



PROGRAM MATERIALS
Program #3663
February 25, 2026

Most Litigated Terms in Business Agreements

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The Most Litigated Terms in Business Agreements



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Agenda

- Setting the stage
- Most Litigated Terms
 - Indemnification/Limitation of Liability
 - Termination
 - Choice of Law/Arbitration/Litigation
 - Integration/Merger Clauses
 - Intellectual Property
- Honorable Mentions
 - Non-competes
 - Non-solicitations
 - NDAs
 - Force Majeure
 - 3rd Party Beneficiaries
- Questions?

Setting the Stage

- 100 different lawyers would give this presentation 100 different ways
- Focusing on clauses that affect B2B transactions, so not employment agreements, government contracts, loan or other financial documents, etc.
- Keep in mind that this area is heavily governed by common law, even where the UCC governs
- Base assumption that there is in fact a contract, so not going to discuss consideration, meeting of the minds, authority to execute, etc.

Setting the Stage

- *Contra Preferentum* – “as between two reasonable and practical constructions of an ambiguous contractual provision ... the provision should be construed less favorably to that party which selected the contractual language.” *United States v. Seckinger*, 397 U.S. 203 (1970)
 - Means a business dispute could be resolved differently based on who drafted the contract
- **Useful contract language:** This [AGREEMENT/CONTRACT] is intended to be construed without regard to any presumption or rule requiring construction or interpretation against the Party drafting an instrument or causing any instrument to be drafted. No parol evidence or other evidence shall be permitted to override the interpretation adopted and advanced by [PARTY 1] and [PARTY 2] agrees that nothing in this [AGREEMENT/CONTRACT] is ambiguous.

Most Litigated Terms

1. Indemnification/Limitation of Liability
2. Termination
3. Choice of Law/Arbitration/Litigation
4. Integration/Merger Clauses
5. Intellectual Property

Indemnification / Limitation of Liability

- An indemnity clause is a promise by one party (the indemnifying party) to be responsible for and cover the loss of the other party (the indemnified party)
- A limitation of liability clause is a legal provision within a contract that restricts the amount or type of damages one party can be held liable for in the event of a breach or dispute



Indemnification / Limitation of Liability

- Courts strictly construe indemnification clauses - *Harleysville Ins. Co. v. Physical Distribution Servs., Inc.*, 716 F.3d 451 (8th Cir. 2013)
- But indemnification clauses are generally enforceable - *Colorado Mill. & Elevator Co. v. Chicago, R.I. & P. R. Co.*, 382 F.2d 834 (10th Cir. 1967)
- Courts invalidate indemnification clauses when:
 - Not signed by both parties - *Perez v. Vezer Indus. Pros., Inc.*, 610 F. App'x 611 (9th Cir. 2015)
 - It attempts to indemnify against willful conduct - *Gibbs-Alfano v. Burton*, 281 F.3d 12 (2d Cir. 2002)
 - Harm experienced was not envisioned by the indemnification clause
Weathersby v. Conoco Oil Co., 752 F.2d 953 (5th Cir. 1984)

Indemnification / Limitation of Liability

- Drafting Tips
 - Specifically exclude intentional torts or other willful conduct
 - Have a separate signature line for the indemnification
 - Establish how settlement negotiations will proceed
 - Specifically exclude failure of insurance coverage
 - Include costs of defense as they accrue and include subpoena responses
 - Decide if losses should be modified by “reasonably foreseeable” language
 - Include an obligation to mitigate for the indemnified party

Indemnification / Limitation of Liability

- Limitation of Liability Clauses are strictly construed - *Great N. Ins. Co. v. ADT Sec. Servs., Inc.*, 517 F. Supp. 2d 723 (W.D. Pa. 2007)
- Limitation of Liability Clauses are generally enforceable - *Negrete v. Citibank, N.A.*, 187 F. Supp. 3d 454 (S.D.N.Y. 2016), *aff'd*, 759 F. App'x 42 (2d Cir. 2019)
- Courts invalidate them when:
 - Unequal bargaining power/ Unconscionable conduct - *In re Lyondell Chem. Co.*, 544 B.R. 75 (Bankr. S.D.N.Y. 2016)
 - If it's really an exculpatory clause - *Underwriters at Lloyds v. FedEx Freight Sys., Inc.*, No. 8:07-CV-212-T-EAJ, 2008 WL 2901049 (M.D. Fla. July 23, 2008)

Indemnification / Limitation of Liability

- Don't the clauses conflict? How can I indemnify you if my liability is limited? Courts have said no:
 - **Selection of remedies** – *Marbro, Inc. v. Borough of Tinton Falls*, 297 N.J. Super. 411, 688 A.2d 159 (Law. Div. 1996)
 - **Limitation of liability doesn't apply to indemnification unless indemnification specifically says otherwise** - *Thrash Com. Contractors, Inc. v. Terracon Consultants, Inc.*, 889 F. Supp. 2d 868 (S.D. Miss. 2012)
 - **Against public policy** - *Epochal Enterprises, Inc. v. LF Encinitas Properties, LLC*, 317 Cal. Rptr. 3d 573 (2024), as modified on denial of *reh'g* (Jan. 31, 2024)
- But this can be changed by statute - *Martin v. Lou Poliquin Enterprises, Inc.*, 696 S.W.2d 180 (Tex.Ct.App.1985)

Indemnification / Limitation of Liability

- Drafting tips:
 - Specifically exclude willful conduct or gross negligence
 - Remember the categories of damages:
 - Consequential
 - Incidental
 - Indirect
 - Exemplary
 - Special
 - Punitive
 - Make clear that clause covers contracts or torts
 - Carve out foreseeable damages

Termination

- This section is not about failure to perform; it's about termination clauses specifically
- Easy with government contracts: either termination for cause/default or termination for convenience



Termination

- Termination for Cause: a contractual provision that allows a party to terminate the agreement if the other party breaches the contract, acts in a way that materially breaches the contract, or fails to act
- Termination for Convenience: a contractual provision that allows a party to end a contract without penalty or cause
 - Don't assume this will reduce litigation, parties still fight over amounts owed and whether it was actually a termination for convenience



Termination

- Notices to Cure

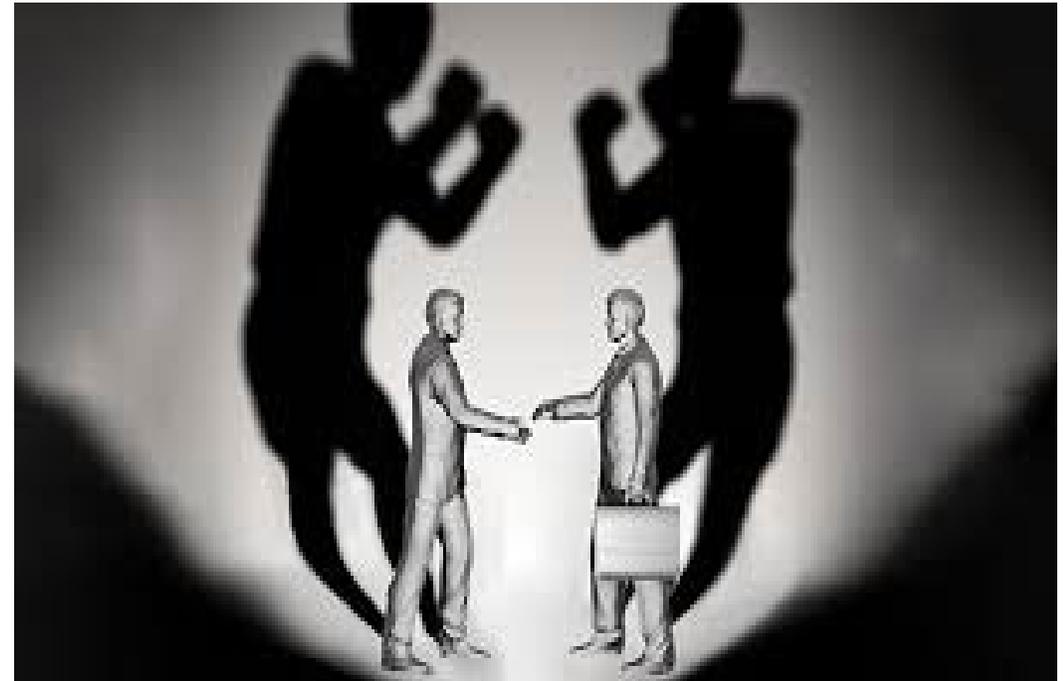
- Often strictly construed, need to carefully follow the steps otherwise might end up being liable for breach - *Henry & Baltic Assocs. v. K & Q Food Corp.*, 796 N.Y.S.2d 837 (App. Term 2005)
- Must clearly identify alleged breach and what must be done to cure it - *Composite Laminates, Inc. v. United States*, 27 Fed. Cl. 310 (1992)
- Must have a reasonable time to cure - *Mason-McDuffie Real Est., Inc. v. Villa Fiore Dev., LLC*, 335 P.3d 211 (Nev. 2014)
- Some courts read in an implied right to notice to cure - *Gray Constr., Inc. v. Medline Indus., Inc.*, No. CV SAG-19-03405, 2023 WL 2333218 (D. Md. Mar. 1, 2023) (collecting cases)
- Do not admit breach if given chance to cure, just cure and document exactly what was fixed

Termination

- Drafting tips:
 - Always include specific reasons that will trigger a termination for cause
 - If putting in cure period, put in specific deadlines and requirements for the notice to cure
 - Always make clear if days are business days or calendar days
- Provide for either party to terminate for convenience if desired
 - Make clear that party entitled to payments for work done up to termination date

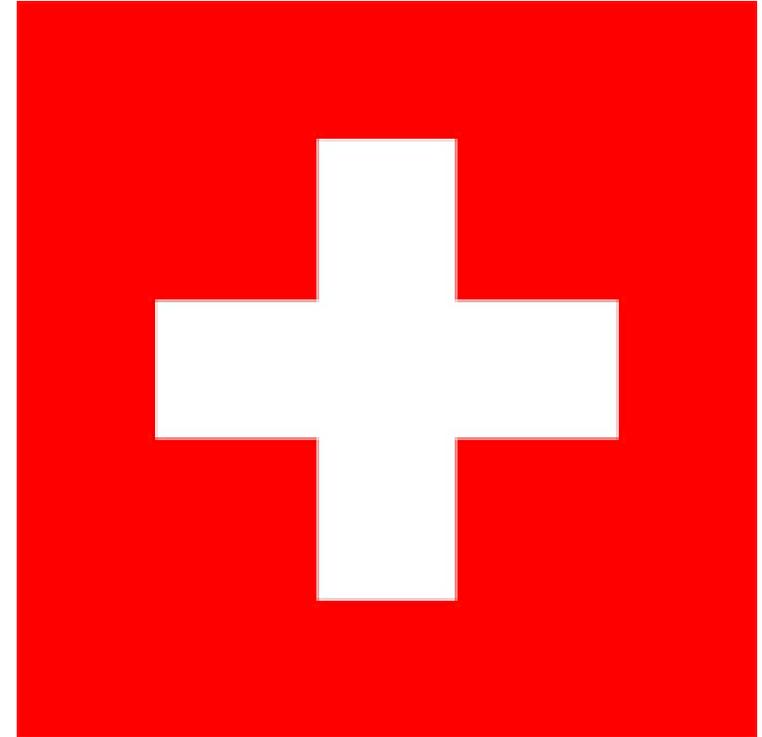
Choice of Law / Arbitration / Litigation

- Parties want to control where their disputes are brought, when their disputes are brought, and what law governs
- This leads to countless disputes over choice of law/forum clauses and whether the parties actually have to arbitrate
- Can also mandate mediation prior to any arbitration/litigation



Choice of Law/Forum

- Under federal law, a forum-selection clause “should control absent a strong showing that it should be set aside.” - *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972)
- Can still challenge if no nexus to forum state, but tough challenge
 - *Sheehan v. Viking River Cruises, Inc.*, No. 20-CV-0753 (WMW/DTS), 2020 WL 6586231 (D. Minn. Nov. 10, 2020) (successfully forcing suit in Switzerland)
- Remember, federal courts sit in diversity and apply the law of the forum state - *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941)

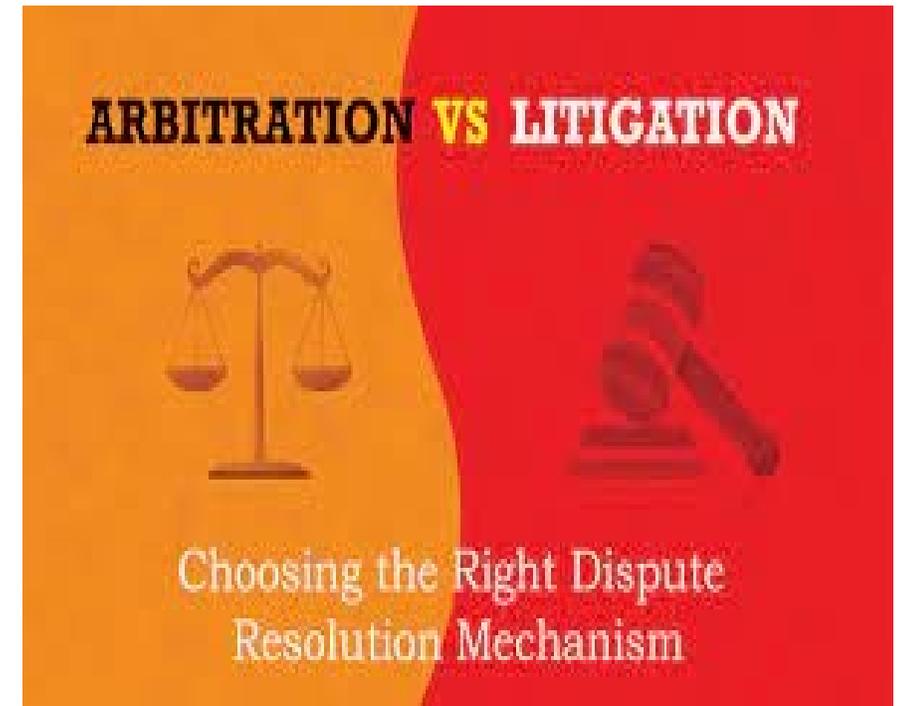


Choice of Law

- You can write it broad enough that the chosen forum governs *all* disputes between the parties, not just disputes about the contract
- Specifically exclude conflict of law rules and statutes
- Remember to invoke the *substantive* laws of the venue
- For venue selection, identify the county suits should be brought in, and provide for state and federal courts if desired

Arbitration / Litigation

- In the last 3 years, 523 cases revolving around disputes about arbitration according to Westlaw
- Challenges take several common forms
 - Does contract require arbitration?
 - What rules govern the arbitration?
 - Is the arbitration award enforceable?



Choice of Law / Arbitration / Litigation

- While parties can volunteer for arbitration, need a contract to compel
- But is putting arbitration in the agreement enough?
 - Domestic: Does **not** need to be signed to compel arbitration- *Zurich Am. Ins. Co. v. Watts Indus., Inc.*, 417 F.3d 682 (7th Cir. 2005)
 - International: Must be in writing, split over whether it must be signed
 - *Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38 (1st Cir. 2008) – does not need to be signed
 - *Taylor Grp., Inc. v. Indus. Distributors Int'l Co.*, 859 F. App'x 439 (11th Cir. 2021) – needs to be signed or show other “clear and unmistakable evidence”



Arbitration / Litigation

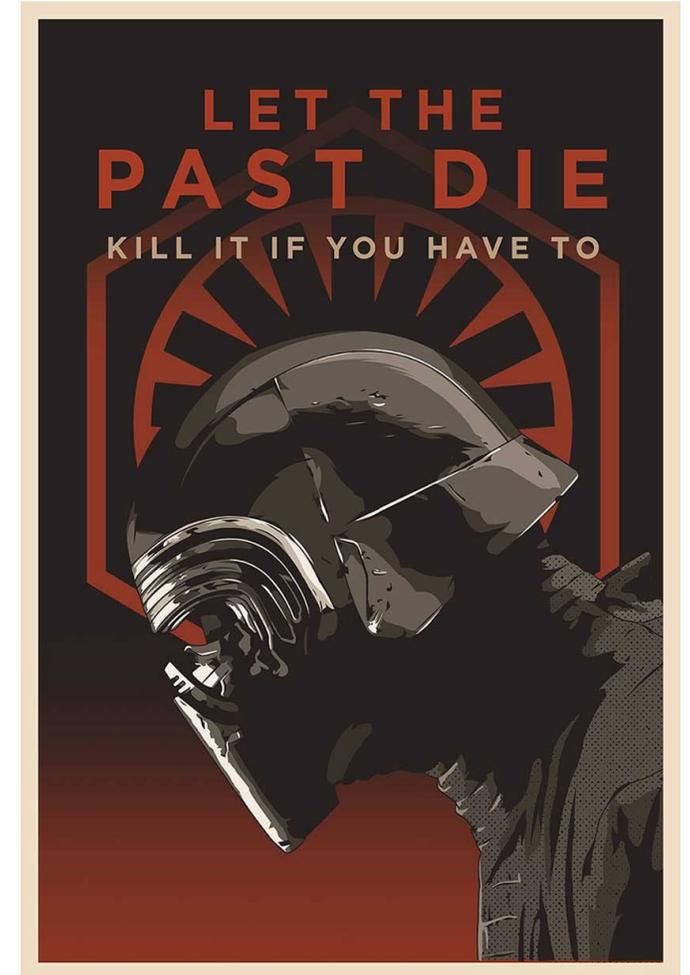
- Is the arbitration award enforceable?
 - Threshold question: Did the parties agree to binding or non-binding?
 - Courts may vacate an arbitrator's decision “only in very unusual circumstances.” *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995)
 - Can overturn if arbitration award exceeded scope of contract - *Eastern Associated Coal Corp. v. Mine Workers*, 531 U.S. 57 (2000)
 - And courts don't have to defer if litigation is not about arbitrated issues or if arbitration did not use methods similar to applicable court procedures - *Mann v. Est. of Meyers*, 61 F. Supp. 3d 508 (D.N.J. 2014)

Arbitration / Litigation

- Arbitration clause should include the following provisions:
 - Identify the county, city, state, country that arbitration (and motion to compel arbitration) has to take place in
 - The number of arbitrators and who picks them
 - Qualifications of the arbitrator
 - Whether the decision must be a reasoned one or not
 - Waiver of punitive damages if desired
 - Costs of arbitration and attorney's fees
 - Usually want an exception for injunctive relief
 - The language of the arbitration if international
 - The arbitration company (AAA, FORUM, JAMS, NAM, etc.)
 - The rules that govern (FRCP, state rules, arbitration provider rules)

Integration / Merger Clauses

- An "integration clause" is a clause which provides that any prior negotiations leading up to the contract are subsumed in the contract and that the contract is complete in itself.
- Designed to block parol evidence, prior conversations
- Does **not** block subsequent modifications; for that you need an amendment or modification provision



Integration / Merger Clauses

- So this precludes discuss of parol evidence, right? Wrong.
 - Some courts allow it if they determine the contract is not actually the entire agreement - *Condrey v. SunTrust Bank of Georgia*, 429 F.3d 556 (5th Cir. 2005)
 - Some courts allow it if a term is still ambiguous - *Enrico Farms, Inc. v. H. J. Heinz Co.*, 629 F.2d 1304 (9th Cir. 1980)
 - Some courts block it no matter what - *Borschow Hosp. & Med. Supplies, Inc. v. Cesar Castillo Inc.*, 96 F.3d 10 (1st Cir. 1996)
- Drafting tip: Contract should have party agree no clauses are ambiguous



Integration / Merger Clauses

- What if the contract was fraudulently induced?
- Some courts say too bad, you waived any reliance on representations
 - *HSBC Realty Credit Corp. (USA) v. O'Neill*, 745 F.3d 564 (1st Cir. 2014)
- Other courts say you cannot contract around fraud
 - *Coal Res., Inc. v. Gulf & W. Indus., Inc.*, 756 F.2d 443 (6th Cir. 1985)
- Drafting tip: specifically exclude fraud in the inducement claims or have party covenant that no representations induced them to sign the agreement





Intellectual Property

- Trademarks: source-identifiers for goods and services
- Patents: exclusive rights to inventions for a period of time
- Copyrights: protections for original works of authorship (e.g., creative works)
 - Statutory and common law
- Trade Secrets: information that has commercial value, is not readily ascertainable, and is maintained as secret
- Legal defense costs for a patent infringement lawsuit can easily exceed \$10 million and courts routinely issue damage awards in the tens or even hundreds of millions of dollars.



Intellectual Property

- “Work for Hire” - works created by employees in the scope of their employment are automatically owned by the employer
- Contractors require specific contract clauses expressly making work for hire, otherwise contractor will retain ownership
 - Key exceptions: (1) contribution to a collective work, (2) motion picture or other audiovisual work, (3) translation, (4) supplementary work, (5) compilation, (6) instructional text, (7) a test, (8) answer material for a test, or (9) an atlas
- Work for hire doesn’t usually extend to inventions or proprietary technology without express agreement, but company can get “shop rights” i.e., implied license



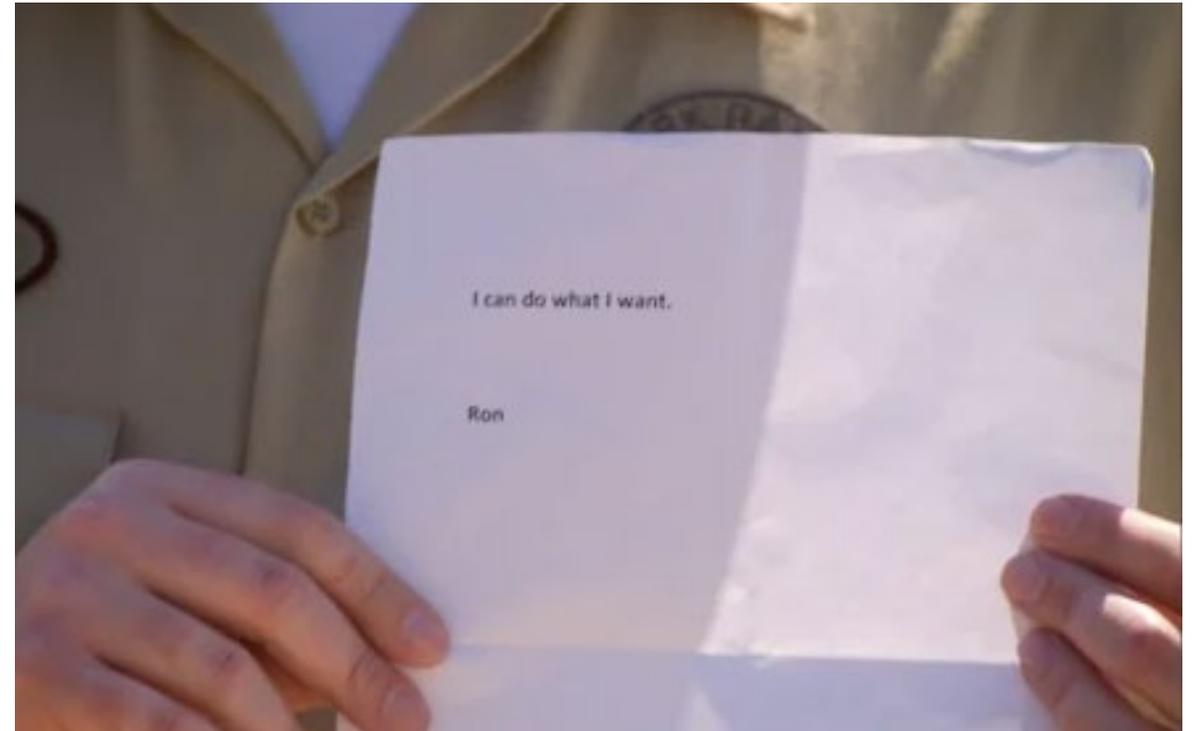
Intellectual Property

- Equity Purchases vs. Purchase of Assets
 - Equity usually means getting all patents, trademarks, copyrights; asset purchase usually means only getting what's specifically listed
 - Has seller already licensed IP to third parties? Is there “springing license” clauses in seller’s contracts?
 - Is there other third-party IP necessary for the purchased IP to function?
 - Will there be co-mingled IP after the transaction?
 - Review seller contracts carefully for definition of “affiliate”
 - Carefully consider covenants not to sue



Intellectual Property

- Licenses
 - Exclusive or Non-Exclusive?
 - What exactly is it allowing you to do?
 - Sublicensable?
 - Quality control?



Intellectual Property

- Drafting Tips:
 - Specifically identify and invoke the work for hire doctrine
 - Have party convey any copyright conceived to the other party and ensure their employees, agents, etc. do the same and waive claims
 - Have a mandatory disclosure deadline for any IP created by the contract
 - Affirmatively require assistance in filing for patent, trademark, copyright etc. for IP created
 - Prohibit creation of derivative works
 - Exclude works in the public domain

Honorable Mentions

1. Non-competes
2. Non-solicitations
3. NDA's
4. Force Majeure
5. 3rd Party Beneficiaries
6. Waiver



Non-Compete Agreements

1. Agreement limiting the ability of the signer to work in the industry for a set amount of time and/or set geographic area
2. Helps protect trade secrets, most importantly factor rates
3. Stops employees from leaving, setting up their own shops, and stealing your clients
4. Often part of a severance package



The Old Rule

- Governed by State Law, not federal
 - Most states said they were legal
- Had to be limited in geographic scope
 - If you tried to make too broad, it would be thrown out
- Had to be limited in time
 - Could not stop someone from working their entire life
- Less concerns if part of a bona fide sale of a business



The New Rule?



- In 2024, FTC promulgated new rule regulating non-competes
- Made non-competes illegal for all but 0.75% workers
 - “Senior Executives”
 - Salary over \$151,164
 - “Policy-Making Position”
- Unless bona fide sale of business
- Have to notify employees their non-competes are void

The Death of the New Rule



- Federal District Courts found that rule exceeded FTC’s authority and New Rule was set aside –
 - *Ryan, LLC v. Fed. Trade Comm'n*, 746 F. Supp. 3d 369 (N.D. Tex. 2024)
 - *Props. of the Villages, Inc. v. Fed. Trade Comm'n*, No. 5:24-CV-316-TJC-PRL, 2024 WL 3870380 (M.D. Fla. Aug. 15, 2024)
- In September of 2025 FTC voted to accede to vacatur of Non-Compete Clause Rule
- Non-competes return to be governed by state law, though some states are seeking to replicate FTC Rule

Non-Solicitation

- Agreement that limits ability of signer to contact your clients or employees to get their business or hire them
- Protects you from having your star employees poached
- Protects your client list from being undercut



The Old Rule



- *Boeing Co.* test:
 - Employers legitimate reason for rule vs. risk rule could chill employee's right to organize or do other NLRA Actions
- Only void if potential adverse impact > justification
- Meant vast majority of non-solicitations were
- Very deferential to businesses

The New Rule



- *Stericycle* (2023):
 - If an employee can “reasonably interpret” an employer rule to prohibit NLRA activity, its illegal
 - And employee is not neutral, objective third party but one “economically dependent” on employer
 - Have to prove “legitimate and substantial business interest” and cannot advance it without more “narrowly tailored rule”
 - Very critical and suspicious of business

NDA's

- An NDA is a legal contract that protects sensitive information shared between two or more parties
- NDAs are generally enforceable - *IDX Sys. Corp. v. Epic Sys. Corp.*, 285 F.3d 581 (7th Cir. 2002)
- NDAs are strictly construed - *Overholt Crop Ins. Serv. Co. v. Travis*, 941 F.2d 1361 (8th Cir. 1991)



NDAs

- Have to be careful that the NDA is not a non-compete in disguise, otherwise it could be struck down - *J.V. & Sons Trucking, Inc. v. Asset Vision Logistics, LLC*, 121 F.4th 690, 698 (8th Cir. 2024)
- This will rarely be a successful challenge, but still something to consider



Force Majeure

- A clause that excuses performance under certain events
 - Typical to see nature disasters, government intervention, or war
- “It is a well established rule of contract law that *force majeure* clauses must be narrowly construed” - *Great Lakes Gas Transmission Ltd. P'ship v. Essar Steel Minnesota, LLC*, 871 F. Supp. 2d 843, 854 (D. Minn. 2012)
- Force Majeure clauses need to be written expansively and preferably with specifics



Force Majeure

- *JN Contemp. Art LLC v. Phillips Auctioneers LLC*, 29 F.4th 118, 123–24 (2d Cir. 2022)
 - Government orders about Covid-19 trigger force majeure
- *Avantax Wealth Mgmt., Inc. v. Marriott Hotel Servs., Inc.*, 108 F.4th 407, 420 (6th Cir. 2024)
 - Covid-19 itself is not a force majeure event, but government regulations about Covid-19 can be
- *Rudolph v. United Airlines Holdings, Inc.*, 519 F. Supp. 3d 438, 450 (N.D. Ill. 2021)
 - Court investigated whether Covid was real reason for non-performance
- *Seib v. Metro. Life Ins. Co.*, No. 3:19-CV-00892-AC, 2021 WL 2449099, at *5 (D. Or. Apr. 7, 2021)
 - Dicta, but Covid-19's effects were reasonably foreseeable at that point



Force Majeure

- Should specifically include or exclude Covid-19
- Don't use "Act of God," specifically spell out fire, flood, tornado, etc.
- Consider whether it will excuse performance forever or until the Force Majeure ends

Questions?

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