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LIMITATION OF LIABILITY

From time to time in drafting an agreement, one of the parties may wish to limit contractually any remedies or liability that the other party might seek at a later point in time. For example, a software developer might seek to limit any possible liability associated with the development of the software or with respect to the contract in any way. Another example would be in a purchase or sale of a business, where a seller may wish to limit liability that the buyer might assert at some future point in time.

In the case, *Aurora Health Care, Inc. v. Codonix Inc*., *2006 WI 1589629 (E. D. Wis. 2006)*, our firm was defending a party who was sued under a long and sophisticated contract. One part of the contract sought to limit liability to a particular sum or to three times the amounts paid under the contract. Furthermore, there was a limitation which provided that in no event will either party be liable for any consequential, indirect, special, or incidental damages. While there may be a dispute as to the meaning of those terms, clearly this is an attempt to limit liability under the contract.

Contractual remedies such as the ones mentioned above have often been upheld by the courts. In a Seventh Circuit case, the parties' contract contained remedy limitations that excluded lost profits, special, contingent, incidental, or consequential damages. Even in the face of those contractual limitations, the claimant sought significant sums of money in lost profits damages. The court noted that both parties were sophisticated commercial parties and that the limitation of remedies provisions still provided the plaintiff with a minimum adequate remedy, and therefore, the remedy limitation "did not fail of its essential purpose." In essence, the Seventh Circuit said, "a deal is a deal."

Provisions that relate to lost cost savings are typically treated as consequential damages or lost profits. A court may determine that a contract does not fail of its essential purpose because someone was denied a certain remedy since the remedy provided for in the contract was a product of that party's own negotiation and making. In other words, if you helped design the contract and you signed it, you made your own bed and you must sleep in it.

Limiting liability or, for that matter, limiting warranties that might be available and the remedies that might flow from those warranties are part of a negotiation that allocates risk in accordance with the parties' sound business practices. The courts may say that a commercial purchaser can better assess its economic expectations and anticipate problems with meeting

those expectations by demanding particular warranties to address the problems, or to ensure against that particular risk. In fact, some courts have indicated that if a commercial purchaser wants a product of higher quality, or better durability, or a better warranty, the purchaser is free to negotiate in the marketplace.

If a party wants stronger warranties and remedies, they are likely to have to make other concessions such as an increase in the price.

Care should be taken in the negotiation of provisions which may limit the liability of the parties to the contract or may limit any warranties under the contract. If a party is concerned about any such limitations, then the best approach may be to seek to negotiate more favorable terms rather than pursuing a claim at a later point in time where the other side will argue that the opponent is seeking to re-write the contract.

If you have any questions, please contact Attorney Randy L. Nash at O’Neil Cannon at 414-276-5000.