay does not void liability unless delay itself is detrimental
 - ◆ **Alternative:** Seller may want notice with in 5 days
“If any third party notifies any Party (the “Indemnified Party”) with respect to any matter (a “Third Party Claim”) that may give rise to a claim for indemnification against any other party (the “Indemnifying Party”) then the Indemnified Party shall promptly notify the Indemnifying Party thereof in writing; provided, however, that no delay on the part of the Indemnified Party in notifying the Indemnifying Party shall relieve the Indemnifying Party from any obligation hereunder unless (and then solely to the extent) the Indemnifying Party is thereby prejudiced.””



Purchase and Sale Agreement

◆ Matters Involving Third Parties

◆ Elements

- ◆ One party (typically the Indemnifying Party) has the right to conduct the defense so long as they act diligently
- ◆ Other party may pay for their own counsel

Neutral: Any Indemnifying Party will have the right to assume the defense of the Third-Party Claim with counsel of his choice reasonably satisfactory to the Indemnified Party at any time within 15 days after the Indemnified Party has given notice of the Third-Party Claim; provided, however, that the Indemnifying Party must conduct the defense of the Third-Party Claim actively and diligently thereafter in order to preserve his rights in this regard; and provided further that the Indemnified Party may retain separate co-counsel at its sole cost and expenses and participate in the defense of the Third-Party Claim.



Purchase and Sale Agreement

◆ Matters Involving Third Parties

◆ Elements – Conduct of Defense

- ◆ For Indemnifying Party to assume defense, Buyer may want:
 - ◆ Indemnifying Party to give written notice that Indemnifying Party will indemnify the Indemnified Party against the Third Party Claim
 - ◆ Evidence that the Indemnifying Party has the financial resources to defend against the Third Party Claim and fulfill its indemnification obligations
 - ◆ Claim involves only money damages and does not seek an injunction or other equitable relief
 - ◆ Settlement or an adverse judgment is not, in the good faith judgment of the Indemnified Party, likely to establish a precedential custom or practice [materially] adverse to the continuing business interests or reputation of the Indemnified Party
 - ◆ The Indemnifying Party conducts the defense of the Third Party Claim actively and diligently



Purchase and Sale Agreement

- ◆ Matters Involving Third Parties
 - ◆ Elements – Conduct of Defense
 - ◆ Seller may want the Indemnifying Party to have the complete ability to control defense



Purchase and Sale Agreement

- ◆ Matters Involving Third Parties
 - ◆ Elements – Settlement
 - ◆ Indemnifying Party will not consent to the entry of any judgement or enter into any settlement with respect to the Third-Party Claim without the prior written consent of the Indemnified Party, not be unreasonably withheld, unless the judgment or proposed settlement involves only the payment of money damages and does not impose an injunction or other equitable relief upon the Indemnified Party.



Purchase and Sale Agreement

- ◆ Computation of Adverse Consequences
 - ◆ Possible adjustments
 - ◆ **Buyer**
 - ◆ Time cost of money
 - ◆ **Seller**
 - ◆ Net of any tax benefits or insurance coverage
 - ◆ Treated as an adjustment of purchase price



Purchase and Sale Agreement

◆ Offsets and Collection

- ◆ If money is to be paid by Buyer to Seller at any later time, such as an earnout or under the terms of a purchase note, Buyer should seek an offset right for the Indemnified Party

◆ **Escrow**

Any indemnification to which Buyer is entitled under this Agreement as a result of any Adverse Consequences it may suffer shall first be made as a payment to buyer from the escrow account in accordance with the terms of the Escrow Agreement and Buyer shall have the option of recouping all or any part of any remaining or additional Adverse Consequences Buyer may suffer (in lieu of seeking any indemnification to which it is entitled) by notifying Seller that Buyer is reducing the principal amount under the Buyer Note.



Purchase and Sale Agreement

- ◆ Exclusive or Nonexclusive

- ◆ **Seller favorable** – The indemnification provisions are an exclusive remedy
- ◆ **Buyer favorable** – nonexclusive

The foregoing indemnification provisions are in addition to and not in derogation of any statutory, equitable, or common law remedy any Party may have with respect to the transactions contemplated by this Agreement.



Guaranties



Guaranties

- ◆ Basic Requirements
- ◆ Types
- ◆ Specific Terms
- ◆ Termination



Basics – Definition

- ◆ A "guaranty" is a promise to answer for another person's debt, default, or failure to perform.
- ◆ Shifts risk of debtor's default onto guarantor
- ◆ Conditional Promise
- ◆ Payment or Performance
- ◆ Separate contract from underlying obligation, though may be part of same document, and often executed simultaneously



Basics – Creation; Consideration

- ◆ Mutual assent, adequate consideration, definiteness, and meeting of the minds
- ◆ Consideration
 - ◆ Separate contracts – both need consideration
 - ◆ Single consideration typical
 - ◆ Separate consideration possible
 - ◆ No need for a direct benefit to guarantor
 - ◆ Usually consists of a benefit to the primary debtor or a detriment to the creditor
 - ◆ Best practice is to recite consideration in guaranty



Basics – Consideration

- ◆ Examples:
 - ◆ the renewal or extension of a note.
 - ◆ creditor's agreement to continue doing business with debtor.
 - ◆ inducing creditor to ship or continue shipping goods to debtor.
 - ◆ extension of the time for payment.
 - ◆ extension of additional credit.
 - ◆ creditor's compromise of a claim against debtor.
 - ◆ reduction of the guarantor's annual loan payments.
 - ◆ release of a previous guaranty.
 - ◆ relinquishment of a lien.
 - ◆ making a loan to the guarantors' companies.
 - ◆ discontinuance of a legal action.
 - ◆ forbearance from enforcing any legal right.



Basics – Written; Clear Intent

- ◆ Statute of Frauds - RCW 19.36.010
- ◆ No magic words required (except some statutes)
- ◆ Sample phrases
 - ◆ "guarantees" an obligation of another
 - ◆ "immediately undertake the obligations of borrowers" upon written notice of default from the creditor
 - ◆ creditor had the right to "call" upon person to make payments due from the debtors
 - ◆ will be "responsible for" an obligation of another when due
- ◆ “Guaranty” not sufficient (commercial usage)
- ◆ Must show, with reasonable clarity, an intent to be liable on an obligation in case of default by the primary obligor



Basics – Valid Primary Obligation

- ◆ Guaranty cannot exist without a primary obligation
- ◆ If underlying agreement is void, guaranty is generally not enforceable
 - ◆ Not signed by debtor
 - ◆ Failure of consideration
 - ◆ Illegality (usury)
- ◆ Does not necessarily extend to inability to enforce rights under primary obligation



Types – Special or General

- ◆ Special

- ◆ Names specific “obligees” or creditor(s)
- ◆ Only enforceable by them

- ◆ General

- ◆ Addressed to persons generally
- ◆ May be enforced by anyone to whom presented



Types – Absolute or Conditional

◆ Absolute

- ◆ Guarantor will perform (pay) upon principal's default (sole condition)
- ◆ Creditor not required to proceed or exhaust remedies against the principal debtor
- ◆ Default rule unless document states otherwise
- ◆ Sample language
 - ◆ "immediate and unconditional"
 - ◆ "unconditionally and irrevocably" guarantee "the prompt and complete payment" of the borrower's obligations under a note "in strict accordance with its terms."
 - ◆ Express waiver of all conditions to avoid potential conflict



Types – Absolute or Conditional

- ◆ Conditional

- ◆ Requires some contingent event (other than debtor's default) or act by creditor before guarantor will be liable.
- ◆ Typical requirement that creditor use reasonable diligence to seek satisfaction from debtor before guarantor



Types – Payment or Collection

◆ Payment

- ◆ Binds the guarantor to pay the debt at maturity
- ◆ No obligation to make a demand on the debtor
- ◆ Type of absolute guaranty, thus the default rule for a guaranty that is silent as to payment vs. collection
- ◆ Sample language
 - ◆ Guaranty "due and punctual performance and payment"
 - ◆ "unconditionally guarantee to Creditor the full and timely payment of all sums due and performance of all obligations of Debtor"



Types – Payment or Collection

◆ Collection

- ◆ Promise that if the creditor cannot collect the claim with due diligence, the guarantor will pay the creditor
- ◆ Due diligence generally includes pursuing legal action against debtor, unless otherwise agreed in the guaranty
- ◆ Guaranty of collection is generally liable for creditor's costs of collection unless otherwise stated, whereas guaranty of payment does not since creditor has no obligation to incur collection costs against debtor



Types - Continuing or Restricted

- ◆ Restricted
 - ◆ Limited to a single or specific number of transactions
- ◆ Continuing
 - ◆ Contemplates future course of dealing and a series of transactions
 - ◆ Indefinite period
 - ◆ An overall debt
 - ◆ All future obligations of the debtor to the creditor
 - ◆ Often used with line of credit
- ◆ Parties' intent controls; presumption against continuing guaranty if there is doubt



Types – Individual or Corporate

- ◆ Use care when describing who is obligated – determination is based on entire writing, not just signature
- ◆ Addition of corporate title after name does not by itself avoid personal liability



Specific Terms – Named “Obligee” (Creditor)

- ◆ Special guaranties are generally only enforceable by the person to whom addressed, unless language or circumstances indicate intention that others could rely on it
- ◆ Principal-agent transactions
- ◆ Successor corporations can generally enforce guaranties, though some cases have held otherwise under specific facts
- ◆ Specific language in guaranty can avoid issues



Specific Terms – Assignability

- ◆ As a general rule, a guaranty is assignable by the creditor absent express language in the document to the contrary.
- ◆ Guaranty of payment
 - ◆ Assignment of a debt passes to the assignee any security for its payment
 - ◆ Can be true even though assignment is not mentioned in the guaranty and the assignee has no knowledge of the guaranty at the time of the assignment
- ◆ Guaranty of a note – frequently been held enforceable by an assignee (although there is contrary authority)
- ◆ Conditional guaranty
 - ◆ Some courts find specific guaranties not assignable without express language
 - ◆ Some courts hold that a special guaranty is assignable so long as the assignment does not materially alter the guarantor's undertaking or the guarantor did not execute the contract based on personal confidence in the creditor



Specific Terms – Duration

- ◆ Restricted guaranty generally determined by its provisions
- ◆ Continuing guaranties last until a specified date or notice of revocation/termination by Guarantor as to future obligations of debtor
- ◆ If no definite duration is specified, generally considered a continuing guaranty
- ◆ Termination after a reasonable time may be implied



Specific Terms – Notice to Guarantor

- ◆ Not required for transactions unless guaranty specifies it; applies to all current and future debts
- ◆ Notice of default generally required, except in absolute or general guaranties, or when guarantor has or should have knowledge of the default
- ◆ No notice given: discharge or damages
- ◆ Right to notices can be waived (and often are)

To the fullest extent permitted by law and except as otherwise provided herein (including, without limitation, the demand required by the foregoing Section 1), the **Guarantor hereby waives** (a) protest of the nonpayment of the Obligations or of any claim for interest or any part thereof, (b) notice of presentment and protest, (c) notice of acceptance of any guaranty herein provided for or of the terms and provisions thereof or hereof by the Buyer, (d) **notice of any indulgences or extensions granted** to the Stockholder or any successor to the Stockholder or any person or entity that has assumed the obligations of the Stockholder, (e) any requirement of diligence or promptness on the part of the Buyer with respect to any Obligation or this Guaranty, (f) any enforcement of the Obligations, and (g) **any and all notices of every kind and description which may be required to be given by any statute or rule of law in any jurisdiction**. The waivers set forth in this Section shall, to the fullest extent permitted by law, be effective notwithstanding the fact that the Stockholder ceases to exist by reason of its liquidation, merger, consolidation or otherwise.



Specific Terms – Conditions and Limitations in Guaranty

- ◆ In general, a guarantor's liability is as unconditioned or as limited as stated in the guaranty.
- ◆ Unconditional – equal to debtor's liability
- ◆ Written conditions and limitations – generally enforceable
- ◆ Conditions agreed to orally – generally unenforceable
- ◆ Some examples of limitations on the guarantor's liability:
 - ◆ to specific creditor(s).
 - ◆ to loans made to the debtor under a particular form of ownership.
 - ◆ to credit extended, or loans for, specific transactions.
 - ◆ to a particular debt or note.
 - ◆ to credit extended or performance required before a specific date.



Termination – Unintended

- ◆ End of debtor's obligations
- ◆ Material alteration to principal obligation – injury or increased risk may be required to allow termination
 - ◆ Alterations of the primary contract that may cause a guarantor's release or discharge include:
 - ◆ a change in the place or method of payment.
 - ◆ a change in the rate of interest (whether an increase or decrease).
 - ◆ conversion of a revolving line of credit to a term loan leading to increased exposure.
 - ◆ an increase in the principal amount of a guaranteed mortgage note.
 - ◆ a change in the ownership of the creditor or principal debtor.
 - ◆ an extension for the payment of the principal obligation.



Termination – Unintended

- ◆ Release or Novation
- ◆ Extension of Excess Credit
- ◆ Impairment of Security
- ◆ Death of Guarantor

- ◆ Creditors often require that these be waived



Termination – Revocation

- ◆ Restricted guaranties may not be revoked
- ◆ Continuing guaranties
 - ◆ cannot be revoked as to past transactions, which may include future renewals and extensions of existing debt if expressly covered by guaranty
 - ◆ generally constitute an offer to guaranty future obligations and can be revoked before those obligations arise
- ◆ Process for revocation may be described in guaranty
- ◆ Notice to creditor is usually required; in writing is advisable



Backstop Agreements



Backstop Agreements – General

- ◆ Backstop Agreement – Sharing liability among guarantors
 - ◆ Parties agree to share specified obligations in a certain way
 - ◆ LLC members or shareholders guaranty company or corporate debt
 - ◆ Lender may be likely to seek recovery from one or a few of several guarantors, for their convenience
 - ◆ Chosen guarantor normally has the most liquid funds
 - ◆ Members or shareholder want to ensure that liability under guaranty is shared pro rata in accordance with their ownership percentages



Backstop Agreements – General

- ◆ Typical Elements
 - ◆ Indemnification by Company (borrower)
 - ◆ Allocation among guarantors based on ownership percentage
 - ◆ Requires Indemnified Party to have actually paid on the guaranty
 - ◆ Each party covenant to take all actions to ensure that he can comply with the terms of the backstop
 - ◆ Default interest
 - ◆ Remedies on default may include recovery from company distributions and levy of company ownership



Releases



Releases - Definition

- ◆ An agreement exempting a person from any liability to another which he or she may in the future incur as a result of the person's negligence, or for certain kinds of contractual damages. In other words, sophisticated parties may contractually limit future remedies. Such agreements are called:
 - ◆ exculpatory clauses or agreements
 - ◆ releases
 - ◆ covenants not to sue
 - ◆ waivers



Releases – Uses for risk allocation

- ◆ Settlement of prior claims
 - ◆ Contract renegotiations/renewals; business acquisitions
- ◆ Liability limitations (commercial)
 - ◆ Disclaimer of liability for incidental or consequential damages
- ◆ Pre-injury release of liability (consumer)
 - ◆ Typical activity participant release
- ◆ Exculpatory clauses are disfavored by courts and thus strictly construed against the drafter and must be clear to be enforced.
- ◆ Will not be enforced if unconscionable or against public policy



Releases – Not Enforceable

- ◆ Fraud / misrepresentation
- ◆ Mutual mistake
- ◆ Duress and undue influence
- ◆ Gross negligence or willful, intentional, or reckless conduct
- ◆ Unconscionable
- ◆ Public interest / public policy



Releases – Clear Language

- ◆ Only extends to liabilities that are described in the release and that were clearly contemplated by the parties when the release was entered into
- ◆ Overly broad and general statements may not be effective; courts may limit them to damages reasonably contemplated by parties
- ◆ More scrutiny in consumer cases



Releases – Conspicuousness

- ◆ Courts consider the following factors:
 - ◆ whether the waiver is set apart or hidden within other provisions;
 - ◆ whether the heading is clear;
 - ◆ whether the waiver is set off in capital letters or in bold type;
 - ◆ whether there is a signature line below the waiver provision;
 - ◆ what the language says above the signature line; and
 - ◆ whether it is clear that the signature is related to the waiver.

- ◆ For example, where a health club used a two-page membership agreement that placed a “Waiver and Release” provision in ordinary type in the middle of the agreement, it was an issue for trial as to whether the waiver was sufficiently conspicuous.



Releases – Conscionability

- ◆ In commercial transactions, if there is no indication of unfair surprise, unconscionability is determined in light of all the surrounding circumstances, including the following nonexclusive factors:
 - ◆ the conspicuousness of the clause in the agreement; whether the important terms were hidden in a maze of fine print
 - ◆ the manner in which the parties entered into the contract, including the presence or absence of negotiations regarding the clause and whether the parties had a reasonable opportunity to understand the terms of the contract
 - ◆ the custom and usage of the trade
 - ◆ any policy developed between the parties during the course of dealing

- ◆ Where one party may be subjected to unfair surprise, especially in consumer contexts:
 - ◆ the clause must be explicitly negotiated between the parties
 - ◆ the remedies being excluded must be set forth with particularity



Releases – Public Policy Factors

- ◆ Whether or not such an agreement violates public policy is determined by the evaluation of six factors (*Wagenblast*):
 - ◆ the transaction concerns a business of a type generally thought suitable for public regulation;
 - ◆ the party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public;
 - ◆ the party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards;
 - ◆ as a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services;
 - ◆ in exercising a superior bargaining power, the party confronts the public with a standardized adhesion contract of exculpation and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence;
 - ◆ as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.



Questions?

Please contact us any time with additional questions.

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