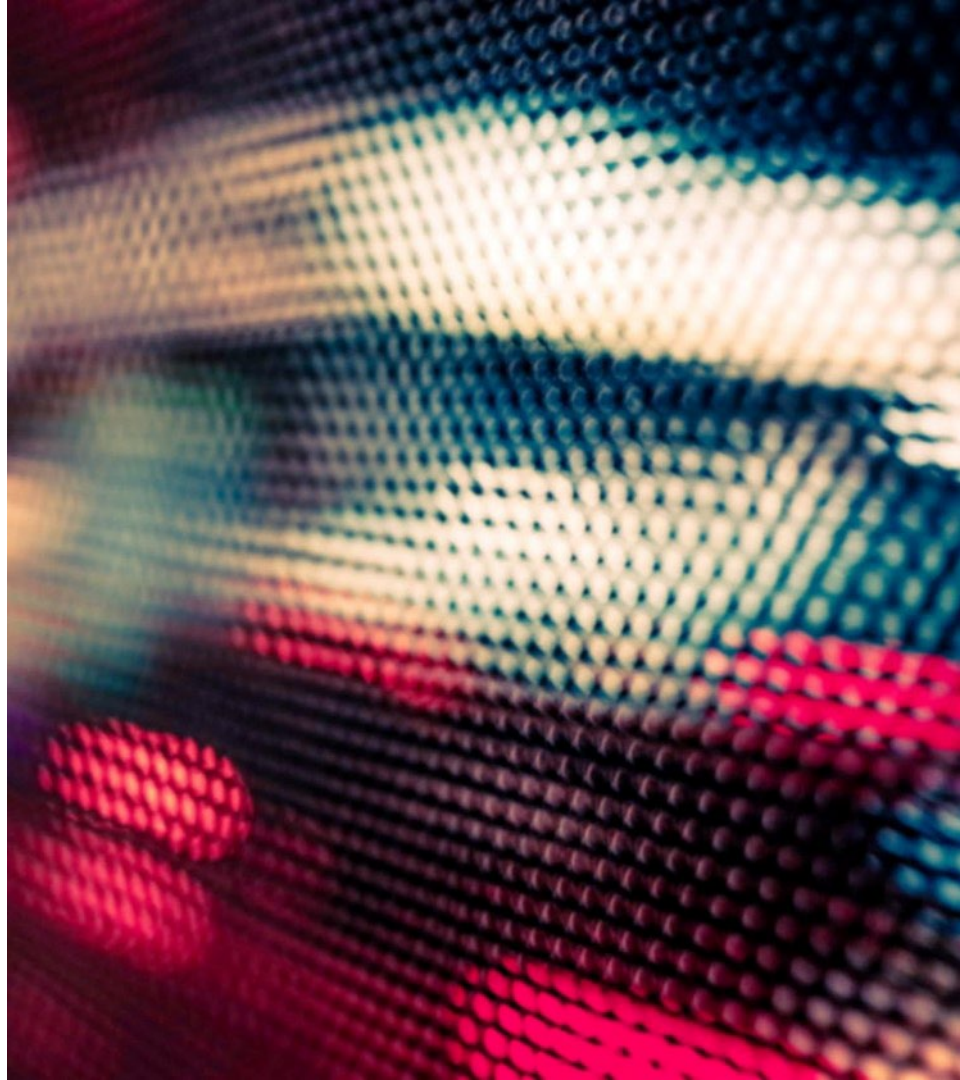


# **The Devil is in the Details: Contract Templates Matter**

**David Barksdale  
Rebecca Calkins  
Elizabeth Sluder  
William Troutman**

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# Contacts



## David Barksdale

### Partner

Los Angeles

David draws on more than 30 years of experience in advising clients on real estate finance investment matters. He represents both lenders and borrowers in structured and syndicated finance transactions and handles acquisitions, dispositions, leasing, workouts and restructurings.



## Rebecca Calkins

### Partner

Los Angeles

Rebecca has over two decades of experience in a wide variety of business litigation matters for clients in the technology, software and music industries. She has successfully handled notable copyright and trademark infringement matters, including landmark copyright victories in high profile cases.



## Elizabeth Sluder

### Partner

Los Angeles

Elizabeth focuses her practice on project finance, mergers and acquisitions, private equity and general corporate advice. She has substantial experience representing clients in renewable energy transactions, including construction and term debt financings, tax equity investments and negotiating supply agreements, construction contracts and offtake arrangements.



## William Troutman

### Partner

Los Angeles

Will advises consumer markets companies on a wide variety of issues, ranging from product safety to market access to ESG. Will's expertise includes product recalls, regulatory compliance, ESG and modern slavery, greenwashing, and supply and distribution agreements. This includes advisory work, disputes, and government enforcement.

# The Front Page

This Agreement Regarding Services (“Agreement”) is made and entered into as of this 1st day of June, 2023 (the “Effective Date”) by and between ABC Corp., a Delaware corporation (“ABC”), and 123, Inc., a California corporation (“123”). ABC and 123 are sometimes referred to herein as the “Parties,” and each as a “Party.”

# Definitions

- **Single most effective tool in bringing precision to language in the contract**
- Examples:
  - “Net Operating Income”
  - “Cost Savings”
  - “Loan Documents”

# Recitals

- **Use this to “tell the story”**
  - How did the parties get here?
  - What are they doing?
  - What do they intend to accomplish?
    - This is the key
    - Helps in establishing intent

# Assignments: To Assign or Not to Assign

*Neither party may assign any of its rights or duties under this Agreement without the prior written consent of the other party.*

# Assignments

## Can the benefits be assigned and the obligations assumed by another party?

- Contracts where you are relying on a specific characteristics that party possesses, that others may not:
  - Skill
  - Experience
  - Financial Resources

# Assignments

## If Assignment is to be permitted, under what circumstances?

- Certain criteria the new party must satisfy:
  - Experience
  - Financial Net Worth and Liquidity
  - Absence from any “blacklist”
    - Competitor
    - Past disputes



# Assignments

**If likely to be assigned, may want to pre-approve specific qualified parties**

- Property or Asset Management Agreements where experience with that type of asset dramatically narrows the pool of potential candidates
- Just makes it more efficient to make a change
- List in an exhibit

# Releases from Liability

Corporation A and Corporation B, on behalf of themselves and their respective Related Parties, release and discharge each other and their respective Related Parties from and against any Claims arising from or relating to the investigation, negotiation, or proposed purchase of the common stock of Corporation A by Corporation B, including without limitation any Claims arising from or relating to the Letter of Intent and the Stock Purchase Agreement and all the agreements referred to in the Stock Purchase Agreement.

# Releases: Basic Principles

- Releases are contractual provisions to be interpreted in accordance with general contract principles
- Releases are generally disfavored by courts and terms are strictly construed against the released party
- When parties are commercially sophisticated and roughly equal in bargaining power, releases have been generally upheld, with a view toward determining the parties' actual intent
- In contrast, if parties are of unequal bargaining power and the release is part of an oppressive contract of adhesion, with one-sided or overly harsh terms, the release may be held unconscionable and therefore unenforceable

# Releases: Legal Restrictions

- Contract Defenses
- Statutory and Regulatory Limitations – Fraud; Willful Injury; Violation of Law
  - Cal. Civil Code Section 1668
- Gross Negligence
  - Release is invalid if it protects a party against his or her gross negligence, as opposed to ordinary negligence
- Contracts Involving “Public Interest”
  - Factors listed in *Tunkl v. Regents of Univ. of Cal.*
  - Organized leisure activities have no compelling public interest, so releases limiting liability for hazardous recreational activities have been upheld

# Releases: Known and Unknown Claims

Unknown or Unsuspected Consequences. The parties understand and acknowledge that Section 3 of this Agreement applies to and includes all unknown or unsuspected consequences or results arising from or relating to the transactions, occurrences, or agreements referred to in that Section. Corporation A and Corporation B, on behalf of themselves and their respective Related Parties, represent and warrant that they have read the contents of California Civil Code §1542, which provides as follows:

“A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party.”

**CORPORATION A AND CORPORATION B, FOR THEMSELVES AND THEIR RESPECTIVE RELATED PARTIES, EXPRESSLY WAIVE ANY AND ALL RIGHTS AND BENEFITS UNDER CALIFORNIA CIVIL CODE §1542.**

# Indemnities

“Indemnity is a contract by which one engages to save another from the legal consequences of the conduct of one of the parties, or of some other person.”

Cal. Civil Code §2772

Risk Allocation Mechanism—Indemnification addresses risk of liability to third parties for activities arising under the contract

# Indemnities: Statutory Rules

## California Civil Code Section 2778

- These rules apply unless contracting parties specify otherwise:
  - **2778(1)**—indemnity against “liability” means indemnitee is entitled to recover upon becoming liable
  - **2778(2)**—indemnity only against “claims, demands, damages or costs” means indemnitee is not entitled to recover without first making payment for such claims, demands, damages or costs
  - **2778(3)**—indemnity against claims, demands or liability encompasses the costs of legal defense
  - **2778(4)**—imposes duty to defend

# Indemnities: Drafting Considerations

- Limiting Monetary Liability
  - Caps/maximum aggregate liability

“Indemnifying Party is not obligated to reimburse Indemnified Party under this Section [NUMBER] [Indemnification] for any Losses that exceed, in the aggregate, \$[AMOUNT] or the total amount paid [or payable] by the Buyer to the Seller under this Agreement [in the [NUMBER] [year/month] period preceding the event giving rise to the indemnification claim], whichever is [greater/less] [(the "Cap")].”



# Indemnities: Drafting Considerations

- Limiting Monetary Liability
  - Baskets (Thresholds or Deductibles)
  - Materiality Qualifiers

“Indemnifying Party shall not be obligated to pay for any Losses under Section [NUMBER] Indemnification) until the amount of such Losses exceeds, in the aggregate, \$[AMOUNT] or the total amount paid [or payable] by the Buyer to the Seller under this Agreement [in the [NUMBER] [year/month] period preceding the event giving rise to the indemnification claim], whichever is [greater/less]

- a) [(the “Threshold”)], in which event Indemnifying Party shall pay or be liable for all such Losses from the first dollar.
- b) [(the “Deductible”)], in which event Indemnifying Party shall only pay or be liable for Losses in excess of the Deductible.”

# Indemnities: Drafting Considerations

- Limit Available Remedies
- Timing and Survival
  - Statute of limitations
  - Contractual time limitation
- Limit Coverage to Types of Claims
  - Reps and Warranties
  - Environmental Claims
  - Taxes

# Indemnities: Legal Restrictions

- General Contract Defenses
  - Indemnity agreements are contracts and are interpreted by courts in accordance with general contract principles
  - Indemnities, together with releases and waivers, are in the broad category of exculpatory provisions that are traditionally disfavored by the courts
  - Provisions are strictly construed; ambiguities are construed against the party seeking indemnification
  - Scrutiny is heavier in the consumer context, or any situation with significantly unequal bargaining power – issues of contracts of adhesion, unconscionability, public policy
  - Modern Trend: ascertain the intent of the parties
  - Careful, specific and precise drafting is key!

# Indemnities: Legal Restrictions

- Statutory and Regulatory Limitations – Fraud; Willful Injury; Violation of Law
  - Includes both statutory law and regulatory provisions
- Gross Negligence
  - Indemnity for gross negligence is invalid and unenforceable as against public policy
  - Indemnity for ordinary negligence is sometimes denied if the language does not specify negligence, despite how broad the wording is
- Securities Fraud
  - SEC says indemnity for violations of federal securities law is against public policy and unenforceable

# Merger Clause/Integration Clause: Is That Really All?

*This Agreement, together with all exhibits referenced herein, constitutes the entire agreement between the Parties in relation to the subject matter of this Agreement and supersedes all prior agreements, understanding and commitments, whether oral or written, between the Parties.*

# Severability: Did We Really Mean That?

*If any term or provision of this Agreement is invalid, illegal or unenforceable in any jurisdiction, such invalidity, illegality or unenforceability shall not affect any other term or provision of this Agreement or invalidate or render unenforceable such term or provision in any other jurisdiction.*

# Choice of Law and Jurisdiction

## **Choice of Law**

### *Scenario One:*

- This Agreement shall be governed by the laws of the State of California without regard to conflict of laws principles.

### *Scenario Two:*

- This Agreement shall be governed by the laws of the State of New York without regard to conflict of laws principles.

## **Consent to personal jurisdiction of California Courts:**

- The parties hereby agree to the non-exclusive personal jurisdiction of the state and federal courts located in the State of California in any action or proceeding arising under this contract.

# Choice of Forum/Venue

## *Forum selection clause.*

The parties hereby agree that any disputes hereunder shall be litigated exclusively in the state or federal courts located in the State of California.

## *Venue selection clause.*

The parties hereby agree that any disputes hereunder shall be litigated exclusively in the Superior Court located in the County of Los Angeles.





**Thank you**



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