

# Panel Presentation:

Drafting, Enforcing, and Defending  
Against Tricky Contractual Provisions





# Welcome

## Panelists:

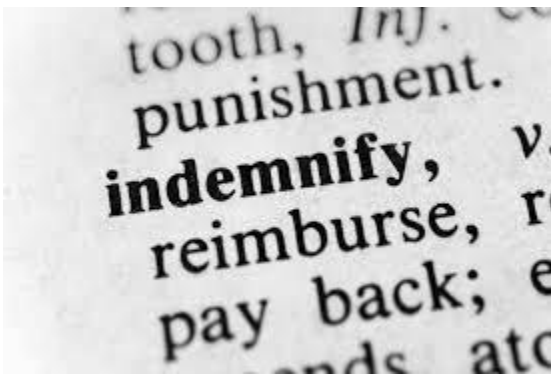
Maureen Dry-Wasson – Allegis Group

Prabir Chakrabarty – Mariner Finance

Matt Kohel – Goodell DeVries

Craig Brodsky – Goodell DeVries

Nikki Nesbitt – Goodell DeVries (moderator)



# Indemnification



# Data Protection



# Arbitration

# First party indemnification

You must pay me back if I get damaged because of your breach.

- Define the indemnified parties
- May be caused by broad language (e.g., “any claims”)
- Narrowly interpreted and state specific case law

# Third party indemnification

You must pay me back if someone else is damaged because of your breach and they come after me to pay for it.

- “Defend, indemnify, and hold harmless” is the standard contractual language

# Indemnification Face Palm

## 9.6 Indemnification.

The CONTRACTOR agrees to indemnify and hold harmless the COMPANY from all liability and damages, including cost of defense and reasonable attorneys' fees, which it or they may incur as a result of injury or damages sustained by any person arising out of the negligence or misconduct of the COMPANY.

The COMPANY agrees to indemnify and hold harmless the CONTRACTOR from all liability and damages, including cost of defense and reasonable attorneys' fees, which it or they may incur as a result of injury or damages sustained by any person arising out of the negligence or misconduct of the CONTRACTOR.

# Sample Language re: First & Third Party indemnification

Bainbridge St. Elmo Bethesda Apartments, LLC v. White Flint Express Realty Group Limited Partnership, LLLP, 454 Md. 475 (2017)

- *Indemnity.* [Contractor] hereby indemnifies, and agrees to defend and hold harmless [Principal]... from any and all claims, demands, debts, actions, causes of action, suits, obligations, losses, costs, expenses, fees, and liabilities (including reasonable attorney's fees, disbursements, and litigation costs) **arising from or in connection with [Contractor's] breach of any terms of this Agreement** or injuries to persons or property resulting from the Work, or the activities of Contractor or its employees, agents, contractors, or affiliates conducted on or about the Property, including without limitation, for any rent loss directly attributable to any damage to the Property caused by the construction of the Project, however Contractor shall not be liable for matters resulting from the negligence or intentional misconduct of Principal, its agents, employees, or contractors. The indemnification obligations set forth herein shall survive the termination of this Agreement indefinitely.

# The “**who**” and the “**what**”

## **Examples of who should indemnify:**

- Vendors and contractors
- Construction industry - indemnify the owner
- Licensors and licensees
- Hazardous activities and high-risk projects

## **Examples of what might prompt indemnification:**

- Simple breach
- Negligence
- Willful misconduct
- Specific types of claims (warranty / misrepresentation)
- Only in the event of litigation or judgment



# Carve-outs and Limitations

- Notice requirements
- Fault allocation and shared responsibility
- Narrow definition of “liabilities” subject to indemnification
- Specify “third party claims” and “direct indemnification”

# Indemnification Take-Aways

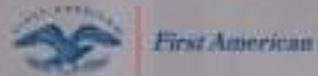
- Do not use boilerplate language
  - Subcontractors v. “its subcontractors”
- Think ahead; tailor the scope to your situation
  - The performance of the contemplated services
  - Infringement v. “knowing infringement”
- Ensure consistency with other contract terms
  - Attorneys’ fees provisions
  - Limitations on Liability



# Data Protection

# Why Data Protection Language?

- **CCPA:** For “Service Provider” you have to enter into specific written data protection language (avoids “sale”).
- **GDPR:** Under Article 28, Controllers who engage Processors have to enter into written agreements with specific requirements passed onto Processors and Sub-Processors.
- **Best practice** to have provisions around how personal data can be used, how it should be protected and what obligations each side has related to data breaches.



Protect Your Family's Largest Investment.

As a buyer of real estate property, you'll want to protect your investment — and the ownership rights that come with it.

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Lender Solutions



Real Estate Data Solutions



Home Warranty and Insurance



Trust Services



International Services

## Title Insurance and Settlement Services

First American Title Insurance Company facilitates and

Number of records affected: [885 million](#)

Year: 2019

Reason: Poor security

# Two main issues:

1. What can / must you do with customer data?
2. What happens when it gets lost?

# GDPR vs. CCPA – Roles of Parties

## GDPR



**Controller:** determines means and purposes of processing (the “how” and the “why”)

**Processor:** processes at direction of Controller and may not use Personal Data for any purpose other than providing services

## CCPA



**Business:** Same

**Service Provider:** Must only use Personal Data for purpose of services; may not use, disclose or retain the Personal Data other than to perform the services; must be prohibited from selling the Personal Data

# **Service provider context:**

How do you know what language to use in a contract?



# Checklist of considerations for contract language

✓	Review entire contract for context
✓	Determine data protection roles for parties
✓	Consider geography/data transfers
✓	Understand personal data involved
✓	Use appropriate contract language for applicable data protection law and roles
✓	Consider data breach implications
✓	Consider risks-Limits on liability/indemnity

# **Planning Ahead for Managing Data Breaches**

# Limiting and Assigning Liability for Data Breach

- **“YOU EXPRESSLY UNDERSTAND AND AGREE THAT YAHOO ... SHALL NOT BE LIABLE TO YOU FOR ANY PUNITIVE, INDIRECT, INCIDENTAL, SPECIAL, CONSEQUENTIAL OR EXEMPLARY DAMAGES...RESULTING FROM: ... UNAUTHORIZED ACCESS TO OR ALTERATION OF YOUR TRANSMISSIONS OR DATA ... OR ... ANY OTHER MATTER RELATING TO THE YAHOO SERVICE.”** *In re: Yahoo Customer Data Security Breach Litigation*
- The court in Yahoo! found that the limitation on consequential damages may be unconscionable and the limitation on other damages was too vague to warrant dismissal of the class action.





- 9.1 INITIAL DISPUTE RESOLUTION If a dispute *arises out of or relates to this Agreement or its breach*, the parties shall endeavor to settle the dispute *first through direct discussions*. If the dispute cannot be settled through direct discussions, the parties shall endeavor to settle the dispute *by mediation* under the Construction Industry Mediation Rules of the American **Arbitration** Association before recourse to the dispute resolution procedures contained in this agreement. Once a party files a request for mediation with the other party and with the American **Arbitration** Association, the parties agree to conclude such mediation within sixty (60) days of filing of the request.... \* \* \*
- 9.4 DISPUTE BETWEEN DESIGN-BUILDER AND ENGINEER ... Any disputes not resolved by mediation shall be decided *by arbitration* under the Construction Industry **Arbitration** Rules of the American **Arbitration** Association.

# Common contexts:

- Employment
- Consumer finance
- FINRA
- Business-to-business

# Drafting Concerns:

- Courts still favor valid arbitration clauses
- *Rankin v. Britton Woods of Frankford, LLC*, (Md. App. 2019) was riddled with spelling and grammatical errors, was a consumer contract that was “take-it-or-leave-it”, did not expressly outline the cost allocation, and was not conspicuously highlighted to the consumer.
- The court invalidated the clause because it was procedurally and substantively unconscionable.



# Fact or Fiction:

- It's cheaper
- It's faster
- It's more comprehensive
- It's more private
- No right to appeal

# QUESTIONS



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