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CLIENT ALERT

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Should You Include a Limitation of Liability Provision in Your Next Contract?

Having a well-drafted contract is one of the most important acts you can take to minimize your risks. As such, you should consider including in your next contract a limitation of liability for consequential and punitive damages. The importance of an enforceable waiver for consequential and punitive damages is hard to overstate, since these types of damages can be hard to define and may result in large and unexpected claims. In a relatively recent case, the South Carolina Supreme Court held that a limitation of liability provision for punitive damages was enforceable in favor of a lender and provided guidance on drafting enforceable liability limitations.

In *Maybank v. BB&T* (2016) 416 S.C. 541, the South Carolina Supreme Court held that a liability limitation provision barred a bank customer from recovering punitive damages from the bank. However, the Supreme Court warned that limitation of liability provisions are disfavored, may be unenforceable in certain situations and will be strictly construed against the drafter. The Court also stated that limitation of liability provisions may be unenforceable if they are unconscionable, violate public policy or if the party seeking enforcement has committed fraud.

In *Maybank*, a sophisticated investor (Maybank) contracted with BB&T for investment and wealth management services. After his investment strategy soured, Maybank sued BB&T for faulty investment advice. The contract between Maybank and BB&T had a limited liability provision, which provided as follows:

Bank and Investment Advisor shall not be liable with respect to their services under this Agreement except for any loss attributable to their negligence or willful misconduct. In no event shall Bank or Investment Advisor be liable for any incidental, indirect, special, consequential or punitive damages.

A jury found for Maybank and awarded \$3,100,000 in actual damages, \$5,000,000 in punitive damages and granted Maybank's motion to treble (triple) the actual damages from \$3,100,000 to \$9,300,000. The trial court also awarded Maybank attorney's fees and costs of \$2,899,306 for a total judgment of \$17,199,306.

The South Carolina Supreme Court held that the limitation of liability provision in the bank's contract was enforceable and barred the award of punitive damages. The Court considered its preference against allowing a large corporation to contractually insulate itself from liability, but declined to void the provision because Maybank was not an "ordinary investor" and had an "extensive history as a trust advisor." The Court also determined that the limited liability provision did not violate public policy nor was it unconscionable. The Court stressed that the liability provision did not deprive Maybank of all damages arising under the contract, but merely limited the type of damages he could recover - in this case, punitive, consequential, indirect or special damages. However, despite enforcing the limited liability provision, the Court indicated a willingness to refuse enforcement of such provisions if poorly drafted or overly broad.

The enforcement of contractual limitations of liability has long been recognized in California. *Lewis v. You Tube, LLC* (2015) 244 Cal. App. 4th 118, 125 ("Limitation of liability clauses" 'have long been recognized as valid in California.' [Citation"]); *Food Safety Net Services v. Eco Safe Systems USA, Inc.* (2012) 209 Cal. App. 4th 1118, 1126 (" . . . they are enforceable with respect to claims for ordinary negligence unless the underlying transaction "affects the public interest". . . ."); and *Markborough California, Inc. v. Superior Court* (1991) 227 Cal. App. 2d 705, 714.

The lesson from *Maybank* is to consider including a limited liability provision - incorporating waiver of consequential and punitive damages - in all contracts, because these contractual damages limitations can be enforceable.

An effective limited liability provision should be drafted precisely and carefully to avoid issues which may prevent enforcement. An effective limited liability provision should:

- Use clear and unambiguous language.
- Be specific. State precisely what type of damages the party agrees to limit.
- Be conspicuous. It should not be buried in the contract or written in small print. It should be in bold print, preferably underlined, all caps and initialed.
- Be limited in scope. A provision that purports to waive all damages or claims may be unenforceable.

Should you have any questions about limited liability provisions, we would be glad to help you.



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