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 Wl 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.

CONSIDERATIONS OF DURABLE POWERS OF ATTORNEY

Historically, if a person is no longer able to make decisions regarding their health or finances, one had to commence a legal proceeding to have the person declared incompetent. The court then appointed a guardian and, to some degree, played a supervisory role over the guardian's decisions and actions.

People often created Powers of Attorney which would deal with financial issues in particular. So for example, if I was trying to sell my house but then moved out of town, I could create a Power of Attorney to have someone else sign the papers on my behalf. In a more permanent way, I could also create a Power of Attorney to have someone else sign checks for me or engage in other identified financial transactions.

A Durable Power of Attorney is a useful tool chosen by many people to give competent individuals the ability to choose a person to manage their affairs and assets in the event of incompetency. As people age and, for example, as increasing numbers of individuals suffer various affirmaties of old age, the Durable Power of Attorney avoids public court proceedings and provides an individual to help make these difficult decisions.

A Durable Power of Attorney is intended to delegate authority to another even if the person signing the Durable Power of Attorney became incompetent in the future.

In a recent Wisconsin Supreme Court case, one of the justices wrote an opinion to put Durable Powers of Attorney in a larger societal and legal context:

> A Durable Power of Attorney, unlike the Common Law Power of Attorney, survives the principal's disability or incapacity.

Many people now will create Durable Powers of Attorney and name their spouse as a person who can make financial decisions should that become necessary in the future. As the State Supreme Court said:

> [D]urable Powers of Attorney are intended to give competent individuals the ability to delegate to an agent broad power to manage their affairs and assets in the event of incompetency.

* * *

> The Durable Power enhances the autonomy of the principal by enabling a principal to make decisions for himself or herself while competent that will continue to be effective if the principal becomes incompetent.

> The Durable Power of Attorney can improve the living conditions of the elderly and provide security for their future care. A Durable Power of Attorney can help a competent principal to handle his or her financial and legal affairs and living arrangements and then can enable the attorney-in-fact, the agent, to handle the principal's finances and day-to-day quality of life without having to declare the principal incompetent and without having to seek court supervision.

Many people would not object to asking their spouse or other trusted family member or friend to serve as a Durable Power of Attorney. Having said that, by merely signing a Durable Power of Attorney, a principal is potentially giving the agent very significant power over one's finances and can even be authorizing the emptying of bank accounts. Further, as time goes by, things might change and the spouse's health might become questionable such that one would want to terminate the Durable Power of Attorney. In that case, one might consider naming an adult child to serve in that capacity.

While Wisconsin has a statute to address some of these issues, there is very little case law interpreting the statute or developing a body of law to assist individuals and attorneys with respect to Powers of Attorney. People considering these issues should contact an attorney who handles elder law issues to explore whether this type of document is appropriate for any individual's situation.

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