

OREGON CASE UPDATE

Court Upholds Liability Limitation in Commercial Lease Agreement

From the desk of Jack Levy: Contracts often contain provisions that attempt to limit or waive liability. Sometimes these provisions are effective, other times not. Generally, courts will focus on whether the waiver provision is clear, conspicuous and fair. Read on to learn how particular language was deemed effective to limit liability for claims of negligence and breach of contract.

Claims Pointer: In this case arising out water intrusion into a leased warehouse, resulting in damage to auto parts, the Oregon Court of Appeals held that a liability waiver provision in a lease was enforceable.

case in point...

American Wholesale Products v. Allstate Ins. Co., 288 Or App 418 (2017)

American Wholesale Products (“American Wholesale”) entered into a lease for a warehouse with the landlord Elpro Investments (“Elpro”). The insurance requirements, waiver of liability and waiver of subrogation provisions in the lease were included in a provision titled “Insurance Required.” It said:

[Elpro] shall be responsible for insuring the premises, and [American Wholesale] for insuring its personal property and trade fixtures located on the premises. Neither party shall be liable to the other for any loss or damage caused by water damage, sprinkler leakage, or any of the risks covered by a standard fire insurance policy with an extended coverage endorsement, and there shall be no subrogated claim by one party’s insurance carrier against the other arising out of any such loss.

American Wholesale’s personal property – its inventory of auto parts - were damaged because of water intrusion into the warehouse. American Wholesale sued Elpro for breach of contract and negligence, blaming the water intrusion on Elpro’s failure to properly maintain the warehouse. The lease required Elpro to maintain the warehouse. The lease also included an indemnity provision which said that under some circumstances Elpro would have to indemnify American Wholesale because of the condition of the premises if caused by Elpro’s negligence or breach of the lease.

Elpro defended against American Wholesale’s claim by arguing that lease waived its liability for

any loss or damage caused by water damage. The trial court agreed with Elpro. On appeal, American Wholesale argued that the waiver was not expressed in “clear and unequivocal terms” as required by law because the lease obligated American Wholesale to maintain the warehouse building and because the indemnity agreement contemplated that Elpro could be held responsible to American Wholesale if Elpro were negligent or if it breached the lease. American Wholesale argued that the combination of these provisions made the waiver language “ambiguous”, meaning that there are alternative plausible interpretations of the waiver language. If the waiver language was deemed ambiguous, the language would have to be interpreted against Elpro because Elpro drafted the lease.

The Oregon Court of Appeals disagreed with American Wholesale and upheld the waiver language, finding that the waiver was clear and unequivocal, unambiguous, and conspicuous. The court said that the starting premise is that a waiver must be “clearly and unequivocally expressed” in order to be enforceable. In addition to evaluating the contract language itself, the court also looks at “the possibility of a harsh or inequitable result” if a party is allowed to be relieved of the consequences of its own negligence. Here, the court upheld the waiver because the parties expressed their intent with sufficient clarity; the waiver released both parties from “any” loss or damage caused by water damage. The court explained that waiver language does not have to use the specific word “negligence” to relieve a party from the consequences of its own negligence. Significantly, the court held there was no harsh or inequitable result in this



Contact: Jack Levy | www.smithfreed.com | email: jl@smithfreed.com

Ph: 503.227.2424 | Fax: 503.227.2535 | 111 SW 5th Ave, Suite 4300 | Portland | OR | 97204

This article is to inform our clients and others about legal matters of current interest. It is not intended as legal advice. Readers should not act upon the information contained in this email without seeking professional counsel.



Smith Freed Eberhard

OREGON LAW UPDATE

Court Upholds Liability Limitation in Commercial Lease Agreement

case in point...

case because the waiver's primary effect is to allocate risk between the parties as evidenced by their agreement in the same paragraph to insure itself against this very type of loss; that is, water damage to personal property.

The court held that there was no ambiguity because of the fact that Elpro was responsible for maintenance under the lease or because Elpro could potentially have to indemnify American Wholesale for claims arising out of Elpro's negligence or breach of the lease. This is because the maintenance, indemnity and waiver provisions could be read to co-exist. Also, the maintenance and indemnity obligations are generic while the waiver provision is specific to claims of water damage.

Further, the court held that the agreement was conspicuous. Generally speaking, a term is conspicuous if it is written, displayed or presented in a manner that a reasonable person should notice it. For example, language is conspicuous when a heading is in capital letters, the font is in greater size than the surrounding text, or in a contrasting type to the surrounding text. American Wholesale argued that Elpro's waiver was inconspicuous because it did not appear in contrasting font and because it was "sandwiched" in the middle of a provision concerning insurance. These facts are correct, nonetheless, the court found the waiver to be conspicuous because the language was short, with only two sentences, and both of the sentences concerned risk allocation. According to the court, the insurance paragraph is not an illogical place to locate the waiver, because it is related to the mutual waiver of losses covered by insurance. Accordingly, the court found that a reasonable person would have noticed the waiver.

Finally, the court made a blanket statement upholding the waiver of subrogation provision in the lease:

For purposes of this case, [the waiver language] makes clear that neither [Elpro], nor [Elpro's] insurer by way of

subrogation, can be liable for the damages that [American Warehouse] alleges.

This broad statement is significant to clarify the effect of waivers of subrogation under Oregon law.

In April we reported on *Kaste v. Land O'Lakes Purina Feed, LLC*, 284 Or App 233 (2017), another case which addressed and ultimately rejected a limitation of liability provision in a dairy feed sale contract [(to view please click [here](#))]. Both Kaste and American Wholesale highlight that, to be effective, limitation of liability provisions should put the other side on unambiguous, **LOUD NOTICE** that their rights are being affected. Vaguely worded, cluttered or fine print language does not work. In other words, it is perfectly reasonable to sell a product, service or real estate AS-IS, or by other limiting terms, but those terms should be abundantly clear. It is also important to follow the court's guidance to give effect of your words.

View full opinion at: <http://www.publications.ojd.state.or.us/docs/A160215.pdf>

Case updates are intended to inform our clients and others about legal matters of current interest. They are not intended as legal advice. Readers should not act upon the information contained in this article without seeking professional counsel.



Contact: Jack Levy | www.smithfreed.com | email: jl@smithfreed.com

Ph: 503.227.2424 | Fax: 503.227.2535 | 111 SW 5th Ave, Suite 4300 | Portland | OR | 97204

This article is to inform our clients and others about legal matters of current interest. It is not intended as legal advice. Readers should not act upon the information contained in this email without seeking professional counsel.

