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## Contractual Limitations of Liability, Warranties and Remedies

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## Abstract

This paper provides an overview of the laws of each state in the United States with respect to limitations of liability, exclusions of damages, disclaimers of warranties and limitations of remedies. The intended audience of this paper is contract negotiators and contracts administration staff. The reader is assumed to be familiar with the risks and contractual issues associated with commercial contracts in general and technology, outsourcing and/or consulting contracts in particular. Accordingly, the paper focuses on providing short, conclusory answers.

Because the focus of this paper is a brief overview of the laws in the fifty states, it is important to note what we did and did not cover. Our research was guided by the following questions:

- **Limitations of Liability** – Are contractual caps, ceilings, or limits on direct damages enforceable? Are agreements that attempt to exclude all indirect damages enforceable?
- **Damages** – Does the state have any blanket limits on the amount of punitive or consequential damages that a party may recover?
- **Disclaimers/Limitations of Warranty** – Are disclaimers of any and all implied warranties enforceable in the state? Can remedies be limited to those express remedies solely and exclusively provided for in a contract?
- **Dispute Resolution** – When the state is a party to a suit, does the state have in place any mandatory dispute resolution procedures such as venue requirements, jury trial requirements, or a requirement that the state must exhaust mandatory administrative procedures before filing a lawsuit?

We obtained our answers through examination of state statutes, state court cases, and Attorney General Opinions. In many of the states we did not find that the sovereign was governed by different contract rules than were private commercial entities. However, the issue has not been explicitly addressed by the highest courts of many states.

We did not include a state by state determination of whether technology contracts would be considered by a court to be a contract for the sale of goods, thereby making it subject to the Uniform Commercial Code (“U.C.C.”) as opposed to a contract for services. Much of the existing body of law covers sales of goods and the enforceability of limitation of liability provisions under the common law is less clear. Because it appears that technology contracts should be governed by the U.C.C., the research in this document assumes that client contracts are contracts for the sale of goods.

In our discussion of the enforceability of limitation of liability provisions, we focused on obtaining a general answer. There are several states that will generally enforce limitations of liability but will void them if the party seeking protection has breached a contract intentionally or in bad faith. Where we came across such cases, they were included in our research results.

## Introduction

In order to assess the risks that our clients undertake when contracting with state and local governments, we reviewed the laws of the fifty states and the District of Columbia regarding the effectiveness of limitations of liability and exclusions of warranties. In most situations, limitations of liability will be enforceable. However, we have identified some instances in which courts may set aside mutually agreed upon limitations based upon public policy or an agreed upon remedy which the court finds to have failed.

### The Uniform Commercial Code

All of the states, with the exception of Louisiana, have adopted some form of the Uniform Commercial Code ("U.C.C."). The U.C.C. is the governing law for the sales of goods. The U.C.C. generally favors the freedom to contract and supports the notion that commercial parties are allowed to allocate the risk of a contract as they decide. As such, most courts will enforce what the parties to a contract have agreed upon as long as that intent is clearly stated.

Section 2-719 of the U.C.C. allows parties to a contract to limit remedies available, as well as to limit consequential damages. Under the U.C.C., the standard for holding a limitation on consequential damages invalid is unconscionability. A contract clause is unconscionable if it is a one-sided, oppressive, and harsh agreement. This standard is primarily intended to protect innocent and unsophisticated consumers. Courts seldom find unconscionability in agreements between sophisticated commercial parties bargaining at arms' length.

Disclaimers or limitations of express and implied warranties are also generally enforceable under the U.C.C. if they are clear and conspicuous and consciously bargained for. The only state that differs markedly is Mississippi, which does not allow implied warranties ever to be disclaimed. However, Mississippi has made a statutory exception for computer hardware and software. The U.C.C. provides explicit guidance on what rules need to be followed in order for a warranty disclaimer or exclusion to be valid. The standard for enforcing a warranty disclaimer or exclusion is unconscionability.

The most significant disparity that we found concerned the issue of whether a consequential damages limitation is enforceable despite the fact that a limited or exclusive remedy has failed of its essential purpose. Section 2-719(2) of the U.C.C. states that a buyer is entitled to any U.C.C. remedy once a limited remedy has failed of its essential purpose. However, section 2-719(3) prevents a buyer from recovering consequential damages when they have been limited or excluded by the contract, unless it can be proven that the limitation or exclusion is unconscionable. Some state courts hold that the two sections are separate and independent provisions and that therefore, a consequential damages limitation will be enforced even if a remedy has failed of its essential purpose, unless that limitation is unconscionable as of the contract formation. Other states that have addressed this conflict hold that the two provisions are not separate and a buyer is able to recover consequential damages, despite a clause in the contract excluding them, if a limited remedy failed of its essential purpose. Some states, like Colorado and possibly Pennsylvania, would allow the consequential damages exclusion to remain valid so long as they can determine that the parties clearly and unambiguously intended that result.

### Gross Negligence, Intentional Torts And Punitive Damages

Most courts look with disfavor on contract provisions that limit a party's liability for gross negligence, fraud, or intentional torts. Most of the states, however, have only addressed the issue of limiting gross negligence

with respect to common carriers. In the few states that do allow a party to limit their liability for gross negligence, the courts hold that there must be a clear and unmistakable intent to exclude gross negligence. This usually means that those exact words should be included in the contract disclaimer.

Some courts also refuse to enforce liability-limiting clauses if the party seeking protection is guilty of gross negligence, fraud or, in some states, bad faith. Alaska, for instance, will find a warranty disclaimer to be unconscionable if a warranty is breached in bad faith. California and Louisiana similarly will not allow a party to limit their liability for fraud, willful injury, or unlawful conduct. Other states simply hold that it would be a violation of public policy to allow a party to avoid liability when it has committed an intentional wrongdoing and as a result, refuse to enforce a limitation of liability provision.

A majority of the states prohibit recovery of punitive damages for breach of contract actions based on common law. Most states require that proof of an independent tort as a prerequisite to the recovery of punitive damages for breach of contract. Furthermore, punitive damages are almost never recoverable against a State or state agency. A few states, such as Connecticut, do not require an independent tort but only require that there be willful, malicious, or tortious conduct.

### **Contracts with State and Local Governments**

With respect to contracts with the states themselves, very few of the states applied different commercial law rules to public contracts. Some states do however have limits on the liability of governmental entities. These statutory limits generally apply to tort actions against the state. Those states that did address the issue generally found that the law governing contracts between private individuals also governs the rights and liabilities of a state under public contracts.

## Alabama

### Limitations of Liability

**Commercial Contracts.** Alabama courts uphold clauses limiting liability, including limits on direct and consequential damages, absent unconscionability. *Fleming Farms v. Dixie Agricultural Supply*, 631 So. 2d 922 (Ala. 1994). Unconscionability is generally never found in commercial contracts. Alabama law specifically allows for limitations on remedies or damages in contracts. Code of Ala. §§7-2-718, 7-2-719 (2005).

We found no cases or statutes discussing limitations of liability for gross negligence.

**State and Local Government Contracts.** We did not identify any cases discussing the enforceability of limitations of liability in public contracts.

### Exclusions of Certain Types of Damages

**Commercial Contracts.** In the context of private contracts, parties, particularly in commercial transactions, may agree to limit damages, e.g. consequential damages. Code of Ala. §7-2-719 (2005); *Kennedy Electric Co. v. Moore-Handley, Inc.*, 437 So. 2d 76 (Ala. 1983). However, a limitation on consequential damages will be excluded if a limited remedy fails of its essential purpose. *Volkswagon of America, Inc. v. Dillard*, 579 So.2d 1301 (Ala. 1991); *Riley v. Ford Motor Co.*, 442 F.2d 670 (5th Cir. 1971). Punitive damages are only recoverable for tort actions. They are limited to three times the compensatory damages of the party claiming such damages or \$500,000. Code of Ala. §§6-11-20,6-11-21 (2005).

**State and Local Government Contracts.** Alabama, by statute, limits the civil liability of governmental entities to \$100,000 for damage or loss of property arising out of any single occurrence. Code of Ala. §11-93-2 (2005). This limit, however, applies only in tort actions. Moreover, the cap does not apply to damages based on intentional interference with business relations. *City of Birmingham v. Business Realty Inv. Co.*, 722 So. 2d 747 (Ala. 1998).

Punitive damages may not be awarded against the State of Alabama or any county or municipality thereof, or any agency thereof, except any entity covered under the Medical Liability Act. Code of Ala. § 6-11-26 (2005).

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** Disclaimers of any and all implied warranties are enforceable in Alabama as long as the writing is conspicuous and not unconscionable. Code of Ala. §7-2-316 (2005); *Fleming Farms v. Dixie Agricultural Supply*, 631 So. 2d 922 (Ala. 1994).

**State and Local Government Contracts.** We did not identify any cases discussing disclaimers or limitations of warranty in public contracts.

**Mandatory Dispute Resolution Procedures.** Under Alabama's laws, the Board of Adjustment has the authority to hear claims arising out of any contract to which the State of Alabama or its agencies are parties. Code of Ala. §41-9-62 (2005). The Board of Adjustment, however, has no jurisdiction over contracts entered into by the Department of Transportation or of claims growing out of forfeitures or of contracts with any state or agency or board where, by law or contract, said agency is made the final arbiter of any disagreement arising out of forfeitures or contracts of said agency or board.

The Supreme Court of Alabama has held that sovereign immunity does not bar a contract suit against the state when the suit at issue is one brought to force a state agency to perform its legal duties under the contract. *State of Alabama Highway Department v. Milton Construction Co.*, 586 So. 2d 872 (Ala. 1991); *Lyons v. River Rd. Construction, Inc.*, 858 So. 2d 257 (Ala. 2003) (distinguishing *Milton Construction* in that a “clear legal duty” must be established specifically by the contract).

## Alaska

### Limitations of Liability

**Commercial Contracts.** Alaska upholds limitations of liability, including limits on consequential damages. However, limitations or exclusions on consequential damages will not be enforced if they are unconscionable. Alaska Stat. § 45.02.719 (2006).

We found no cases discussing limitations of liability for gross negligence.

**State and Local Government Contracts.** We did not identify any cases discussing the enforceability of limitations of liability in public contracts.

### Exclusions of Certain Types of Damages

**Commercial Contracts.** Parties in Alaska may limit damages e.g. consequential damages. Alaska Stat. §45.02.719 (2006). Following the UCC, Alaska will allow limitations of damages so long as the limit or exclusion is not unconscionable. Punitive damages are unavailable in a breach of contract claim unless the conduct at issue also constitutes an independent tort. *Kalenka v. Taylor*, 896 P.2d 222 (Alaska 1995). Per diem damages are allowed as long as they are non-punitive. *Carr-Gottstein Properties v. Benedict*, 72 P.2d 308 (Alaska 2003). There are no statutory caps on damages.

**State and Local Government Contracts.** Judgments in claims against the state may not include punitive damages. Alaska Stat. §09.50.280 (2006). There are no statutory caps on punitive damages.

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** In the context of contracts between private parties, disclaimers of warranty will be enforced if they are clear and conspicuous. A disclaimer may be denied enforcement if it is unreasonable. Alaska Stat. §45.02.316(a) (2006). Alaska follows the view that when a warranty fails, a separate provision barring consequential damages will survive as long as the bar itself is not unconscionable. *Pierce v. Catalina Yachts, Inc.*, 2 P.3d 618 (Alaska 2000). Alaska has held that if one party breaches a warranty by acting in bad faith, a warranty disclaimer barring consequential damages will be found to be unconscionable. *Id.*

**State and Local Government Contracts.** We did not identify any cases discussing disclaimers or limitations of warranty in public contracts.

### Mandatory Dispute Resolution Procedures

Alaska has waived its immunity. Pursuant to Alaska's statutes, a corporation having a contract claim against the state may bring an action in state court that has jurisdiction over the claim. Alaska Stat. §9.50.250 (2006). However, if an action affects a state agency, it should be considered first by that administrative agency and should follow that agency's procedures. *State v. Zia, Inc.*, 556 P.2d 1257 (Alaska 1976).

## Arizona

### Limitations of Liability

**Commercial Contracts.** In the context of private contracts for the sale of goods, exculpatory clauses, including limitations of liability, are upheld unless they are unconscionable. A.R.S. §§47-2719; 47-2302; 47-2316 (2006). Limitations of consequential damages for injury to a person in the case of consumer goods is prima facie unconscionable, but limitation of damages where the loss is commercial is not. Id. § 47-2719. Findings of unconscionability in a commercial setting are rare. *Salt River Project v. Westinghouse Electric Corp.*, 694 P.2d 198, 205 (Ariz. 1984). Arizona courts hold that they will give effect to the intention of the parties where the parties are on “equal footing.” Id. at 213.

We found no cases discussing the enforceability of a limitation of liability clause for gross negligence in a contract between two private commercial parties.

**State and Local Government Contracts.** We did not identify any cases discussing the enforceability of limitations of liability in public contracts.

### Exclusions of Certain Types of Damages

**Commercial Contracts.** In the context of private contracts, parties, particularly in commercial transactions, may agree to limit or exclude damages, e.g., consequential damages so long as the limitation or exclusion is not unconscionable. See *Salt River Project v. Westinghouse Electric Corp.*, 694 P.2d 198 (Ariz. 1984); A.R.S. §47-2719 (2006). Arizona generally will not allow punitive damages for breach of contract, unless there is an independent tort proven, e.g., fraud. *Continental National Bank v. Evans*, 107 Ariz. 378, 489 P.2d 15 (Ariz. 1971).

**State and Local Government Contracts.** Under Arizona’s laws, a public entity cannot be found liable for punitive or exemplary damages. A.R.S. §12-820.04 (2006); *Mitchell v. Dupnik*, 75 F.3d 517 (9th Cir. 1996).

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** In the context of contracts between private parties, there does not appear to be anything in the case law indicating that disclaimers of warranties are not enforceable. Arizona appears to follow general contract law principles, i.e., that disclaimer of warranty language be conspicuous, clear, and not unconscionable. A.R.S. §§ 47-2316, 2719 (2006).

Note, however, that a proper disclaimer of warranty in the terms of a contract does not lead to the conclusion that a similar limitation of tort liability in the same contract is enforceable. *Salt River Project v. Westinghouse Electric Corp.*, 694 P.2d 198, 212 (Ariz. 1984).

**State and Local Government Contracts.** We did not identify any cases discussing disclaimers or limitations of warranty in public contracts.

### Mandatory Dispute Resolution Procedures

All breach of contract claims against the state must be presented according to the regulations set forth by the purchasing agency. Any final decision of a director may then be subject to judicial review by filing suit in

the superior court of Maricopa County and served on the director and the purchasing agency. A.R.S. §41-2614 (2006).

## Arkansas

### Limitations of Liability

**Commercial Contracts.** Arkansas upholds limitations of liability absent unconscionability and specifically allows for limitations on remedies in contracts. Ark. Stat. Ann. §4-2-719 (2006). If parties voluntarily enter into an agreement with a clause that limits liability, a court must give effect to such clause. *W. William Graham, Inc. v. The City of Cave City*, 709 S.W. 2d 94 (Ark. 2000). However, such clauses will be strictly construed against the party relying on them and be limited to their exact language. Ark. Stat. Ann. §4-2-719 (2006).

We did not identify any cases addressing the issue of limitations of liability for gross negligence.

**State and Local Government Contracts.** We did not identify any cases discussing the enforceability of limitations of liability in public contracts.

### Exclusions of Certain Types of Damages

**Commercial Contracts.** In the context of private contracts, parties in Arkansas may agree to limit or exclude damages, e.g., consequential damages. Ark. Stat. Ann. §4-2-719(3) (2006). Such exclusions are allowed as long as they are not unconscionable. *Id.*; *Gramling v. Baltz*, 485 S.W. 2d 183 (Ark. 1972). A limitation of consequential damages in a contract will fail if a limited remedy fails of its essential purpose. *Caterpillar Tractor Co. v. Waterson*, 679 S.W. 2d 814 (Ark. App. 1984); *Great Dane Trailer Sales, Inc. v. Malvern Pulpwood, Inc.*, 785 S.W.2d 13 (Ark. 1990).

One cannot recover punitive damages for breach of contract claims unless there is an additional tort, i.e. deceit. *Wheeler Motor Co. v. Roth*, 867 S.W. 2d 446 (Ark. 1993).

**State and Local Government Contracts.** We did not identify any cases or statutes discussing limitation of damages in public contracts. However, the state of Arkansas cannot be made to pay punitive damages. Ark. Stat. Ann. §21-9-203 (2006).

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** Arkansas will generally uphold disclaimers of implied warranties if they are conspicuous and in writing. Ark. Stat. Ann. §4-2-316 (2006). Remedies for breach of warranty may also be limited pursuant to Ark. Stat. Ann. §4-2-719 (2006); *Caterpillar Tractor Co. v. Waterson*, 679 S.W. 2d 814 (Ark. App. 1984).

**State and Local Government Contracts.** We did not identify any cases discussing disclaimers or limitations of warranty in public contracts.

### Mandatory Dispute Resolution Procedures

Under Arkansas' sovereign immunity doctrine, claims for breach of contract are only cognizable by the Arkansas Claims Commission. Ark. Stat. Ann. §21-9-202 (2006); *Arizona Tech University v. Link*, 17 S.W. 3d 809 (Ark. 2000). All suits that would result in an increase in the State's financial obligations are barred unless there is an applicable exception.

## California

### Limitations of Liability

**Commercial Contracts.** California upholds limitations of liability, but strictly construes their terms. A party may not limit liability for fraud, willful injury to persons or property, or for violation of law, whether willful or negligent. Cal. Civ. Code § 1668 (2006); *Wheeler v. Oppenheimer*, 295 P.2d 128 (Cal. App. 1956); *Halliday v. Greene*, 244 Cal.App. 2d 482 (1966). See also, *Tunkle v. Regents of University of California*, 383 P.2d 441 (Cal. 1963) ("no public policy opposes private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed on the other party").

There can be no exemption from liability for gross negligence in California. *Halliday v. Greene*, 244 Cal.App. 2d 482 (1966); See also, Cal Civil Code § 1668 (2006). However, no court has addressed the issue of whether a limitation of liability for gross negligence would be enforceable. *Farnham v. Superior Ct. of Los Angeles County*, 60 Cal.App. 4th 69 (1997).

#### State and Local Government Contracts

We did not identify any cases discussing the enforceability of limitations of liability in public contracts. California courts, however, have held that the law governing contracts between private individuals also governs the government's rights and liabilities under public contracts. *Souza & McCue Construction Co. v. Superior Court*, 370 P.2d 338 (Cal. 1962). The doctrine of governmental immunity does not apply. *Id.* at 339.

### Exclusions of Certain Types of Damages

**Commercial Contracts.** In the context of private contracts, parties in California may agree to limit or exclude damages, e.g., consequential damages. *Nunes Turfgrass v. Vaughan-Jacklin Seed Co.*, 200 Cal. App. 3d 1518 (1988); Cal. U. Com. Code §2719(3) (2001). A limitation on consequential damages where the loss is commercial is valid unless it is proved that the limitation is unconscionable. *Nunes Turfgrass*, 200 Cal. App. 3d at 1534. If a limited remedy clause fails of its essential purpose, a plaintiff may pursue all fo the remedies available for breach of contract. *RRX Indus., Inc. v. Lab-Con, Inc.*, 772 F.2d 543 (9th Cir. 1985); Cal. Com. Code § 2719(2) (West 2006). California determines whether a limitation on consequential damages will be upheld on a case-by-case basis, weighing factors such as the type of goods involved, the parties, the allocation of risk, and the precise nature and purpose of the contract. *RRX*, 772 F.2d at 547. *Therefore, to ensure that a damages limitation will be enforced, the intent of the parties must be made clear in the contract.* California generally will not allow punitive damages for breach of contract, unless there is an independent tort proven, e.g., fraud. Cal. Civ. Code § 3294 (West 2006).

A liquidated damages provision is enforceable under California law if it is considered reasonable. Cal Civ. Code § 1671 (West 2006). "Reasonable" is construed to mean that at the time of contracting, damages would have been difficult to calculate and the stated amount is reasonable to both parties. *Id.* In addition, liquidated damages will not necessarily be the sole remedy unless the parties expressly so state in the contract. *General Insurance Co. v. Commerce Hyatt House*, 5 Cal. App. 3d 460 (1970).

**State and Local Government Contracts.** We did not identify any cases discussing limitations of damages recoverable for breach of contract in public contracts.

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** California will generally uphold disclaimers of implied warranties if they are conspicuous and “bargained-for.” A disclaimer may be denied enforcement if it is unconscionable, i.e., if it is a one-sided or harsh agreement. Cal. U. Com. Code §2316 (2006).

**State and Local Government Contracts.** We did not identify any cases discussing disclaimers or limitations of warranty in public contracts.

### Mandatory Dispute Resolution Procedures

All breach of contract claims against the state must first be raised before the contracting agency. Claimants may then bring suit in court to challenge an adverse decision. Cal. Pub. Contract Code §19100 (2006).

### Other research

California law parallels the general understanding of “time is of the essence”; if there is a time stipulation in a contract and that stipulation is not met, a breach of contract has occurred. A “time is of the essence” clause is enforceable under California law, provided it is stated expressly and unequivocally. *Bisno v. Sax*, 346 P.2d 814, 721 (Cal. Ct. App. 1960). The non-breaching party can either seek to rescind the contract or affirm and sue for damages under the contract. *Karapetian v. Carolan*, 188 P.2d 809 (Cal. Ct. App. 1948).

## Colorado

### Limitations of Liability

**Commercial Contracts.** Colorado upholds limitations of liability absent unconscionability and specifically allows for limitations on remedies in contracts. C.R.S. § 4-2-719 (2005). However, a sales contract must provide minimum adequate remedies.

We did not identify any cases addressing the issue of limitations of liability for gross negligence.

**State and Local Government Contracts.** We did not identify any cases discussing the enforceability of limitations of liability in public contracts. Colorado courts, however, have held that by entering into contracts, the state lays aside its attributes as a sovereign and binds itself substantially as one of its citizens does when entering into a contract. *Ace Flying Service, Inc. v. Colorado Department of Agriculture, et al.*, 314 P.2d 278, 280 (1957); C.R.S. 24-10-107 (2005).

### Exclusions of Certain Types of Damages

**Commercial Contracts.** In the context of private contracts, parties in Colorado may agree to limit or exclude damages, e.g., consequential damages. C.R.S. §4-2-719(3) (2000). Such exclusions are allowed as long as they are not unconscionable. *Id.* However, consequential damages are available, despite an exclusion of such remedy, if a contract remedy of replacement or repair of defective parts fails of its essential purpose. *Cooley v. Big Horn Harvestore Systems*, 813 P.2d 736 (Colo. 1991). Whether the failure of the essential purpose doctrine applies requires a two-tiered evaluation: (1) Identification of the essential purpose of the limited remedy; and (2) Whether the remedy, in fact, failed to accomplish such purpose. *Id.* at 744. *Parties may agree to exclude this possibility if they use clear and unambiguous language. Id.*

A jury may award reasonable exemplary damages if the wrongful act is attended by circumstances of fraud, malice, or willful and wanton conduct. C.R.S. 13-21-102 (2005). An award of reasonable exemplary damages may not exceed an amount that is equal to the amount of actual damages awarded to the injured party. *Id.* Exemplary damages are not allowed in pure contract actions. *Ballow v. PHICO Insurance Co.*, 878 P.2d 672 (1994).

**State and Local Government Contracts.** A public entity cannot be liable either directly or by indemnification for punitive or exemplary damages or for damages of outrageous conduct. C.R.S. §24-10-114 (2005). Moreover, Colorado limits the maximum recovery for any injuries if a public entity is found liable. C.R.S. § 24-10-114(1)(a) (2005).

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** Colorado will generally uphold disclaimers of implied warranties if they are conspicuous and in writing. C.R.S. § 4-2-316 (2005).

**State and Local Government Contracts.** We did not identify any cases discussing disclaimers or limitations of warranty in public contracts.

### **Mandatory Dispute Resolution Procedures**

All breach of contract claims against the state must be raised with the head of the purchasing agency. Any decision is subject to appeal de novo to the executive director or the district court of the city and county of Denver pursuant to C.R.S. § 24-109-101 (2005).

## Connecticut

### Limitations of Liability

**Commercial Contracts.** Connecticut upholds limitations of liability, as long as they clearly represent the parties' intentions. A contract will not be construed to limit remedial rights unless there is clear intention that the enumerated remedies are exclusive. *International Marine Holdings, Inc. v. Stauff*, 691 A.2d 1117, 1124 (Conn. App. Ct. 1997); *Shawmut Bank of Connecticut, N.A. v. Connecticut Limousine Service, Inc.*, 670 A.2d 880, 885 (Conn. App. Ct. 1996). We found no cases regarding clauses limiting gross negligence liability.

**State and Local Government Contracts.** While our research disclosed no cases specifically addressing limitations of liability in public contracts, the policy of the state is that the state's rights and liabilities are equal to those of a private person in like circumstances. *Chotkowski v. State*, 690 A.2d 368 (Conn. 1997); *State v. F.H. McGraw*, 41 F. Supp. 369 (D. Conn. 1941).

### Exclusions of Certain Types of Damages

**Commercial Contracts.** Punitive damages are not recoverable in tort, unless expressly authorized by statute or through statutory construction. If awarded, punitive damages are limited to expenses of litigation less taxable costs. *DiNapoli v. Cooke*, 682 A.2d 603, 609 (Conn. App. Ct. 1996). Punitive damages are not ordinarily available in contract actions, unless tortious conduct that is malicious, willful, or reckless is alleged. *City of Hartford v. International Association of Firefighters*, 717 A.2d 258, 264 (Conn. App. Ct. 1998).

**State and Local Government Contracts.** Cases suggest that an award of punitive damages might not be recoverable against a municipality or other state agent, because such an award would penalize the public financially, and thus be against public policy. *Trimachi v. Connecticut Workers Compensation Commission*, 2000 Conn. Super. LEXIS 1548 (Conn. Super. Ct. 2000).

### Disclaimers/Limitations of Warranty Commercial Contracts

A disclaimer of warranties will be enforced if it is express, conspicuous, and fairly obtained without fraud. *Bridgeport L.A.W. Corp. v. Levy*, 147 A. 841, 845-46 (Conn. 1929).

**State and Local Government Contracts.** We did not identify any cases discussing limitations of warranties recoverable for breach of contract in public contracts.

### Mandatory Dispute Resolution Procedures

Any person wishing to present a claim against the state shall file with clerk of the Office of the Claims Commissioner a notice of claim containing certain information listed in Conn. Gen. Stat. § 4-147 (2006). *Capers v. Lee*, 684 A.2d 696, 698 (Conn. 1997). The Claims Commissioner may authorize a suit against the state on any claim which, in his opinion, presents an issue of law or fact under which the state, were it a private person, could be liable. Conn. Gen. Stat. §4-160 (2006).

## Delaware

### Limitations of Liability

**Commercial Contracts.** Delaware upholds limitations of liability absent unconscionability and specifically allows for limitations on remedies in contracts. 6 Del. C. §2-719 (2006). Liability limitation provisions must, however, meet the test of reasonableness and any limitation must not cause the contractual remedy to fail of its essential purpose. *J.A. Jones Construction Co. v. City of Dover*, 372 A.2d 540 (Del. 1977).

We did not identify any cases addressing the issue of limitations of liability for gross negligence. However, based on the *J.A. Jones* case, Delaware does not favor contractual provisions that purport to relieve a party from liability resulting from its own fault. *Id.* at 546.

**State and Local Government Contracts.** We did not identify any cases discussing the enforceability of limitations of liability in public contracts. However, the highest court in Delaware has held that a party contracting with a state agency has all the remedies under that contract which any private citizen has against another private citizen. *George & Lynch, Inc. v. State*, 197 A.2d 734 (Del. 1964).

### Exclusions of Certain Types of Damages

**Commercial Contracts.** In the context of private contracts, parties in Delaware may agree to limit or exclude damages, e.g., consequential damages. 6 Del. C. §2-719 (2006). Such exclusions are allowed as long as they are not unconscionable or unreasonable. *Id.*; *J.A. Jones Construction Co. v. City of Dover*, 372 A.2d 540 (Del. 1977). Note, however, that Delaware will ignore a consequential damages limitation if a limited remedy fails of its essential purpose. 6 Del. C. § 2-719(2); *Beal v. General Motors Corp.*, 354 F. Supp. 423 (D. Del. 1973).

Generally, one cannot recover punitive damages for breach of contract claims unless the conduct also amounts independently to a tort. *E.I. Dupont de Nemours and Co. v. Pressman*, 679 A.2d 436, 445 (Del. 1995) (quoting Restatement (Second) of Contracts). There is no mandatory statutory cap on punitive damages.

**State and Local Government Contracts.** We did not identify any cases or statutes discussing limitation of damages in public contracts.

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** Delaware will generally uphold disclaimers and limitations on warranties if they are conspicuous and in writing. 6 Del. C. §2-316 (2006). Remedies for breach of warranty may also be limited pursuant to 6 Del. C. §2-719 (2006).

**State and Local Government Contracts.** We did not identify any cases discussing disclaimers or limitations of warranty in public contracts.

### Mandatory Dispute Resolution Procedures

In Delaware, sovereign immunity does not bar contract claims against the state. If an agency is authorized by statute to enter into contracts, it therefore follows that they can be subject to suit. *George & Lynch, Inc. v.*

*State*, 197 A.2d 734 (Del. 1964). We did not identify any mandatory dispute resolution procedures in Delaware.

## District of Columbia

### Limitations of Liability

**Commercial Contracts.** D.C. generally enforces limitations of liability, absent unconscionability, as long as the prescribed remedy is exclusive and does not fail of its essential purpose. D.C. Code §28:2-719 (2006); *Potomac Plaza Terraces, Inc. v. QSC Productions, Inc.*, 868 F. Supp. 346 (D.D.C. 1994). When an exclusive remedy is found to fail its essential purpose, parties are free to seek any other remedies available under the Sales subtitle of the D.C. Code. *Potomac Plaza*, 868 F. Supp. at 353. We found no cases regarding clauses limiting gross negligence liability.

**State and Local Government Contracts.** We did not identify any cases discussing the enforceability of limitations of liability in public contracts.

### Exclusions of Certain Types of Damages

**Commercial Contracts.** Contracts in D.C. may exclude certain remedies and damages, unless the exclusions fail of their essential purpose. D.C. Code §28:2-719 (2006). Consequential damages may be limited or excluded, as long as such provision is not unconscionable, and the enforcing party has not broken its obligation of good faith in performance of the contract. *Id.*; *Potomac Plaza Terraces, Inc. v. QSC Productions, Inc.*, 868 F. Supp. 346 (D.D.C. 1994); D.C. Code §28: 1-203 (2006). Limitation of consequential damages where the loss is commercial is not prima facie unconscionable. D.C. Code §28:2-719 (2006). D.C. generally will not allow punitive damages for breach of contract, unless there is an independent tort proven, e.g., fraud. *Brown v. Coates*, 253 F.2d 36 (D.C. Cir. 1958).

**State and Local Government Contracts.** In contract actions executed on behalf of the D.C. government, its officers, departments, agencies, or other units of government cannot be liable for punitive damages. D.C. Code § 2-308.02 (2006) However, sovereign immunity is not a defense to actions based upon written procurement contracts executed by the government. *Id.* at § 2-308.01; *Grunley Construction Co. v. District of Columbia*, 704 A.2d 288 (D.C. 1997).

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** Disclaimers of the implied warranty of merchantability must mention merchantability, and be conspicuous; other disclaimers must be conspicuous. *Bowler v. Stewart-Warner Corp.*, 563 A.2d 344, 355 (D.C. 1989). Remedies for breach of warranty can be limited as long as they are reasonable. *McGregor & Werner Graphics v. Cottrell Co.*, C.A. No. 517-72 (D.D.C. 1972).

**State and Local Government Contracts.** We did not identify any cases discussing disclaimers or limitations of warranty in public contracts.

### Mandatory Dispute Resolution Procedures

All breach of contract claims by the government against a contractor must be decided by the contracting officer, which shall be final and not subject to review unless an administrative appeal or action for judicial review by the Contract Appeals Board is timely commenced. *Fry & Welch Associates v. District of Columbia Contract Appeals Bd.*, 664 A.2d 1230 (D.C. 1995). This is also true for all breach of contract claims against the state. *Lawlor v. District of Columbia*, 758 A.2d 964 (D.C. 2000).

## Florida

### Limitations of Liability

**Commercial Contracts.** Florida upholds limitations of liability. Generally, parties to a commercial contract may stipulate what the consequences of a breach will be so long as such stipulations are reasonable and not a result of fraud or deceit. *Rollins, Inc. v. Heller*, 454 So. 2d 580 (Fla. Dist. Ct. App. 1984). In *Rollins*, the Florida court also held that a limitation of liability clause also applies to gross negligence. Therefore, it is possible to limit one's liability for gross negligence in Florida.

**State and Local Government Contracts.** Under Florida law, the rights and remedies of parties to a public contract are, in general, governed by the principles applicable to contracts except insofar as the authority of public agents is limited by statute. 43 Fla. Jur. Public Works and Contracts §49. No applicable statutes were found. However, the Attorney General's Office has issued several opinions indicating that the Department of General Services and other state agencies may not enter into a limitation of remedies agreement where the contractor's liability for damages to the state, for any cause and regardless of the form of action, is limited. 1985 Op. Atty Gen. Fla. 185; 1993 Fla. AG LEXIS 52. According to the opinion, it is questionable whether state agencies have the authority to have the state, in effect, act as an indemnitor of the contractor for damages in excess of the limit.

### Exclusions of Certain Types of Damages

**Commercial Contracts.** A sales contract may limit or alter the measure of damages. However, consequential damages may not be limited or excluded if the limitation or exclusion is unconscionable. Fla. Stat. §672.719(3) (2006). Punitive damages are not generally recoverable in actions for breach of contract, even where the breach is willful and flagrant or oppressive. *Splitt v. Deltona Corp.*, 662 F.2d 1142 (5<sup>th</sup> Cir. 1981). If the breach of contract is accompanied by an independent tort for which punitive damages are allowed, then the above rule does not apply. *Lewis v. Guthartz*, 428 So. 2d 222 (Fla. 1982). Florida has a punitive damages statute, which limits the amount that can be recovered. The statute places a cap on some conduct and in other cases, the fact finder has discretion. Fla. Stat. §768.73 (2006); *Christenson & Associates v. Palumbo-Tucker*, 656 So. 2d 266 (Fla. App. 4th 1995).

**State and Local Government Contracts.** The State may not pay or be required to pay monetary damages under the judgment of any court except pursuant to an appropriation made by law. Fla. Stat. §11.066(3) (2006). As noted above, opinions by the Attorney General have indicated that state agencies are not authorized to enter into contracts that limit a contractor's damages.

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** A disclaimer of warranties will be enforced provided the disclaimer is not made under unconscionable circumstances. Fla. Stat. §672.316 (2006). Actual knowledge of a disclaimer of warranty on the part of the buyer may be a prerequisite to effectiveness of the provision. *Vaughan's Seed Store v. Stringfellow*, 48 So. 410 (Fla. 1909).

**State and Local Government Contracts.** We did not identify any cases discussing disclaimers or limitations of warranty in public contracts.

### Mandatory Dispute Resolution Procedures

There are no mandatory dispute resolution procedures in Florida. Moreover, the state has waived its immunity for actions in contract when it enters into a contract generally authorized by law. *Champagne-Webber, Inc. v. City of Ft. Lauderdale*, 519 So. 2d 696 (Fla. Dist. Ct. App. 4<sup>th</sup> Dist. 1988). “Where a suit is brought on an express, written contract entered into by a state agency under statutory authority, the defense of sovereign immunity does not protect the state agency from an action arising out of a breach of either an express or implied covenant or condition of that contract.” *Id.* at 698.

## Georgia

### Limitations of Liability

**Commercial Contracts.** Georgia upholds limitations of liability, absent a limiting statute or controlling public policy. *Orkin Exterminating Co. v. Stevens*, 203 S.E.2d 587 (Ga. Ct. App. 1973). A party is responsible for what she or he signs, absent emergency, misrepresentation, or reliance on a fiduciary relationship between the parties. *Carswell v. Middle Georgia Pools & Leisure World, Inc.*, 449 S.E.2d 628 (Ga. Ct. App. 1994). We found no cases regarding clauses limiting gross negligence liability; however, contracts against liability for negligence in general are not favored by Georgia law, and will be strictly construed. *Cash v. Armco Steel Corp.*, 462 F. Supp. 272 (N.D. Ga. 1978).

**State and Local Government Contracts.** Our research disclosed no cases specifically addressing limitations of liability in public contracts. In general, the state's contracts are interpreted as the contracts of individuals are and are controlled by the same laws. *Regents of University System of Georgia v. Blanton*, 176 S.E. 673 (Ga. Ct. App. 1934). However, there must be an express consent to the action of express legislative waiver of sovereign immunity to maintain a suit against the state. If there is no express legislative waiver of a department's sovereign immunity from suit, the case will be dismissed. *Meadows Motors v. Department of Administrative Services*, 233 S.E.2d 14 (Ga. App. 1977).

### Exclusions of Certain Types of Damages

**Commercial Contracts.** Provisions restricting remedies are enforceable if explicit, prominent, clear, and unambiguous. *Imaging Systems International, Inc. v. Magnetic Resonance Plus, Inc.*, 490 S.E.2d 124 (Ga. Ct. App. 1997). Punitive damages are recoverable in tort, and have no limit in cases of product liability or specific intent. In other tort cases, punitive damages are limited to \$250,000. Ga. Code Ann. § 51-12-5.1 (2006). Punitive damages are not ordinarily available in contract actions, unless tortious conduct or fraud is alleged. Ga. Code Ann. § 13-6-10 (2006); *Clark v. Aenchbacher*, 238 S.E.2d 442 (Ga. Ct. App. 1977).

**State and Local Government Contracts.** Punitive damages are not recoverable in tort against any state agent. Ga. Code Ann. § 50-21-30 (2006).

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** A disclaimer of warranties will be enforced if it is conspicuous and is "bargained-for." A disclaimer may be denied enforcement if it is unconscionable, i.e., if it is a one-sided or harsh agreement. Ga. Code Ann. § 11-2-316 (2006); *Mullis v. Speight Seed Farms, Inc.*, 505 S.E.2d 818 (Ga. Ct. App. 1998). Georgia enforces contractual limitations of remedies, as long as they do not fail of their essential purpose. Ga. Code Ann. § 11-2-719 (2006).

**State and Local Government Contracts.** We did not identify any cases discussing disclaimers of warranty in public contracts.

### Mandatory Dispute Resolution Procedures

Georgia has waived its defense of sovereign immunity with respect to breach of contracts entered into by the state or its agencies. Ga. Code Ann. § 50-21-1 (2006). Proper venue for such actions is the Superior Court of Fulton County. *Id.* Georgia has also waived its sovereign immunity for the torts of state officers and employees while acting within the scope of their official duties or employment. Ga. Code Ann. § 50-21-23

(2006). The state shall be liable for such torts in the same manner as a private individual or entity would be liable under like circumstances. *Id.* Tort claims against the state must be preceded by notice within twelve months of the date the loss was discovered or should have been discovered. Ga. Code Ann. § 50-21-26 (2006).

## Hawaii

### Limitations of Liability

**Commercial Contracts.** Hawaii generally upholds limitations of liability absent unconscionability. *Earl M. Jorgensen Co. v. Mark Construction, Inc.*, 540 P.2d 978 (Haw. 1975). However, this same case held that a limitation of liability clause will be ignored if a contractually limited remedy has failed of its essential purpose. We found no cases regarding clauses limiting gross negligence liability.

**State and Local Government Contracts.** We did not identify any cases discussing the enforceability of limitations of liability in public contracts. However, when Hawaii has consented to be sued (as it does in contract cases), its liability is to be judged under the same principles as those governing the liability of private parties. Haw. Rev. Stat. § 661-1 (2006); *Fought & Co., Inc. v. Steel Engineering and Erection, Inc.*, 951 P.2d 487 (Haw. 1998).

### Exclusions of Certain Types of Damages

**Commercial Contracts.** Consequential damages may be limited or excluded in commercial contracts, unless such limitation or exclusion is unconscionable. Haw. Rev. Stat. § 490:2-719 (2006). Hawaii generally will not allow punitive damages for breach of contract, unless there is proof of willful, wanton, or reckless activity resulting in tortious injury. *Ross v. Stouffer Hotel Co. Ltd. Inc.*, 879 P.2d 1037 (Haw. 1994).

**State and Local Government Contracts.** We did not identify any cases discussing exclusion of damages in public contracts.

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** A disclaimer of warranties will be enforced if it is conspicuous and is “bargained-for.” A disclaimer may be denied enforcement if it is unconscionable, i.e., if it is a one-sided or harsh agreement. Haw. Rev. Stat. § 490:2-316 (2006). Hawaii enforces contractual limitations of remedies, as long as they do not fail of their essential purpose. *Earl M. Jorgensen Co. v. Mark Construction, Inc.*, 540 P.2d 978 (Haw. 1975).

**State and Local Government Contracts.** We did not identify any cases discussing limitations of warranties recoverable for breach of contract in public contracts.

### Mandatory Dispute Resolution Procedures

Contract claims against the state are not precluded by sovereign immunity. Haw. Rev. Stat. § 661-1 (2006). Tort actions against the state must be consented to by the state. *Pele Defense Fund v. Paty*, 837 P.2d 1247 (Haw. 1992).

## Idaho

### Limitations of Liability

**Commercial Contracts.** Idaho courts have held that parties to a transaction may agree to limit their liability for negligence or waive their rights and remedies subject to certain exceptions, i.e. unconscionability. *Lee v. Sun Valley Company*, 695 P.2d 361 (Idaho 1984); Idaho Code §28-2-719 (2006). Such clauses, however, will be strictly construed.

We did not identify any cases addressing the specific issue of limitations of liability for gross negligence.

**State and Local Government Contracts.** We did not identify any cases discussing the enforceability of limitations of liability in public contracts. However, the highest court of Idaho has cited other states' decisions holding that a state lays aside its attributes of sovereignty when entering a contract and is therefore subject to the same rights and liabilities as an ordinary citizen. *Grant Construction Co. v. Burns*, 443 P.2d 1005 (Idaho 1968). However, nothing in *Grant* can be construed as stating either expressly or impliedly that the state has waived its immunity to tort actions. *Walker v. Idaho Board of Highway Directors*, 524 P.2d 169 (1974).

### Exclusions of Certain Types of Damages

**Commercial Contracts.** In the context of private contracts, parties in Idaho may agree to limit or exclude damages, e.g., consequential damages. Idaho Code §28-2-719 (2006). Such exclusions are allowed as long as they are not unconscionable or unreasonable. *Id.* However, a limitation on consequential damages will be ignored if a limited remedy fails of its essential purpose. *Id.*; *Clark v. International Harvester Co.*, 581 P.2d 784 (Idaho 1978).

In order to obtain an award of punitive damages, a party must prove, by clear and convincing evidence, oppressive, fraudulent, wanton, malicious, or outrageous conduct by the opposing party. Idaho Code §6-1604 (2006). Punitive damages are disfavored in contract actions and are only awarded in narrow, compelling circumstances, i.e. malice, fraud or gross negligence. *General Auto Parts Co., Inc. v. Genuine Parts Company*, 979 P.2d 1207 (Idaho 1999).

**State and Local Government Contracts.** Governmental entities and their employees may not be liable for punitive damages. Idaho Code §6-918 (2006).

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** Idaho will generally uphold disclaimers and limitations on warranties if they are conspicuous and in writing. Idaho Code § 28-2-316 (2006).

**State and Local Government Contracts.** We did not identify any cases discussing disclaimers or limitations of warranty in public contracts.

### Mandatory Dispute Resolution Procedures

When a state enters a legislatively authorized contract, it has consented to suit against it for breach of contract. As a result, an action against the state for breach of contract may be brought in any district court with appropriate jurisdiction. *Grant Construction Co. v. Burns*, 443 P.2d 1005 (Idaho 1968).

## Illinois

### Limitations of Liability

**Commercial Contracts.** Illinois upholds limitations of liability in private commercial contracts but strictly construes their terms against the party they benefit. *Scott & Fetzer Co. v. Montgomery Ward & Co.*, 493 N.E. 2d 1022 (Ill. 1986).

We did not identify any cases discussing the enforceability of limits on gross negligence in commercial contracts.

**State and Local Government Contracts.** We did not identify any cases addressing the enforceability of limitations of liability in public contracts. Illinois courts, however, have held that the law governing contracts between private individuals also governs the government's rights and liabilities under public contracts. *Bond County Community Sch. Dist. No. 2 v. Indiana Insurance Co.*, 269 Ill. App. 3d 488 (1995).

### Exclusions of Certain Types of Damages

**Commercial Contracts.** In the context of private contracts, parties, particularly in commercial transactions, may agree to limit damages, e.g., consequential damages. *Lefebvre Intergraphics v. Sanden Mach.*, 946 F. Supp 1358 (N.D. Ill. 1996). Illinois generally will not allow punitive damages for breach of contract, unless there is an independent, statutorily enumerated tort proven, e.g., fraud, misappropriation of trade secrets, or interference with business relationships. There must also be proper allegations of malice, wantonness, or oppression. *Morrow v. L.A. Goldschmidt Associates Inc.*, 492 N.E. 2d 181 (Ill. 1986). Punitive damages are limited by statute to three (3) times the amount of economic damages. 735 Ill. Comp. Stat. 5/2 – 1115.05 (West 2006).

**State and Local Government Contracts.** Because a state is bound to observe the same rules of conduct in performance of its contractual obligations, the state may be held to respond in damages for breach of contract. *Commercial Light Co. v. State*, 26 Ill. Ct. Cl. 443 (1969).

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** In the context of contracts between private parties for the sale of goods, Illinois upholds limitations and disclaimers of warranties, if they are conspicuous. 810 Ill. Comp. Stat. 5/2-316(2) (West 2006); *Lefebvre Intergraphics v. Sanden Mach.*, 946 F. Supp 1358 (ND Ill 1996).

**State and Local Government Contracts.** We did not identify any cases discussing disclaimers or limitations of warranty in public contracts.

### Mandatory Dispute Resolution Procedures

Claimants must exhaust administrative remedies before suing the state in the Court of Claims for breach of contract, where administrative remedies exist. 705 Ill. Comp. Stat. 505/8 (West 2006).

## Indiana

### Limitations of Liability

**Commercial Contracts.** Indiana, through its enactment of the Uniform Commercial Code (“U.C.C.”), recognizes commercial contracts clauses limiting liability. *General Bargain Center v. American Alarm Co.*, 430 N.E. 2d 407 (Ind. App. 1982); Burns Ind. Code Ann §26-1-2-719 (2006).. Limitations of liability are enforceable as long as they are not unconscionable. *Martin Ripsens & Son & Petoseed Co. v. Hall Farms, Inc.*, 621 N.E. 2d 1078 (Ind. 1993); Burns Ind. Code Ann. §26-1-2-302 (2006). We found no cases discussing gross negligence.

**State and Local Government Contracts.** We did not identify any cases discussing the enforceability of limitations of liability in public contracts. However, the Supreme Court of Indiana has held that when the State enters into contracts with private parties, the rights and obligations of the parties are based on the same principles as if both contracting parties were private persons. *State of Indiana v. Feigel*, 178 N.E. 435 (Ind. 1931); *Carr v. State*, 26 N.E. 778, 779 (Ind. 1891).

### Exclusions of Certain Types of Damages

**Commercial Contracts.** In the context of private contracts, parties in Indiana may agree to limit or exclude damages, e.g., consequential damages, as long as the exclusion is not unconscionable. Burns Ind. Code Ann. §26-1-2-719 (2006); *General Bargain Center v. American Alarm Co.*, 430 N.E. 2d 407 (Ind. App. 1982).

A punitive damage award may not be more than the greater of either (a) \$50,000 or (b) three times the amount of compensatory damages awarded in the action. Burns Ind. Code Ann. §34-51-3-4 (2006). Indiana generally follows the rule that punitive damages are not awarded in cases involving a breach of contract. *Monte Carlo, Inc. v. Wilcox*, 390 N.E.2d 673 (Ind. App. 1979). In *Miller Brewing Co. v. Best Beers of Bloomington, Inc.*, 608 N.E.2d 975, 981 (1993), the Supreme Court of Indiana noted that although many courts have suggested that there are exceptions to the rule, i.e. fraud, no exception has ever been applied in Indiana. Thus, the Court held that no exception exists. *Id.*

**State and Local Government Contracts.** We did not identify any cases or statutes discussing limitation of damages in public contracts with respect to contract actions.

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** Indiana will generally uphold disclaimers and limitations on warranties as long as it is in writing and conspicuous. Burns Ind. Code Ann. §26-1-2-316 (2006). Disclaimers of implied warranties must be clear, conspicuous, conscionable, and consciously bargained for. *Royal Business Machines, Inc. v. Lorraine Corp.*, 633 F.2d 34 (7<sup>th</sup> Cir. 1980).

**State and Local Government Contracts.** We did not identify any cases discussing disclaimers or limitations of warranty in public contracts.

### Mandatory Dispute Resolution Procedures

The State of Indiana may be sued on contract claims but the claim must be tried to a court, not a jury. Burns Ind. Code Ann. §34-13-1-1 (2006). We did not find any other mandatory dispute resolution procedures for public contract disputes.

## Iowa

### Limitations of Liability

**Commercial Contracts.** Limitations of liability are enforceable as long as the limitation is not unconscionable. Iowa Code § 554.2719 (2005). Limitation of consequential damages where the loss is commercial is not prima facie unconscionable. *Id.*

We found no cases or statutes discussing limitations of liability for gross negligence. However, it is not against public policy in Iowa to contract to limit or exempt liability for negligence. *Manning & Manning v. International Harvester Co.*, 381 N.W.2d 376, 379-80 (Iowa App. 1985). The freedom to contract actually promotes public policy. *Id.*

**State and Local Government Contracts.** We did not identify any cases discussing the enforceability of limitations of liability in public contracts. However, the Supreme Court of Iowa has held that the State, by entering into a contract, lays aside its attributes as a sovereign and its contracts are interpreted as the contracts of individuals are. *Kersten Company, Inc. v. Department of Social Services*, 207 N.W.2d 117, 120 (Iowa 1973).

### Exclusions of Certain Types of Damages

**Commercial Contracts.** In the context of private contracts, parties in Iowa may agree to limit or exclude damages, e.g., consequential damages. Iowa Code § 554.2719 (2005). Such exclusions are allowed as long as they are not unconscionable. *Id.*

Under Iowa law, punitive damages may only be awarded if the jury or court decides that, by a preponderance of the evidence, the conduct of the defendant from which a claim arose constituted willful and wanton disregard for the rights or safety of another. Iowa Code § 668A.1(1)(a) (2005). The statute also enumerates other special interrogatories that must be answered affirmatively before awarding any punitive or exemplary damages. *Id.* at § 668A.1(2). Moreover, punitive damages are generally not awarded in breach of contract actions unless there is an independent tort and the breach is committed maliciously. *Seastrom & Jacobsen v. Farm Bureau Life Insurance Co.*, 601 N.W.2d 339 (Iowa 1999).

**State and Local Government Contracts.** Punitive damages may not be awarded against a governmental entity for breach of contract. *Parks v. City of Marshalltown*, 440 N.W. 2d 377 (Iowa 1989).

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** Iowa will generally uphold disclaimers and limitations on warranties if they are conspicuous and in writing. Iowa Code § 554.2316 (2005). They must also not be unreasonable. *Id.*

**State and Local Government Contracts.** We did not identify any cases discussing disclaimers or limitations of warranty in public contracts.

### Mandatory Dispute Resolution Procedures

The courts of Iowa have held that Iowa waives its sovereign immunity by entering into a contract and is answerable for its breach. *Kersten Company, Inc. v. Department of Social Services*, 207 N.W.2d 117 (Iowa

1973). Iowa is to be treated as any other party in a court of law when it is a defendant. Iowa Code §613.10 (2005).

## Kansas

### Limitations of Liability

**Commercial Contracts.** In the context of private contracts for the sale of goods, exculpatory clauses, including limitations of liability, are upheld unless they violate public policy or are illegal. *Anderson v. Union Pacific R. Co.*, 790 P.2d 438, 440 (Kan. 1990). Kansas will not uphold limitations of liability where they are not fairly and honestly negotiated. *Id.* at 441.

We found no cases discussing the enforceability of a limitation of liability for gross negligence in a contract between two private commercial parties.

**State and Local Government Contracts.** We did not identify any cases discussing the enforceability of limitations of liability in public contracts. Kansas's courts, however, have held that where the government enters into business ordinarily reserved to field of private enterprise, it should be held to the same responsibilities and liabilities. *Shapiro v. Kansas Public Employees Retirement System*, 532 P.2d 1081 (Kan. 1975).

### Exclusions of Certain Types of Damages

**Commercial Contracts.** In the context of private contracts, parties, particularly in commercial transactions, may agree to limit or exclude damages, e.g., consequential damages so long as the limitation or exclusion is not unconscionable. K.S.A. §84-2-719 (2006); *Kansas City Structural Steel Company v. L.G. Barcus & Sons, Inc.*, 535 P.2d 419 (Kan. 1975). Kansas generally will not allow punitive damages for breach of contract, unless there is an independent tort proven, e.g., fraud. Moreover, the defendant's actions must be malicious, willful, or wanton. *Enlow v. Sears, Roebuck and Co.*, 822 P.2d 617 (Kan. 1991); K.S.A. §60-3701 (2006). Punitive damages may not exceed the lesser of the annual gross income of the defendant or five million dollars, or 1.5 times the profitability of the conduct. K.S.A. 60-3702 (2006).

**State and Local Government Contracts.** We did not identify any cases discussing limitations of damages recoverable for breach of contract in public contracts.

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** In the context of contracts between private parties, there does not appear to be anything in the case law indicating that disclaimers of warranties are not enforceable. Kansas appears to follow general contract law principles, i.e., that disclaimer of warranty language be conspicuous, clear, and not unconscionable. Furthermore, remedies for breach of warranty may be limited so long as they do not fail of their essential purpose. K.S.A. 84-2-316 (2006).

In a recent case, the U.S. District Court for the District of Kansas found that the limitation of liability in the contract did not exclude lost revenue that was a direct damage of breach because the disclaimer of lost revenue was in the definition of consequential damages and did not include any wording, such as "any" or "all," that would indicate that the intent of the parties was to disclaim all lost revenue, including lost revenue that was a direct damage. *Penncro Associates, Inc. v. Spring Corp.*, 2006 U.S. Dist. LEXIS 6953 (D. Kansas 2006). Therefore, in order to avoid placing a client in this situation, do not disclaim damages by defining them as consequential, but instead list the types of damages that are disclaimed and always make sure the disclaimer uses the words "any" or "all" when referring to the types of damages that are disclaimed.

**State and Local Government Contracts.** We did not identify any cases discussing disclaimers or limitations of warranty in public contracts.

### **Mandatory Dispute Resolution Procedures**

There are no mandatory dispute resolution procedures when the state is the plaintiff. However, when a claim is made against the state for which there has been no appropriation, the claim must be submitted to the legislature pursuant to Chapter 46, Article 9 of the Kansas statutes. We did not identify any additional mandatory dispute resolution procedures.

## Kentucky

### Limitations of Liability

**Commercial Contracts.** Kentucky generally upholds limitations of liability unless unconscionable. *Carboline Co. v. Oxmoor Center*, 1985 Ky. App. LEXIS 555 (1985). We found no cases regarding clauses limiting gross negligence liability.

**State and Local Government Contracts.** We did not identify any cases discussing the enforceability of limitations of liability in public contracts. However, an Attorney General decision, while not ruling on the matter, calls into doubt the enforceability of such limitations, by reasoning that they may not be in the public interest. 1982 Ky. AG LEXIS 394 (April 1982). "The law does not look with favor on provisions which relieve one from liability for his own fault or wrong." *Id.* at \*8.

### Exclusions of Certain Types of Damages

**Commercial Contracts.** Kentucky will not alter the bargained-for allocation of risk unless a breach of contract is so fundamental that it was not considered by the parties. Ky. Rev. Stat. Ann. § 355.2-303 (Michie 2006). Consequential damages may be limited or excluded in commercial contracts, unless such limitation or exclusion is unconscionable. Ky. Rev. Stat. Ann. § 355.2-719 (Michie 2006). However, if a limited remedy fails of its essential purpose, a clause limiting liability for incidental damages will not be enforced. *Carboline Co. v. Oxmoor Center*, 1985 Ky. App. LEXIS 55 (1985). A plaintiff may recover punitive damages only upon proving, by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice. Punitive damages may not be awarded for breach of contract unless the breach includes separately tortious conduct. Ky. Rev. Stat. Ann. § 411.184 (Michie 2006); *Faulkner Drilling Co. v. Gross*, 943 S.W.2d 634 (Ky. Ct. App. 1997).

**State and Local Government Contracts.** Damages against the state for breach of contract cannot exceed double the original contract amount. Ky. Rev. Stat. Ann. § 45A.245(2) (Michie 2006).

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** A disclaimer of warranties will be enforced if it is conspicuous and is bargained-for. Ky. Rev. Stat. Ann. § 355.2-316 (Michie 2006); *Gooch v. Dowell, Inc.*, 743 S.W.2d 38 (Ky. Ct. App. 1988). Kentucky enforces contractual limitations of remedies, as long as they do not fail of their essential purpose. Ky. Rev. Stat. Ann. § 355.2-719 (Michie 2006); *Middletown Engineering Co. v. Climate Conditioning Co.*, 810 S.W.2d 57, 59 (Ky. Ct. App. 1991).

**State and Local Government Contracts.** We did not identify any cases discussing limitations of warranties recoverable for breach of contract in public contracts.

### Mandatory Dispute Resolution Procedures

All controversies are first dealt with by the secretary of the Finance and Administration Cabinet, who issues an opinion. Ky. Rev. Stat. Ann. § 45A.235 (Michie 2006). Following an adverse opinion, a contractor may sue the Commonwealth in the Franklin Circuit Court, without a jury. Ky. Rev. Stat. Ann. § 45A.245 (Michie 2006); *Goss v. Sparta Stockyards, Inc.*, 481 S.W.2d 39 (Ky. 1972). Claims must be commenced in the Franklin Circuit Court within one year from the date of completion specified in the contract. Ky. Rev. Stat. Ann. § 45A.260 (Michie 2006).

## Louisiana

### Limitations of Liability

**Commercial Contracts.** Louisiana upholds limitations of liability, except when they contradict law, morals, or public policy. *Rosenblath's, Inc. v. Baker Industries, Inc.*, 634 So.2d 969, 974 (La. Ct. App. 1994). Parties may legally contract to exclude liability for negligence, if the exculpatory agreement clearly expresses that intent. *Banner Chevrolet v. Wells Fargo Guard Services.*, 508 So.2d 966, 967 (La. Ct. App. 1987); La. Civ. Code Ann. art. 2004 (West 2006). However, any clause is null that, in advance, excludes or limits the liability of one party for intentional or gross fault that causes damage or physical injury to the other party. La. Civ. Code Ann. art. 2004 (West 2006).

**State and Local Government Contracts.** It is contrary to public policy to allow a party to a contract to exempt itself from negligent acts that cause injury. *Sandel & Lastrapes v. City of Shreveport*, 129 So.2d 620 (La. Ct. App. 1961). However, in *Freeman v. Department of Highways*, 197 So. 2d 188, 198 (La. Ct. App. 1967), the appeals court stated that the conclusion in *Sandel* is not supported by citation of authority. The Louisiana Supreme Court agreed, finding the Court of Appeal, First Circuit correct in refusing to follow the *Sandel* case. *Freeman v. Department of Highways*, 217 So. 2d 166, 177 (La. 1968). Therefore, while *Sandel* still stands for the proposition that it is contrary to public policy to allow a party to exempt itself from negligent acts that cause injury, it is not controlling authority in the state of Louisiana.

### Exclusions of Certain Types of Damages

**Commercial Contracts.** Louisiana enforces stipulations of damages unless they have been shown to be so manifestly unreasonable as to be contrary to public policy. *Lombardo v. Deshotel*, 647 So.2d 1086 (La. 1994). The Civil Code does not provide for the infliction of exemplary or punitive damages on a person for the violation of a contract, but it does provide for the imposition of damages for the breach of certain kinds of contracts where the loss cannot be fixed in dollars and cents, and the parties who enter into such contracts are presumed to have in contemplation the disappointment, discomfort and inconvenience that will be suffered by one of the parties if the other fails or refuses to do what he has agreed to do. *Melson v. Woodruff*, 23 So.2d 364 (La. Ct. App. 1945).

**State and Local Government Contracts.** We did not identify any cases discussing exclusions of damages in public contracts.

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** A disclaimer of warranties will be enforced if it is express, clear, conspicuous, contained in the contract, and brought to the attention of the buyer. La. Civ. Code Ann. arts., 2520, 2548 (West 2006); *Creger v. Robertson*, 542 So.2d 1090 (La. Ct. App. 1989).

**State and Local Government Contracts.** We did not identify any cases discussing limitations of warranties recoverable for breach of contract in public contracts.

### Mandatory Dispute Resolution Procedures

There is no sovereign immunity from suit and liability in contract and tort. La. Const. art. 12, §10. The Louisiana Procurement Code develops a mandatory scheme for resolution of contract disputes and establishes a multi-step administrative review process. La. Rev. Stat. Ann. § 39:1551, et seq. (West 2006).

## Maine

### Limitations of Liability

**Commercial Contracts.** Maine generally upholds limitations of liability as long as they are not unconscionable. 11 M.R.S. §§ 2-718, 2-719 (2005). We found no cases interpreting limitations of liability in the context of two commercial parties.

We found no cases discussing the enforceability of limitations of liability for gross negligence in a contract between two commercial parties.

**State and Local Government Contracts.** Our research has not found any statute under which the State of Maine has waived sovereign immunity. However, the Maine Supreme Court has suggested that “a general statute allowing the State to enter into contracts implies a waiver of sovereign immunity by the Legislature when the State is sued for breach of that contract.” *Profit Recovery Group, USA, Inc. v. Department of Administration & Financial Services*, 871 A.2d 1237, 1244-45 (Me. 2005) (holding that pre- and post-judgment interest was erroneously denied to an auditing corporation that had been successful in obtaining a money judgment against a state agency for breach of contract, because sovereign immunity did not protect the state agency from the money judgment).

### Exclusions of Certain Types of Damages

**Commercial Contracts.** In the context of private commercial contracts, parties may agree to limit damages, e.g. consequential damages, absent unconscionability. 11 M.R.S. §2-719 (2005). We found no state law cases interpreting this provision of the Code.

Under the law of Maine, punitive damages cannot be recovered for breach of contract under any circumstances. *Drinkwater v. Patten Realty Corp.*, 563 A.2d 772, 776 (Me. 1989). Punitive damages may be recovered in a tort action if the defendant acted with malice. *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985). The *Tuttle* court expressly rejected a standard that would permit an award of punitive damages on the basis of grossly negligent or reckless conduct. *Id.* There is no cap on punitive damages.

**State and Local Government Contracts.** We did not identify any cases discussing limitations of damages recoverable for breach of contract in public contracts. Maine does, however, have a Tort Claims Act that provides that any award of damages against a governmental entity may not exceed \$400,000. Additionally, no award against a governmental entity may include punitive or exemplary damages. 14 M.R.S. § 8105 (2005).

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** Maine allows for disclaimers and limitations of warranties. Warranties may be excluded or modified as long as they are conspicuous and in writing, as required by the Uniform Commercial Code. 11 M.R.S. § 2-316 (2005); *Todd Equipment Leasing Co. v. Milligan*, 395 A.2d 818 (Me. 1978).

**State and Local Government Contracts.** We did not identify any cases discussing disclaimers or limitations of warranty in public contracts.

### Mandatory Dispute Resolution Procedures

The Maine Supreme Court has recognized that “a general statute allowing the State to enter into contracts **implies** a waiver of sovereign immunity by the Legislature when the State is sued for breach of contract.” *Profit Recovery Group*, 871 A.2d at 1244. So regardless of the lack of waiver of sovereign immunity in the statute, the highest court in Maine seems to be willing to recognize that a legal contract implies a right of action at law for its breach, even when the state is a party.

## Maryland

### Limitations of Liability

**Commercial Contracts.** Maryland upholds limitations of liability and Maryland courts are hesitant to strike down voluntary bargains on public policy grounds. They will only do so if the contract provision is “patently offensive to the public good.” *Maryland-National Park and Planning Commission v. Washington National Arena*, 386 A.2d 1216 (Md. 1978). A limitation of liability will not however protect against gross negligence. *Baker v. Roy H. Haas Assoc.*, 629 A.2d 1317 (Md. 1993).

**State and Local Government Contracts.** We did not identify any cases discussing the enforceability of limitations of liability in public contracts. Maryland courts generally apply the same law governing contracts between private individuals. In *Washington National Arena* (cited above), the dispute concerned a contract with a public agency. Moreover, when a government enters into contract relations, “its rights and duties therein are governed generally by the law applicable to contracts between private individuals.” 1997 Md. AG LEXIS 33 (quoting *Lynch v. United States*, 292 U.S. 571, 579 (1934)).

### Exclusions of Certain Types of Damages

**Commercial Contracts.** Damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of damages where the loss is commercial is not prima facie unconscionable. Md. Commercial Law Code Ann. §2-719 (2006). As a rule, Maryland will not allow punitive damages for a breach of contract action even if the breach is malicious. *Sims v. Ryland Group, Inc.*, 378 A.2d 1, 37 (Md. App. 1977).

**State and Local Government Contracts.** We did not identify any cases discussing limitations of damages recoverable for breach of contract in public contracts.

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** Contractual limitations on warranties are allowed under Maryland law so long as they are conspicuous and in writing. Md. Commercial Law Code Ann § 2-316 (2006); *Fairchild Indus. v. Maritime Air Service, Ltd.*, 333 A.2d 313 (Md. 1975). A warranty disclaimer or exclusion may be denied enforcement if it is unconscionable, i.e., if it is a one-sided or harsh agreement. Md. Commercial Law Code Ann. § 2-302 (2006).

**State and Local Government Contracts.** We did not identify any cases discussing disclaimers or limitations on warranty in public contracts.

### Mandatory Dispute Resolution Procedures

All breach of contract claims against the state must follow the dispute resolution procedures set forth in the Maryland statutes.. Md. Code Ann. State Fin. & Proc. §§ 15-215 through 15-223 (2006). Contract claims must be submitted to the procurement officer for the unit responsible for the procurement. However, this only applies to contract claims made by a contractor and not initiated by the state. Md. State Finance and Procurement Code Ann. §15-211 (2006). All appeals from the final action of a unit are to be heard by the Maryland State Board of Contract Appeals. *Id.*

## Massachusetts

### Limitations of Liability

**Commercial Contracts.** Massachusetts upholds limitations of liability unless they are unconscionable or against public policy, and specifically allows for limitations on remedies in contracts. *Chase Commercial Corp. v. Owen*, 32 Mass. App. Ct. 248, 253-54 (1992); Mass. Ann. Laws ch. 106, §§2-718, 2-719 (2006) Note, however, that a party may not use an exculpatory provision to escape liability for fraud or misrepresentation. *Zircon Co. v. Graphik Dimensions, Inc.*, 1996 Mass. Super. LEXIS 227, \*7 (1996).

While a party may contract against liability for harm caused by its negligence, it may not do so with respect to gross negligence for that would violate public policy. *Zavras vs. Capeway Rovers Motorcycle Club*, 687 N.E.2d 1263, 1265 (Mass. App. Ct. 1997).

**State and Local Government Contracts.** We did not identify any cases discussing the enforceability of limitations of liability in public contracts. However, courts have held that the Commonwealth may be liable for breach of contract to the same extent as a private person. Therefore, the law applicable to public contracts is the same as that applicable to private contracts. *R. Zoppo Co., Inc. v. Commonwealth*, , 232 N.E. 2d 346 (Mass. 1967); *Cooke v. United States*, 91 U.S. 389, 398 (1875).

### Exclusions of Certain Types of Damages

**Commercial Contracts.** In the context of private contracts, parties in Massachusetts may agree to limit or exclude damages, e.g., consequential damages, provided it is not unconscionable. Mass. Ann. Laws ch. 106, §2-719(3) (2006); *Logan Equipment Corp. v. Simon*, 736 F. Supp. 1188, 1196-1197 (D. Mass. 1987). Such exclusion must be conspicuous. A limitation on recovery of consequential damages between two commercially sophisticated parties does not offend public policy. *Canal Electric Co. v. Westinghouse Electric Corp.*, 548 N.E. 2d 182 (Mass. 1990). A disclaimer of consequential damages is enforceable even though the only remedy available fails of its essential purpose. *Id.* at 375, 378 n.8. The disclaimer of consequential damages is an entirely separate contractual provision from the limited repair or replacement remedy and thus survives the failure of the limited remedy. The limited remedy of repair and a consequential damages exclusion are two discrete ways of attempting to limit recovery for breach of warranty. The former survives unless it fails of its essential purpose, while the latter is valid unless it is unconscionable. *Id.*

Punitive damages are only recoverable if they are expressly authorized by statute. *Flesner v. Technical Communications Corp.*, 575 N.E. 2d 1107 (Mass. 1991). As with other jurisdictions, punitive damages are never allowed for a pure breach of contract action.

**State and Local Government Contracts.** We did not identify any cases or statutes discussing limitation of damages in public contracts with respect to contract actions. In tort actions, the Massachusetts Tort Claims Act limits recovery to \$100,000. Mass. Ann. Laws ch. 258, §2 (2006).

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** Massachusetts will generally uphold disclaimers and limitations on warranties if they are conspicuous and in writing. The limitation must not, however, be unconscionable. Mass. Ann. Laws ch. 106 §§ 2-316, 2-302 (2006).

**State and Local Government Contracts.** We did not identify any cases discussing disclaimers or limitations of warranty in public contracts.

### **Mandatory Dispute Resolution Procedures**

By voluntarily entering into a contract, the State consents to jurisdiction. *Minton Construction Corp. v. Commonwealth*, 494 N.E. 2d 1031 (Mass. 1986). Since the waiver of sovereign immunity is not by statute, but by the common law, a party looks to the same statutes as if they were bringing an action against a private party. *See Zoppo*, 232 N.E. 2d at 349.

## Michigan

### Limitations of Liability

**Commercial Contracts.** Michigan upholds limitations of liability generally. Mich. Comp. Laws § 440-2719 (2006). However, Michigan courts will not uphold exculpatory provisions if one party is at an obvious disadvantage in bargaining power or if public policy is violated. *Allen v. Michigan Bell Tel. Co.*, 171 N.W. 2d 689 (Mich. App. 1969).

A party may not contract against liability for harm caused by his gross negligence. *Universal Gym Equipment v. Vic Tanny International*, 526 N.W. 2d 5 (Mich. App. 1994), **vacated in part**, 531 N.W. 2d 719 (Mich. App. 1995).

**State and Local Government Contracts.** We did not identify any cases discussing the enforceability of limitations of liability in public contracts.

### Exclusions of Certain Types of Damages

**Commercial Contracts.** In the context of private commercial contracts, parties may agree to limit damages, e.g. consequential damages. Mich. Comp. Laws §§ 440.2719, 440.2316 (2006); *Latimer v. William Mueller & Son, Inc.*, 386 N.W. 2d 618 (Mich. 1986). A limit on damages will be enforced unless to do so would be unconscionable. However, if a limited remedy fails of its essential purpose, an accompanying limitation of damages will be inoperable. *Severn v. Sperry Corp.*, 538 N.W. 2d 50 (Mich. App. 1995).

Michigan does not ordinarily award punitive damages for breach of contract unless there is a showing of recklessness, negligence, or malice. *Valentine v. General American Credit, Inc.*, 332 N.W. 2d 591 (Mich. App. 1983). There must also be proof of a tort independent of the breach of contract. *Hetes v. Schefman & Miller Law Office*, 393 N.W. 2d 577 (Mich. App. 1986).

**State and Local Government Contracts.** We did not identify any cases discussing limitations of damages recoverable for breach of contract in public contracts.

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** Michigan courts allow parties to a contract to provide for limitations of warranties. Parties may contract as to limitations resulting from breach of express and implied warranties as long as they are conspicuous and in writing. Mich. Comp. Laws § 440.2316 (2006); *Latimer v. William Mueller & Son, Inc.*, 386 N.W. 2d 618 (Mich. 1986). A warranty disclaimer may not be unconscionable. Such limitations of liability may also preclude recovery for losses resulting from negligence.

**State and Local Government Contracts.** We did not identify any cases discussing disclaimers or limitations of warranty in public contracts.

### Mandatory Dispute Resolution Procedures

Suits against the state must be brought under the conditions specified in the consent or in the waiver of its immunity from suit or liability. *Shuey v. State of Michigan*, 106 F. Supp. 32 (1952). Pursuant to Mich. Comp. Laws § 600.6419 (2006), all claims against the state must be instituted in the Court of Claims.

**Other research**

Michigan law parallels the general understanding of “time is of the essence”; if there is a time stipulation in a contract and that stipulation is not met, a breach of contract has occurred. A “time is of the essence” contractual term is enforceable under Michigan law, if the parties intended time to be an essential element of their agreement. *Freidman v. Winshall*, 73 N.W.2d 248 (Mich. 1955). The non-breaching party may seek rescission of the contract. *Cooper v. Klopfenstein*, 185 N.W.2d 604 (Mich. Ct. App. 1971).

## Minnesota

### Limitations of Liability

**Commercial Contracts.** Minnesota generally upholds limitations of liability clauses in contracts between private commercial parties. Minn. Stat. § 336.2-719 (2005). Parties may, without violating public policy, limit liability resulting from their own negligence where the negligence claimed is not induced by the contract. The parties' intent must be clear. *Independent School District No. 877 v. Loberg Plumbing and Heating Co.*, 123 N.W. 2d 793 (Minn. 1963).

An exculpatory clause may not, however, exonerate a party from willful or wanton recklessness or intentional torts. *Schlobohm v. Spa Petite, Inc.*, 326 N.W. 2d 920 (Minn. 1982).

**State and Local Government Contracts.** We did not identify any cases discussing the enforceability of limitations of liability in public contracts but, in contracts cases, courts have held that the state is not immune when it steps into an industrial or commercial enterprise. *Susla v. State*, 247 N.W. 2d 907 (Minn.1976).

### Exclusions of Certain Types of Damages

**Commercial Contracts.** A commercial contract may limit or alter the measure of damages, i.e. consequential damages. However, consequential damages may not be limited or excluded if the limitation or exclusion is unconscionable. Minn. Stat. §336.2-719 (2005). A contractual limitation of liability for consequential damages will continue to have effect regardless of a failure of the contract's essential purpose. *International Financial Services, Inc. v. Franz*, 534 N.W.2d 261 (Minn. 1995). Punitive damages are not generally recoverable in actions for breach of contract. They are only available when an independent tort is pleaded. *Molenaar v. United Cattle Co.*, 553 N.W.2d 424, 428 (Minn. App. 1996). There is no cap on punitive damages for torts in Minnesota but a court has discretion to limit such damages. Minn. Stat. §549.20 (2005).

**State and Local Government Contracts.** We did not identify any cases discussing limitation of damages recoverable for breach of contract in public contracts.

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** Minnesota allows for disclaimers or exclusions of warranties unless they are unconscionable. *International Financial Services, Inc. v. Franz*, 534 N.W. 2d 261 (Minn. 1995); Minn. Stat. §§ 336.2-316, 336.2-302 (2005). Disclaimers of warranties must be conspicuous as required by the Uniform Commercial Code. Minn. Stat. § 336.2-316 (2005).

**State and Local Government Contracts.** We did not identify any cases discussing disclaimers or limitations of warranty in public contracts.

### Mandatory Dispute Resolution Procedures

The state of Minnesota has waived its immunity for breach of contract actions. *McCree & Company v. State*, 91 N.W. 2d 713 (Minn. 1958). We did not uncover any mandatory dispute resolution procedures.

## Mississippi

### Limitations of Liability

**Commercial Contracts.** Mississippi generally upholds limitations of liability clauses in contracts between private commercial parties. *Palmer v. Orkin Exterminating Co.*, 871 F. Supp. 912 (1994). Limitations of liability, including those for simple negligence, will be enforced as long as they were fairly and honestly negotiated. *Turnbough v. Ladner*, 754 So. 2d 467 (Miss. 1999). Mississippi follows the general rule of the U.C.C. that limitations of liability may not be unconscionable or violate public policy. We found no cases specifically dealing with gross negligence.

**State and Local Government Contracts.** Mississippi courts have held that when the legislature has authorized the State to enter into a contract and the State has done so lawfully, the obligations and duties of the contract should be mutually binding and reciprocal. *City of Grenada v. Whitten Aviation, Inc.*, 755 So. 2d 1208 (1999). Furthermore, contract terms are enforced against the state in the same way as they are against private contracting parties. *Quinn v. Mississippi State University*, 720 So. 2d 843, 849-50 (Miss. 1998). However, Miss. Code Ann. § 11-46-3 (2006) grants immunity to the state and its political subdivisions for “breach of implied term or condition of any warranty or contract.” *City of Jackson v. Stewart*, 908 So.2d 703 (Miss. 2005). By statute, the Executive Director of the Mississippi Department of Information Technology Services is authorized to negotiate a limitation on the liability to the state of prospective contractors provided that such limitation provides the state with reasonable protection. Miss. Code Ann. § 25-53-21(e) (2006).

Attorney general opinions have indicated that a public contract may not limit the liability of a contractor for negligence because of public policy. 1993 Miss. AG LEXIS 158. Furthermore, public entities may not assume contingent liabilities of other entities. 1999 Miss. AG LEXIS 235. Additionally, because there is no authority for allowing public contracts to include clauses limiting liability to the amount of the contract, Mississippi is reluctant to enter into such agreements. 1993 Miss. AG LEXIS 158; See also, Miss. Const. § 100.

### Exclusions of Certain Types of Damages

**Commercial Contracts.** A commercial contract may limit or alter the measure of damages, i.e. consequential damages. However, consequential damages may not be limited or excluded if the limitation or exclusion is unconscionable. *Patrick Petroleum Corp. v. Callon Petroleum Co.*, 531 F.2d 1312 (5<sup>th</sup> Cir. 1976); Miss Code Ann. §75-2-719 (2006). Moreover, a limitation on consequential damages may not be enforced if a limited remedy fails of its essential purpose. *Massey-Ferguson, Inc. v. Evans*, 406 So.2d 15 (Miss. 1981).

In order to recover punitive damages, a plaintiff must demonstrate a willful and malicious wrong or a gross, reckless disregard for the rights of others. *Valley Forge Insurance Co. v. Strickland*, 620 So. 2d 535 (Miss. 1993). Punitive damages are recoverable in a breach of contract action if the breach resulted from an intentional wrong and was accompanied by malice or gross, reckless disregard. *American Funeral Assurance Co. v. Hubbs*, 700 So. 2d 283, 285 (Miss. 1997). Mississippi has also recognized breach of fiduciary duty as an extreme circumstance that would allow for punitive damages. *Fought v. Morris*, 543 So. 2d 167, 173 (Miss. 1989). Mississippi has a punitive damages statute that covers tort actions. Miss. Code Ann. §11-1-65 (2006). Punitive damages for contract actions are governed by common law. There are no rules as to the maximum amount of punitive damages allowed by law.

**State and Local Government Contracts.** In any tort action brought against a governmental entity, liability may not exceed the sum of \$500,000.00. Miss. Code Ann. §11-46-15(1)(c) (2006) Judgments against a

governmental entity may not include an award for punitive or exemplary damages. Miss. Code Ann. §11-46-15(2) (2006). Limitations of liability are permitted in public contracts provided that the limitation provides the state with reasonable protection. Miss. Code §25-53-21(e) (2006). However, We found no cases discussing the enforceability of limits on damages in public contracts. Further, as noted above, Attorney General Opinions have advised agencies not to include such clauses in public contracts.

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** Under Mississippi law, neither the warranty for merchantability nor the warranty for fitness for a particular purpose may be disclaimed. Miss. Code Ann. §11-7-18; §75-2-719(4) (2006). However, under Miss. Code Ann. §75-2-315 (2000), the above two warranties do not apply to disclaimers or any limitation of remedies for breach of such warranties concerning computer hardware, computer software, and services performed on computer hardware and computer software, which are sold between merchants. State agencies are considered “merchants” under this statute. 1998 Miss. AG LEXIS 288.

**State and Local Government Contracts.** We did not identify any cases discussing disclaimers or limitations of warranty in public contracts. Note, however, that warranties of merchantability and fitness for a particular use cannot be disclaimed under Mississippi law except for as noted above.

### Mandatory Dispute Resolution Procedures

When the state has authority from the legislature to enter into a contract, the state necessarily waives its immunity from suit for breach of contract. *Quinn v. Mississippi State University*, 720 So. 2d 843 (Miss. 1998). However, *City of Jackson v. Estate of Stewart*, 908 So. 2d 703 (Miss. 2005) overruled *Quinn* to the extent that it discussed sovereign immunity waivers for breach of **implied** contract. Mississippi statute grants immunity to the state and its political subdivisions for “breach of implied term or condition of any warranty or contract.” Miss. Code Ann. § 11-46-3 (2006)

Any person having a basis for a claim against the state of Mississippi must first make demand on the auditor of public accounts. After the claim has been denied, suit may be brought in the court having jurisdiction over the subject matter, which holds its sessions at the seat of government. Miss. Code Ann. §11-45-1 (2006). However, the auditor has no power to audit breach of contract claims against the state. Lastly, any clause in a contract purporting to limit the time frame in which the state can file suit is void under Section 104 of the Mississippi Constitution. See *also*, Miss Code Ann. §15-1-51 (2006).

## Missouri

### Limitations of Liability

**Commercial Contracts.** In Missouri, limitations of liability are strictly construed, but valid if legitimately negotiated, clear, unambiguous, unmistakable, and conspicuous. *Purcell Tire and Rubber Co., Inc. v. Executive Beechcraft, Inc.*, 59 S.W. 3d 505 (Mo. 2001). Basically, such provisions cannot be unconscionable. *Bracey v. Monsanto Co., Inc.*, 823 S.W.2d 946 (Mo. 1992). Although exculpatory clauses releasing an individual from future negligence are disfavored, they are not prohibited as against public policy. *Lewis v. Snow Creek, Inc.*, 6 S.W.3d 388 (Mo. Ct. App. 1999). However, one may never exonerate oneself from future liability for intentional torts or for gross negligence. *Sale v. Slitz*, 998 S.W.2d 159 (Mo. Ct. App. 1999).

**State and Local Government Contracts.** We did not identify any cases discussing the enforceability of limitations of liability in public contracts.

### Exclusions of Certain Types of Damages

**Commercial Contracts.** Missouri will not alter the bargained-for allocation of risk unless a breach of contract is so fundamental that it was not considered by the parties. Mo. Rev. Stat. § 400.2-303 (2006). Consequential damages may be limited or excluded in commercial contracts, unless such limitation or exclusion is unconscionable. Mo. Rev. Stat. § 400.2-719 (2006); *World Enterprises, Inc. v. Midcoast Aviation Services*, 713 S.W.2d 606 (Mo. Ct. App. 1986). However, if a limited remedy fails of its essential purpose, consequential damages may be recovered by the buyer, despite any clause in the contract excluding them. *R.W. Murray, Co. v. Kresko*, 758 F.2d 266 (8th Cir. 1984). Missouri generally will not allow punitive damages for breach of contract, unless there is proof of intentional or wanton misconduct. *Propes v. Griffith*, 25 S.W.3d 544 (Mo. Ct. App. 2000).

**State and Local Government Contracts.** We did not identify any cases discussing the enforceability of exclusions of damages in public contracts.

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** A disclaimer of warranties will be enforced if it is in writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that “[t]here are no warranties which extend beyond the description on the face hereof.” Mo. Rev. Stat. § 400.2-316 (2006).

**State and Local Government Contracts.** Disclaimers of warranty are enforced in public contract cases, just as in private contract cases. *See, St. Louis Air Cargo Services, Inc. v. City of St. Louis*, 929 S.W.2d 821 (Mo. Ct. App. 1996).

### Mandatory Dispute Resolution Procedures

Contract claims against the state are not precluded by sovereign immunity. *V.S. DiCarlo Construction Co., Inc. v. State*, 485 S.W.2d 52 (Mo. 1972); *Jones v. Carnahan*, 965 S.W.2d 209 (Mo. Ct. App. 1998). While sovereign immunity is not waived for tort actions, there are a few exceptions, including for injury caused by the condition of public property. Mo. Rev. Stat. § 537.600 (2006). Regardless, persons having claims against the state must submit these with evidence, for review by the commissioner of administration, within two years of the claims' accrual. Mo. Rev. Stat. § 33.120 (2006).

## Montana

### Limitations of Liability

**Commercial Contracts.** Montana upholds limitations of liability, as long as they are not unconscionable. *Vandalia Ranch, Inc. v. Farmers Union Oil and Supply Co.*, 718 P.2d 647 (Mont. 1986); Mont. Code Ann. §30-2-719(3) (2005).

**State and Local Government Contracts.** Montana courts have held that the law governing contracts between private individuals also governs the government's rights and liabilities under public contracts. *Sornsin Construction Co. v. State*, 180 Mont. 248 (1978).

### Exclusions of Certain Types of Damages

**Commercial Contracts.** Montana enforces contractual limitations of remedies, as long as they do not fail of their essential purpose. Consequential damages may be limited or excluded in commercial contracts. *Schlenz v. John Deere Co.*, 511 F. Supp. 224 (D. Mont. 1981); Mont. Code Ann. §30-2-719(2) (2005). Montana generally will not allow punitive damages for breach of contract, unless there is an independent tort proven, e.g., fraud. *Lemley v. Allen*, 203 Mont. 37 (Mont. 1983).

**State and Local Government Contracts.** The state of Montana can never be liable for punitive damages. Mont. Code Ann. §18-1-404(1)(a); *Martel Construction, Inc. v. State*, 817 P.2d 677 (Mont. 1991).

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** A disclaimer of warranties will be enforced if it is conspicuous and is "bargained-for." A disclaimer may be denied enforcement if it is unconscionable, i.e., if it is a one-sided or harsh agreement. *Schlenz v. John Deere Co.*, 511 F. Supp. 224 (D. Mont. 1981).

**State and Local Government Contracts.** In contract actions against the state, every stipulation or condition in a contract which restricts a party from enforcing its rights is void. Mont. Code Ann. §18-1-403 (2005).

### Mandatory Dispute Resolution Procedures

In contract actions against the state, every stipulation or condition in a contract which restricts a party from enforcing its rights is void. Mont. Code Ann. §18-1-403 (2005). This includes forum selection clauses, which are hence void against the state. *State v. District Court*, 215 Mont. 110 (Mont. 1985). It is unclear whether this law would extend to arbitration clauses. Procedures for contract actions against the state are the same as if Montana were a private person. Mont. Code Ann. §18-1-411 (2005). However, when a contracting agency of the state provides a procedure for the dispute arising between the contractor and said agency, the contractor must resort to such procedure before proceeding to bring an action in court. Mont. Code Ann. §18-1-402 (2005).

## Nebraska

### Limitations of Liability

**Commercial Contracts.** Limitations of liability are valid, as long as they are not unconscionable or contrary to public policy. *Ray Tucker & Sons, Inc. v. GTE Directories Sales Corp.*, 253 Neb. 458 (Neb. 1997). Public policy prevents a party from limiting its damages for gross negligence or willful and wanton misconduct. *New Light Co. v. Wells Fargo Alarm Services*, 247 Neb. 57 (Neb. 1994). However, the Nebraska Supreme Court has also held that whether a particular exculpatory clause in a contractual agreement violates public policy depends upon the facts and circumstances of the agreement and the parties involved. *Id.* If such a limitation of damage would have a tendency to be injurious to the public, it is void for public policy. *Id.* at 63.

**State and Local Government Contracts.** We did not identify any cases discussing the enforceability of limitations of liability in public contracts.

### Exclusions of Certain Types of Damages

**Commercial Contracts.** Nebraska upholds agreements as to the allocation of risk, as long as they are not unconscionable. Neb. Rev. Stat. Ann. §2-303 (LexisNexis 2006). Consequential damages may be limited or excluded in commercial contracts. *John Deere Co. v. Hand*, 211 Neb. 549 (Neb. 1982). Limitations on remedies are enforceable, unless they fail of their essential purpose. *Id.* If a limited remedy fails of its essential purpose, consequential damages may be recovered by the buyer, despite any clause in the contract excluding them. *Id.* No rules were found, either in case law or in statutes, regarding whether punitive damages are allowed for breach of contract.

**State and Local Government Contracts.** We did not identify any cases discussing limitations of damages recoverable for breach of contract in public contracts.

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** A disclaimer of warranties will be enforced if it is conspicuous and is reasonable. *Adams v. American Cyanamid Co.*, 1 Neb. Ct. App. 337 (Neb. Ct. App. 1992). A disclaimer may be denied enforcement if it is unconscionable, i.e., if it is a one-sided or harsh agreement. *Id.*

**State and Local Government Contracts.** We did not identify any cases discussing disclaimers or limitations of warranty in public contracts.

### Mandatory Dispute Resolution Procedures

The state may be sued on contracts, express or implied, to which it is a party. Neb. Rev. Stat. Ann. §25-21,206 (LexisNexis 2006). The exclusive remedy for resolving such contract claims is provided in the State Contract Claims Act, under which the claim must be filed within two years of accrual. Neb. Rev. Stat. Ann. §81-8,306 (LexisNexis 2006).

## Nevada

### Limitations of Liability

**Commercial Contracts.** Nevada generally upholds limitations of liability clauses in contracts between private commercial parties. *American Fire & Safety, Inc. v. City of North Las Vegas*, 849 P. 2d 352, 360 (Nev. 1993).

We found no cases discussing the enforceability of a limitation of liability for gross negligence in a contract between two private commercial parties.

**State and Local Government Contracts.** We did not identify any cases discussing the enforceability of limitations of liability in public contracts. However, the Supreme Court of Nevada has frequently cited U.S. Supreme Court cases holding that government contracts should be held to the same principles of general contract law. *American Fire & Safety, Inc. v. City of North Las Vegas*, 849 P. 2d 352, 360 (Nev. 1993). Also, Nevada has waived its immunity from liability and action and has, by statute, consented to having its liability determined in accordance with the same rules of law as are applied to civil actions against natural persons and corporations. Nev. Rev. Stat. Ann. §41.031 (LexisNexis 2006).

### Exclusions of Certain Types of Damages

**Commercial Contracts.** In the context of private contracts, parties, particularly in commercial transactions, may agree to limit damages, e.g., consequential damages as long as the limitation is not unconscionable. Limitations of consequential damages for commercial loss are not prima facie unconscionable, but limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable. Nev. Rev. Stat. Ann. §104.2719(3) (LexisNexis 2006). Punitive damages are not allowed for breach of contract. In other cases, such damages are generally limited to three (3) times compensatory damages, unless compensatory damages are less than \$100,000, in which case there is a cap of \$300,000 in punitive damages. Nev. Rev. Stat. Ann. § 42.005 (LexisNexis 2006). It must be shown that the defendant acted with malice or fraud. Id.

**State and Local Government Contracts.** Nevada has limited a local government's recovery under a contract to the amount specified in a liquidated damages provision. *American Fire & Safety v. City of North Las Vegas*, 849 P. 2d 352 (Nev. 1993). In tort actions against the state, the claimant is limited to \$50,000 in damages, and may not recover exemplary or punitive damages. Nev. Rev. Stat. Ann. §41.035 (LexisNexis 2006).

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** In the context of contracts between private parties, Nevada upholds disclaimers of warranty unless they are unconscionable, i.e., one-sided, oppressive, or if they unfairly surprise an innocent party. If parties are of equal bargaining power and negotiate at arm's length, the disclaimer will be upheld. *Bill Stremmel Motors, Inc. v. IDS Leasing Corp.*, 514 P.2d 654 (Nev. 1973).

**State and Local Government Contracts.** We did not identify any cases discussing disclaimers or limitations of warranty in public contracts.

### **Mandatory Dispute Resolution Procedures**

An action against the State of Nevada must be filed in the county where the cause or some part thereof arose, or in Carson City. Nev. Rev. Stat. Ann. §41.031(2) (LexisNexis 2006). There do not appear to be any other mandatory procedures for when the state is a party to an action.

## New Hampshire

### Limitations of Liability

**Commercial Contracts.** New Hampshire generally upholds limitations of liability, as long as they are not unconscionable or against public policy. *PK's Landscaping v. New England Telephone and Telegraph Co.*, 519 A.2d 285 (N.H. 1986). We found no cases regarding clauses limiting gross negligence liability.

**State and Local Government Contracts.** While We did not identify any cases discussing the enforceability of limitations of liability clauses in public contracts, we found cases that enforced statutory limitations of liability. By implication, limitation of liability clauses are likely enforceable. *City of Berlin v. New Hampshire*, 474 A.2d 1025 (1984).

### Exclusions of Certain Types of Damages

**Commercial Contracts.** Parties may modify or allocate “unless otherwise agreed” risks or burdens imposed unless it is unconscionable. Where a risk or a burden as between parties “unless otherwise agreed” is allocated, the agreement may not only shift the allocation, but may also divide the risk or burden. N.H. Rev. Stat. Ann. §382-A:2-303 (LexisNexis 2006). New Hampshire generally will not allow punitive damages for breach of contract, unless there is an independent tort proven, e.g., fraud. See generally, *Jarvis v. Prudential Insurance Co.*, 448 A.2d 407 (1982).

**State and Local Government Contracts.** We did not identify any cases discussing limitations of damages recoverable for breach of contract in public contracts. Tort action awards against the state are limited to \$250,000 per claimant and \$2,000,000 per any single incident. N.H. Rev. Stat. Ann. §541-B:14 (LexisNexis 2006). No punitive damages are permitted against the state. N.H. Rev. Stat. Ann. §541-B:14(1) (LexisNexis 2006).

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** A disclaimer of warranties will be enforced if it is conspicuous and is “bargained-for.” *H. G. Fischer X-Ray Co. v. Meredith*, 433 A.2d 1306 (1981). A disclaimer may be denied enforcement if it is unconscionable, i.e., if it is a one-sided or harsh agreement. *Xerox Corp. v. Hawkes*, 475 A.2d 7 (1984).

**State and Local Government Contracts.** We did not identify any cases discussing disclaimers or limitations of warranty in public contracts.

### Mandatory Dispute Resolution Procedures

All breach of contract claims against the state must first be raised before the contracting agency. Claimants may then bring suit in court to challenge an adverse decision. N.H. Rev. Stat. Ann. §541-B:11 (LexisNexis 2006). Actions against the state must be tried without a jury. N.H. Rev. Stat. Ann. §491:8 (LexisNexis 2006).

## New Jersey

### Limitations of Liability

**Commercial Contracts.** Limitations of liability are enforceable as long as the limitation does not violate public policy. *Moreira Construction Co., v. Moretrench Corp.*, 235 A.2d 211 (N.J. Super. App. Div. 1967).

At least one New Jersey case has held that an exculpatory clause that purports to bar suits for negligent performance of contractual duties also bars suits for very negligent or grossly negligent performance. *Tessler & Son, Inc. v. Sonitrol*, 497 A.2d 530 (N.J. Super. 1985).

**State and Local Government Contracts.** We did not identify any cases discussing the enforceability of limitations of liability in public contracts. However, the New Jersey Contractual Liability Act states that the state consents to having its contracts determined in accordance with the same rules of law as are applicable to individuals and corporations. N.J.S.A. 59:13-3 (2006). No punitive damages are permitted against the state. *Id.*

### Exclusions of Certain Types of Damages

**Commercial Contracts.** In the context of private contracts, parties in New Jersey may agree to limit or exclude damages, e.g., consequential damages. N.J.S.A. §12A:2-719(3); §12A:2-718 (2006). Such exclusions are allowed as long as they are not unconscionable. *Id.*

New Jersey courts have held that the enforceability of a consequential damages clause does not depend on the effectiveness of the limited remedies afforded by the contract. Thus, even if a limited remedy fails of its essential purpose, a court could still enforce a limitation of consequential damages clause. *Kearney & Trecker v. Master Engraving Co.*, 527 A.2d 429 (N.J. 1987).

In order to obtain an award of punitive damages, a party must establish actual malice or wanton and willful disregard of persons who foreseeably might be harmed. N.J.S.A. §2A:15-5.12(a) (2006). Punitive damages are not recoverable in breach of contract actions. *Sandler v. Lawn-A-Mat Chemical & Equipment Corp.*, 358 A.2d 805 (N.J. Super. 1976).

**State and Local Government Contracts.** Under the New Jersey Contractual Liability Act, a party may not recover against the state for punitive or consequential damages arising out of a breach of contract. N.J.S.A. 59:13-3 (2006).

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** New Jersey will generally uphold disclaimers and limitations on warranties if they are conspicuous and in writing. N.J.S.A. § 12A:-2-316; §12A-2-302 (2006). They must also not be unconscionable.

**State and Local Government Contracts.** Under the New Jersey Contractual Liability Act, the state has waived its sovereign immunity from liability arising out of an express contract or a contract implied in fact. However, no punitive or consequential damages arising out of contract shall be recovered from the state. N.J.S.A. § 59:13-3 (2006).

## Mandatory Dispute Resolution Procedures

Prior to 1970, the doctrine of sovereign immunity prevented the state of New Jersey from being sued on a contract action. However, immunity from suit was abolished through passage of the New Jersey Contractual Liability Act. N.J.S.A. 59:13-3 (2006). Pursuant to this Act, parties contracting with the state who wish to file a contract action against it must file a notice of claim with the contracting agency within ninety days of the claim's accrual. *County of Morris v. Fauver*, 707 A.2d 958 (N.J. 1998); N.J.S.A. 59:13-5 (2006). New Jersey courts have jurisdiction over claims against the state for breach of contract. All such claims are to be heard by a judge sitting without a jury in accordance with court rules. N.J.S.A. 59:13-4 (2006).

## Other Research

**Formation of a Contract with the State.** The usual principles of "offer and acceptance" will govern the formation of a contract between the State of New Jersey (the "State") and a vendor. According to the New Jersey Contractual Liability Act, N.J.S.A. 59:13-3, the State of New Jersey "waives its sovereign immunity from liability arising out of an express contract or a contract implied in fact and consents to have the same determined in accordance with the rules of law applicable to individuals and corporations; provided, however, that there shall be no recovery against the State for punitive or consequential damages arising out of contract nor shall there be any recovery against the State for claims based on implied warranties or upon contracts implied in law." Usual principles of contract law therefore will govern any contract between a private entity and the State or its subdivisions, unless the particular issue is "controlled by" statutes enacted by the Legislature or regulations promulgated by an Executive branch agency. See, e.g., *Walsh v. New Jersey*, 674 A.2d 988, 995 (N.J. App. Div. 1996), adopted by *Walsh v. New Jersey*, 689 A.2d 131, 131 (N.J. 1997) (holding that a statute codifying the "employment-at-will" principle overrides common law construction of an employment contract). Thus, unless in direct conflict with a codified statute or regulation, *Walsh*, 674 A.2d at 996, usual principles of contract law will govern a contract executed between the State and a private entity or individual. On the issue of contract formation, because there is no statute enacted by the Legislature nor rule promulgated by the Purchase Division of the Department of the Treasury, common law principles will govern "offer and acceptance" of a contract under New Jersey law.

Common law contractual principles have been applied frequently by the New Jersey courts in the context of a contracting process with the State. See, e.g., *New Jersey v. Comm. Workers of America*, 711 A.2d 300, 305-06 (N.J. 1988) (applying common law principles to interpret an arbitration clause); *County of Morris v. Fauver*, 707 A.2d 958 (N.J. 1998) (applying common law principles of contract abandonment, contract modification, mutual mistake, and equitable relief). With respect to the "offer and acceptance" of a contract, the New Jersey Supreme Court has stated:

A contract does not come into being unless there be a manifestation of mutual assent by the parties to the same terms; and, while the manifestation of mutual assent is usually had by an offer and an acceptance either in words or by conduct, it is elementary that there can be no operative acceptance by acts or conduct unless the offeree's assent to an offer according to its terms is unequivocally shown. There must be an agreement – a "meeting of the minds" -- on the subject matter ... or there is no legally enforceable obligation. An expression of assent that modifies the substance of the tender, while it may be operative as a counter-offer, is yet not an acceptance and does not consummate a contract. In the very nature of the contract, acceptance must be absolute. If the contemplated agreement is to be bilateral, the offeror and offeree alike must express agreement as to every term of the contract. The offeror does this in the offer; the offeree must do this in his acceptance. ... It is requisite that there be an unqualified acceptance to conclude the manifestation of assent. Conduct may take the place of written or spoken words in the formation of

contracts; but silence does not ordinarily serve as an acceptance of an offer, although it may suggest acceptance where the particular circumstances reasonably impose on the offeree a duty to speak if the offer is rejected. *Johnson & Johnson v. Charmley Drug Co.*, 95 A.2d 391, 397 (N.J. 1953).

Moreover, “A reply to an offer, although purporting to accept it, which adds qualifications or requires performance of conditions, is not an acceptance but is a counteroffer.” *Larsen & Fish, Inc. v. Schultz*, 69 A.2d 328, 329 (N.J. App. Div. 1949). See also *County of Morris*, 707 A.2d at 965 (“As with the formation of a contract, a proposal to terminate the contract by one party must actually be accepted by the other in order to constitute abandonment”). These same principles of contract formation will apply to the process where a party submits a Proposal in response to the State’s RFP: there will be no binding “contract” unless the State, as offeree, expresses its assent to every term of the Proposal.

**Offer to the State Valid for 180 Days.** By certifying that a particular portion of the Proposal will be valid for 180 days after the bid opening, a party likely will restrict or waive its right to withdraw unilaterally, at any time prior to acceptance, that portion of the proposal. As stated by the Supreme Court of New Jersey, “a continuing offer grounded in sufficient consideration constitutes an ‘option’ as the term is known in law. Since it is promise on sufficient consideration, it is irrevocable for the time of its continuance, and takes the classification of a contract. Until the conditions set forth in the option are performed by the [offeree] or the time limits specified therein have expired, the option-contract is binding upon the [offeror] alone.” *American Handkerchief Corp. v. Frannat Realty Co.*, 109 A.2d 793, 795 (N.J. 1954). Courts will not typically “enter into an inquiry as to the adequacy of consideration,” looking only to determine that “good and valuable consideration” was “bargained for between” and “really intended by” the parties. *Id.* at 796. In this case, good and valuable consideration could take the form of the State’s inclusion and serious contemplation of a party’s bid. Additionally, even if consideration is lacking, an offer can become irrevocable if the offeree acts in reliance on the offer, if the offeror has reason to foresee such reliance. *Id.*

**Indemnification by the State Against Third Party Claims for Personal or Property Damage.** Nothing in the New Jersey statutory code prohibits the State from indemnifying a vendor against third party claims for personal or property damages arising out of the services a provider renders to the State. In fact, there is affirmative precedent for the State providing such indemnification.

In *Scott v. State of New Jersey*, 628 A.2d 379, 382 (N.J. App. Div. 1993), the Court held that a “unilateral contract” was formed between the State and a foster parent when “the State bound itself to indemnify [the plaintiff] ... under the terms of the Foster Parent Liability Program.” In that case, the State, in a brochure issued by the New Jersey Division of Youth and Family Services (DYFS), established a foster parent indemnification program as a “quasi-legislative initiative” under DYFS’s statutory authority to “expend such sums as may be necessary for the reasonable and proper cost of ... any specialized commodity or service.” *Id.*; see also N.J.S.A. 30:4C-27 (2006). Much like the broad grant of authority to the DYFS in *Scott*, the Director of the Purchasing and Property Division (the “Division”), or his or her designate, possesses the express statutory authority to “determine the terms and conditions of the various types of agreements or contracts ... concerning the purchasing or procurement, not inconsistent with any applicable law, as he may deem advisable to promote competition and to implement this act.” N.J.S.A. 52:34-13 (2006). The regulations governing the Division describe the Division’s “primary mission” as “procur[ing], in a timely and effective manner, the goods and services necessary for the daily operation of State government.” N.J.A.C. 17:12-1.1 (2006). Thus, based on *Scott*, if the Director of the Division, or his or her designate, deems it “advisable” or “necessary” to the mission of the Department to indemnify a vendor against third party claims,

then the State would be permitted to provide such a contractual indemnification. See also *Palmentieri v. City of Atlantic City*, 555 A.2d 752 (N.J. App. Div. 1988) (the State or subdivision thereof may indemnify another if it “has the statutory or common-law authority to take the action authorized”). Although the precise language surrounding the scope of the indemnification would be subject to negotiation between the parties, any indemnification by the State would certainly exclude claims arising out of a party’s fraudulent, criminal, malicious, willful or intentional misconduct, which serve as limitations on the State’s indemnification obligations to its own employees under the Tort Claims Act. See N.J.S.A. 59:10-1 (2006).

## New Mexico

### Limitations of Liability

**Commercial Contracts.** New Mexico generally upholds limitations of liability, strictly construing their terms, but only if they do not violate public policy and do not result from unequal bargaining power. *Lynch v. Santa Fe National Bank*, 627 P.2d 1247 (N.M. Ct. App. 1981); N.M. Stat. Ann. § 55-2-719 (2006). Clauses limiting gross negligence liability are not enforceable, as they contravene public morals. *Lynch v. Santa Fe National Bank*, 627 P.2d 1247 (N.M. Ct. App. 1981); *Coachlight Las Cruces, Ltd., v. Mountain Bell Telephone Co.*, 664 P.2d 994 (N.M. Ct. App. 1983).

**State and Local Government Contracts.** Limitations on liability are enforceable in public contracts. *State v. Dean Witter Reynolds, Inc.*, 812 P.2d 777 (N.M. 1991). Additionally, statutory limitations of liability have been enforced in state contract cases. *City of Artesia v. Carter*, 610 P.2d 198 (N.M. Ct. App. 1980).

### Exclusions of Certain Types of Damages

**Commercial Contracts.** New Mexico upholds agreements as to the allocation of risk, including limitations of consequential damages, as long as they are not unconscionable. N.M. Stat. Ann. §§ 55-2-719, 55-2-303 (2006). Punitive damages may be recovered for breach of contract when the defendant's conduct was malicious, fraudulent, oppressive, or committed recklessly with wanton disregard. *Romero v. Wolf*, 784 P.2d 992 (N.M. 1989); *Hood v. Fulkerson*, 699 P.2d 608 (N.M. 1985).

**State and Local Government Contracts.** Limitations of damages recoverable for breach of contract in public contracts are enforceable in New Mexico. *State v. Siplast, Inc.*, 877 P.2d 38 (N.M. 1994).

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** A disclaimer of warranties will be enforced if it is conspicuous and is bargained-for. A disclaimer may be denied enforcement if it is unconscionable, i.e., if it is a one-sided or harsh agreement. N.M. Stat. Ann. § 55-2-316 (2006). Limitations on remedies are enforceable, unless they fail of their essential purpose. N.M. Stat. Ann. § 55-2-719 (2006).

**State and Local Government Contracts.** We did not identify any cases discussing disclaimers or limitations of warranty in public contracts.

### Mandatory Dispute Resolution Procedures

New Mexico law permits suits against the state for breach of contract, but provides a statute of limitations of two years on such claims. *Vinnell Corp. v. State*, 512 P.2d 71 (N.M. 1973); *Gathman-Matotan Architects and Planners, Inc. v. State*, 787 P.2d 411 (N.M. 1990).

## New York

### Limitations of Liability

**Commercial Contracts.** New York generally upholds limitations of liability, except for when the party seeking protection has engaged in misconduct. *Novak & Co. v. New York City Housing Authority*, 480 N.Y.S.2d 403 (N.Y. App. Term. 1984). The courts have a policy against limiting liability in contracts in cases of grossly negligent conduct as well as purely intentional wrongdoing. *Novak & Co. v. New York City Housing Authority*, 480 N.Y.S.2d 403 (N.Y. App. Term. 1984).

**State and Local Government Contracts.** The enforceability of limitations of liability in public contracts seems to be treated the same as in private contracts, as the court maintained no separate discussion regarding the public nature of a party in *Novak & Co. v. New York City Housing Authority*, 480 N.Y.S.2d 403 (N.Y. App. Term. 1984).

### Exclusions of Certain Types of Damages

**Commercial Contracts.** Exclusions of damages are enforceable, unless there is willful or gross negligence, or intentional wrongdoing. *A.H.A. General Construction, Inc. v. New York City Housing Authority*, 92 N.Y. 2d 20 (N.Y. Ct. App. 1998) (N.Y. App. Div. 1997). Consequential damages may be limited or excluded in commercial contracts, unless such limitation or exclusion is unconscionable. *Corinno Civetta Construction Corp. v. City of New York*, 502 N.Y.S.2d 681 (N.Y. 1986). New York generally will not allow punitive damages for breach of contract, unless there is also a tort. *Thyssen, Inc. v. S.S. Fortune Star*, 777 F.2d 57 (2d Cir. 1985).

**State and Local Government Contracts.** Exclusions of damages are treated the same in public contracts as in commercial contracts. *Cf., Novak & Co. v. New York City Housing Authority*, 480 N.Y.S.2d 403 (N.Y. App. Term. 1984); *A.H.A. General Construction, Inc. v. New York City Housing Authority* 661 N.Y.S.2d 213 (N.Y. App. Div. 1997); *Corinno Civetta Construction Corp. v. City of New York*, 502 N.Y.S.2d 681 (N.Y. 1986).

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** A disclaimer of warranties will be enforced if it is conspicuous and is “bargained-for.” A disclaimer may be denied enforcement if it is unconscionable, i.e., if it is a one-sided or harsh agreement. *Prince Brothers Co. v. Olin Construction Co., Inc.*, 528 F. Supp. 716 (D.C.N.Y. 1981). Additionally, disclaimers of warranties will be strictly interpreted. *Computerized Radiological Services, Inc. v. Syntex Corp.*, 595 F. Supp. 1495 (D.C.N.Y. 1984). New York enforces contractual limitations of remedies, as long as they do not fail of their essential purpose. *American Telephone & Telegraph Co. v. New York City Human Resources Administration*, 833 F. Supp. 962 (S.D.N.Y. 1993).

**State and Local Government Contracts.** We did not identify any cases discussing limitations of warranties recoverable for breach of contract in public contracts.

### Mandatory Dispute Resolution Procedures

The Court of Claims has waived the state’s common law sovereign immunity with respect to contract cases. A claim for breach of contract shall be filed and served on the attorney general within six months after accrual of the claim. New York Court of Claims Law §10 (McKinney 2006).

## Other research

**Time is of the Essence.** New York state law with respect to the term “time is of the essence” follows the commonly understood meaning that “insofar as a time for performance is specified in the contract, failure to comply with the time requirement will be considered to be a material breach of the agreement.” *Retrofit Partners I, L.P. v. Lucas Industries, Inc.*, 201 F.3d 155 (2d Cir. 2000). New York law requires that the provision in a contract specifying dates for performance must be strictly enforced and, unless expressly stated otherwise, it is inferred that time is of the essence in such provision. *Towers Charter & Marine Corp. v. Cadillac Insurance Co.*, 894 F.2d 516, 523 (2d Cir. 1990). “Time is generally of the essence where definite time of performance is specified in contract, unless circumstances indicate contrary intent”. *Burgess Steel Prods. Corp. v. Modern Telecomm., Inc.*, 613 N.Y.S.2d 158, 159 (N.Y. App. Div. 1994).

In commercial contracts, time is generally of the essence of the contract. *New York & Cuba Mail S.S. Co. v. Guayaquil & Q.R. Co.*, 270 F. 200, 201 (2d Cir. 1920). Therefore, the concept of “time is of the essence” definitely exists under the laws of New York, and even seems to be an understood clause in an option contract.

New York law on the phrase “time is of the essence” may be summarized as follows:

- New York law parallels the general understanding of “time is of the essence”; if there is a time stipulation in a contract and that stipulation is not met, a breach of contract has occurred.
- Liquidated damages are recoverable when time is of the essence, as long as a valid liquidated damages clause is present. A valid clause must cap the amount of liquidated damages that are recoverable and must not allow for the nonbreaching party to sue for other actual damages above and beyond the liquidated damages sum.
- In the presence of a valid liquidated damages clause, the liquidated damages shall be the sole remedy for the breach.
- While cost of cover is an allowable remedy under New York law, one can infer that cost of cover is not granted in a case in which liquidated damages exist because the courts have stated that liquidated damages are intended as the sole remedy for a material breach.

**Liquidated Damages in Conjunction with Time is of the Essence.** Liquidated damages are a cure for a material breach under the laws of New York. One cause of a material breach under New York law is a party’s failure to meet the “time is of the essence” provision in the contract. In contracts involving liquidated damages related to material breach, a party may not seek actual damages; the party may only seek liquidated damages in an amount that does not exceed the amount stated in the liquidated damages clause. A liquidated damages provision that allows a minimum liquidated recovery, while also permitting the party not in breach to sue for actual damages beyond the liquidated sum, is invalid. *Stock Shop, Inc. v. Bozell & Jacobs, Inc.*, 481 N.Y.S.2d 269, 270 (N.Y. App. Div. 1984). In another case, the court stated that a clause for liquidated damages, which is reasonable, “precludes any recovery of actual damages.” *Federal Realty Limited Partnership v. Choices Women’s Medical Center, Inc.*, 289 A.D.2d 439 (2001). See also *Frankel’s Carpet Fashions, Inc. v. Jacob W. Abraham*, 228 N.Y.2d 123 (1962) (“The landlord may not in one breath claim liquidated damages and then seek actual damages in addition to liquidated damages.) Therefore, for a liquidated damage provision to be viewed as valid by the courts, there must be a cap placed on the amount of liquidated damages that can be sought. In addition, the provision may not permit the nonbreaching party

to sue for damages beyond the liquidated sum. Pursuant to subdivision (1) of *section 2-718* of the Uniform Commercial Code, a liquidated damage provision will be valid if reasonable with respect to either the harm that the parties anticipate will result from a breach or the actual damages suffered by the nonviolating party at the time of a breach. *Id.*, 270.

In *Stock Shop*, there was no true liquidation of damages because the plaintiff had the option to disregard the liquidated sum and sue for actual damages. *Id.*, 271. In order for a liquidated damages clause to be valid, an amount must be specified and both parties must be bound to that amount. In *Dalston Construction Corp. v. Wallace*, the court invalidated a similar clause; the clause in question fixed a minimum amount to be paid by the homeowner to the contractor, but left the door open for actual damages to be proven in addition those damages deemed liquidated. *Dalston Construction Corp. v. Wallace*, 214 N.Y.S.2d 191, 193. The court declined to acknowledge this clause as a settlement as it permitted the contractor to “have his cake and eat it too.” *Id.*, 193.

A term fixing unreasonable liquidated damages, albeit small or large, is expressly made void as a penalty. *Comind, Companhia de Seguros v. Sikorsky Aircraft Division of United Technologies Corp.*, 116 F.R.D. 397, 415 (D. Conn. 1987). Thus, another stipulation that must be met for a liquidated damages clause to be considered valid by the courts is that the damages set must be reasonable. If they are deemed unreasonable, by virtue of either being too small or too large, the court will invalidate the clause.

The district court in *Gregory v. Simon & Schuster* cites *Stock Shop*, stating that the plaintiff can not receive any more than the amount granted in the liquidated damages clause in the contract. The plaintiff argued that the language of the contract gave her the option to elect liquidated damages in lieu of actual damages. The court also states that if the plaintiff’s interpretation of the language held true, the liquidated damages clause would have been rendered unenforceable and without any effect whatsoever. *Cynthia Gregory v. Simon & Schuster, Inc.*, 1994 U.S. Dist. LEXIS 9833, at \*16-17 (S.D.N.Y. 1994). Under the laws of New York, a valid liquidated damages clause must cap the amount of damages and not allow for further damages to be sought.

**Damages in Addition to Liquidated Damages.** If a liquidated damages clause exists in a contract, the nonbreaching party may not seek actual damages beyond the amount given in the liquidated damages. Any liquidated damages clause that allows for a party to elect actual damages over liquidated damages is rendered unenforceable by the Uniform Commercial Code, as those damages would be deemed unreasonable. A valid liquidated damages clause must fix the damages in advance and be for a pre-determined sum. Thus, if one party does not deliver goods or services within a set timeframe, it will be in material breach, regardless of whether or not time is specifically stated to be of the essence. If a valid liquidated damages clause exists in the contract between the parties, then the agreed-upon liquidated damages shall be the remedy for this breach of contract. A clause for liquidated damages, which is reasonable, “precludes any recovery of actual damages.” *Federal Realty Limited Partnership v. Choices Women’s Medical Center, Inc.*, 289 A.D.2d 439 (2001). See also *Frankel’s Carpet Fashions, Inc. v. Jacob W. Abraham*, 228 N.Y.2d 123 (1962) (“The landlord may not in one breath claim liquidated damages and then seek actual damages in addition to liquidated damages.”)

Under New York law, when there is a valid liquidated damages clause in place, liquidated damages are the sole remedy for a breach of contract. Therefore, the nonbreaching party may not seek other damages, whether monetary or non-monetary.

**Cost of Cover.** Cost of cover of damages is an acceptable remedy under New York law. *Fertico Belgium S.A. v. Phosphate Chemicals Export Association, Inc.*, 70 N.Y.2d 76 (1987). In that case, Fertico sought cover under the Uniform Commercial Code by acquiring substitute fertilizer from a third party due to Phoschem's breach. Because Fertico's purchase was made in good faith, without unreasonable delay, and the replacement fertilizer was a reasonable substitute for the Phoschem fertilizer, the court held that Fertico was entitled to a damage remedy under subdivision (2) of *section 2-712* of the Uniform Commercial Code. Pursuant to such subdivision, "a covering buyer's damages are equal to the difference between the presumably higher cost of cover and the contract price, plus incidental or consequential damages suffered on account of the breach, less expenses saved". *Id.* 79-83.

Although the cost of cover is an allowable remedy in New York, when liquidated damages are involved, the liquidated damages shall be the sole remedy for a material breach. Therefore, a reasonable interpretation of current New York law is that cost of cover and liquidated damages are mutually exclusive. The cost of cover would be unrecoverable if the liquidated damages clause is the sole remedy.

## North Carolina

### Limitations of Liability

**Commercial Contracts.** North Carolina generally upholds limitations of liability but only when such limitation is reasonable. *Billings v. Joseph Harris Co.*, 226 S.E.2d 321 (N.C. 1976). We found no cases regarding clauses limiting gross negligence liability.

**State and Local Government Contracts.** The state of North Carolina cannot limit its liability via contract with respect to the truth of supplied statements of fact. *Lowder v. State*, 217 S.E.2d 682 (N.C. Ct. App. 1975).

### Exclusions of Certain Types of Damages

**Commercial Contracts.** North Carolina will not alter the allocations of risk bargained for by the parties unless the contract is unconscionable. N.C. Gen. Stat. § 25-2-303 (2006). Consequential damages may be limited or excluded in commercial contracts, unless such limitation or exclusion is unconscionable. N.C. Gen. Stat. § 25-2-719 (2006). North Carolina may award punitive damages only if the claimant proves liability for compensatory damages, plus either related malice, fraud, or willful or wanton conduct. Also, punitive damages are not awarded solely for breach of contract. N.C. Gen. Stat. § 1D-15 (2006). Punitive damages are limited by the greater of three times the amount of compensatory damages or two hundred fifty thousand dollars (\$250,000). N.C. Gen Stat. § 1D-25(b).

**State and Local Government Contracts.** We did not identify any cases discussing limitations of damages recoverable for breach of contract in public contracts.

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** A disclaimer of warranties will be enforced if it is conspicuous. *Muther-Ballenger v. Giffin Electrical Consultants, Inc.*, 397 S.E.2d 247 (N.C. Ct. App. 1990). North Carolina enforces contractual limitations of remedies, as long as they do not fail of their essential purpose. N.C. Gen. Stat. § 25-2-719 (2000); *Williams v. Hyatt Chrysler-Plymouth, Inc.*, 269 S.E.2d 184 (N.C. Ct. App, 1980).

**State and Local Government Contracts.** We did not identify any cases discussing disclaimers or limitations of warranty in public contracts.

### Mandatory Dispute Resolution Procedures

When the state, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract. *Smith v. State*, 222 S.E.2d 412 (N.C. 1976); *Dickens v. Thorn*, 429 S.E. 2d 176 (N.C. Ct. App., 1993);

### Other Research

According to N.C. Gen. Stat. § 22B-10 (2006), a contract provision which includes a waiver of jury trial is unenforceable and is considered unconscionable as a matter of law. However, according to case law, an agreement to arbitrate a dispute, rather than litigate, is not an unenforceable contract requiring waiver of a jury. Furthermore, it is unenforceable for contracts "entered into" in North Carolina to require that arbitration of any dispute be heard in another state. N.C. Gen. Stat. §22B-3 (2006).

## North Dakota

### Limitations of Liability

**Commercial Contracts.** North Dakota upholds limitations of liability provisions if they are not unconscionable. Such provisions are not held to the reasonableness standard of N.D. Cent. Code § 41-02-97 (2006). *Tharalson v. Pfizer Genetics, Inc.*, 728 F.2d 1108 (8<sup>th</sup> Cir. 1984); N.D. Cent. Code § 41-02-19 (2006). We found no cases regarding clauses limiting gross negligence liability.

**State and Local Government Contracts.** We did not identify any cases discussing the enforceability of limitations of liability in public contracts. However, in general, the state may be held liable only if a private person, under the same circumstances, would be liable. N.D. Cent. Code § 31-12.2-02 (2006).

### Exclusions of Certain Types of Damages

**Commercial Contracts.** North Dakota will not alter the bargained-for allocation of risk. The agreement may not only shift the allocation but may also divide the risk or burden. N.D. Cent. Code § 41-02-20 (2006). Consequential damages may be limited or excluded in commercial contracts, unless such limitation or exclusion is unconscionable. N.D. Cent. Code § 41-02-98 (2006). North Dakota will not allow punitive damages for the breach of an obligation arising out of contract. For other actions, punitive damages can be awarded only when there has been oppression, fraud, or malice. N.D. Cent. Code § 32-03.2-11 (2006); *Veneklase v. City of Fargo*, 904 F. Supp. 1038 (D.N.D. 1995).

**State and Local Government Contracts.** The liability of the state is limited to two hundred fifty thousand dollars per person and one million dollars for any number of claims arising from a single occurrence. The state may not be held liable for punitive damages. N.D. Cent. Code § 32-12.2-02 (2006).

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** A disclaimer of warranties will be enforced if it is conspicuous and “bargained for.” *Steiner v. Ford Motor Co.*, 606 N.W.2d 881 (N.D. 2000). North Dakota enforces contractual limitations of remedies, as long as they do not fail of their essential purpose. N.D. Cent. Code § 41-02-98 (2006); *Farmers Union Grain Term. Association v. Nelson*, 223 N.W.2d 494 (N.D. 1974).

**State and Local Government Contracts.** We did not identify any cases discussing disclaimers or limitations of warranty in public contracts.

### Mandatory Dispute Resolution Procedures

An action arising upon contract may be brought in the district court against the state the same as against a private person. N.D. Cent. Code § 32-12-02 (2006); *Effertz v. North Dakota Workers' Compensation Bureau*, 481 N.W.2d 223 (N.D. 1992). However, claims arising upon contract for the recovery of money only must be presented to the applicable agency before being maintained against the state. N.D. Cent. Code § 32-12-03 (2006).

## Ohio

### Limitations of Liability

**Commercial Contracts.** Ohio generally upholds limitations of liability clauses in contracts between private commercial parties. While they are viewed critically by the courts, such clauses may be freely bargained for in the state. *Nahra v. Honeywell*, 892 F. Supp. 962 (N.D. Ohio 1995); *Berjian v. Ohio Bell Tel. Co.*, 375 N.E.2d 410 (Ohio 1978). Limitations of liability may not be unconscionable or violate public policy and may not contain vague or ambiguous terms.

Based on language in the above cases, it appears that one cannot limit one's liability for gross negligence in Ohio. Gross negligence is defined as willful and wanton misconduct, and limitations of liability will not be enforced if such conduct is involved. *Berjian v. Ohio Bell Tel. Co.*, 375 N.E.2d 410 (Ohio 1978); *Askenazi v. General Elec. Co.*, 1997 Ohio App. LEXIS 3560 (1997).

**State and Local Government Contracts.** Ohio courts have held that the law governing contracts between private individuals also governs the government's rights and liabilities under public contracts. *State v. Cooper*, 171 N.E. 399 (Ohio 1930); *State v. Buttles*, 3 Ohio St 309 (1854).

A 1996 Ohio Attorney General Opinion advised the State Treasurer that hold harmless and indemnification clauses may be included in a state contract, so long as they do not create state debt, and as long as they do not violate the constitutional restriction on lending the state's credit in a manner that benefits private enterprise. Ohio Const. art. II, §22, art. VIII, §§1-3, Ohio Rev. Code Ann. §§126.07 and §131.33 (Anderson 2000); Ohio Const. art. VIII, §4. A hold harmless and indemnification clause will comply with the law as long as it obligates the state of Ohio only for the duration of the biennium in which the contract is executed. The clause must also specify a maximum dollar amount for which the state of Ohio is obligated and the amount must be appropriated and certified prior to the execution of the contract. In order to comply with the prohibition against lending the state's credit, the private party to the contract must furnish the state sufficient consideration to support the financial obligation that the state assumes under the hold harmless clause. 1996 Ohio AG LEXIS 53.

### Exclusions of Certain Types of Damages

**Commercial Contracts.** A commercial contract may limit or alter the measure of damages, i.e. consequential damages. However, consequential damages may not be limited or excluded if the limitation or exclusion is unconscionable. *Avenell v. Westinghouse Electric Corp.*, 324 N.E. 2d 583 (Ohio App. 1974); Ohio Rev. Code Ann. §1302.93 (Anderson 2006). Punitive damages are not recoverable for breach of contract actions, unless there is an independent tort proven that is accompanied by conduct that is wanton, reckless, malicious, or oppressive. *Ketchum v. Miller*, 136 N.E. 145 (Ohio 1922); *Hofner v. Davis*, 675 N.E. 2d 1339 (Ohio App. 1996). **There is no longer a statutory cap on punitive damages in Ohio.**

**State and Local Government Contracts.** When parties to a state public contract have contracted as to the measure of damages, court review is limited to a consideration of whether the head of the state agency abused his discretion in determining the reasonableness of the compensation to be provided. *Conn Construction Co. v. Ohio Department of Transportation*, 470 N.E. 176 (Ohio App. 1983). Punitive damages are not recoverable against the state or its agencies because to allow such damages would violate public policy. *Drain v. Kosydar*, 374 N.E. 1253 (Ohio 1978).

## Oklahoma

### Limitations of Liability

**Commercial Contracts.** Limitations of liability are valid in Oklahoma, as long as they do not violate public policy, injure public morals, public health, or confidence in administration of the law, or destroy individuals' rights to personal safety or private property. *Manning v. Brannon*, 956 P.2d 156 (Okla. Ct. App. 1997). Oklahoma courts overwhelmingly reject attempts to limit liability by contract for gross negligence, willful misconduct, and fraud. *Satellite Sys., Inc. v. Birch Telecom of Okla., Inc.* 51 P. 3d 585 (Okla. 2002); *Elsken v. Network Multi-Family Sec. Corp.*, 838 P. 2d 1007 (Okla. 1992).

**State and Local Government Contracts.** We did not identify any cases discussing the enforceability of limitations of liability in public contracts. However, Oklahoma Attorney General Opinion 06-11 notes that Article 10, § 26 of the Oklahoma Constitution prohibits limitation of liability clauses in all state contracts unless at the time the contract is executed funds have been appropriated and encumbered to pay for any contingent liability. 2006 Okla. AG LEXIS 11, 36 (Okla. AG 2006). A limitation of liability clause that creates an unfunded contingent liability for the state is void for public policy. *Id.*

### Exclusions of Certain Types of Damages

**Commercial Contracts.** Oklahoma will not alter the bargained-for allocation of risk. Parties may not only shift the allocation but may also divide the risk or burden.. Okla. Stat. tit. 12A, § 2-303 (2005). Consequential damages may be limited or excluded in commercial contracts, unless such limitation or exclusion is unconscionable. Okla. Stat. tit. 12A, § 2-719 (2005); *Tuttle v. Kelly-Springfield Tire Co.*, 585 P.2d 1116 (Okla. 1978). Oklahoma enforces contractual limitations of remedies, as long as they do not fail of their essential purpose. Okla. Stat. tit. 12A, §2-719 (2005). If a limited remedy fails of its essential purpose, consequential damages may be recovered by the buyer, despite any clause in the contract excluding them. *Osburn v. Bendix Home Systems, Inc.* 613 P.2d 445 (Okla. 1980). Oklahoma will not allow punitive damages for the breach of an obligation arising out of contract. For other actions, punitive damages can be awarded only when there has acted with reckless disregard of others' rights or malice. Okla. Stat. tit. 23, § 9.1 (2005); *Payne v. DeWitt*, 995 P.2d 1088 (Okla. 1999).

**State and Local Government Contracts.** The tort liability of the state is limited to \$25,000 for any claim or to any claimant who has more than one claim for loss of property arising out of a single act, accident, or occurrence, \$125,000 to any claimant for a claim for any other loss arising out of a single act, accident, or occurrence (except as otherwise provided), and one million dollars for any number of claims arising from a single occurrence. The state may not be held liable for punitive damages. Okla. Stat. tit. 51, § 154 (2005).

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** A disclaimer of warranties will be enforced if it is conspicuous and "bargained for." *Tuttle v. Kelly-Springfield Tire Co.*, 585 P.2d 1116 (Okla. 1978).

**State and Local Government Contracts.** We did not identify any cases discussing disclaimers or limitations of warranty in public contracts.

### Mandatory Dispute Resolution Procedures

When the state enters into a valid contract, it consents to be sued on that contract in an ordinary action at law. *State Bd. of Public Affairs v. Principal Funding Corp.*, 542 P.2d 503 (Okla. 1975). However, breach of contract claims against the state must first be raised before the contracting agency, if that agency has such an administrative policy. Claimants may then bring suit in court to challenge an adverse decision. Okla. Stat. tit. 51, § 156 (2005) (tort claims); *Speaker v. Board of City Commissioners of Oklahoma County*, 312 P.2d 438 (Okla. 1957).

## Oregon

### Limitations of Liability

**Commercial Contracts.** A limitation of liability will be upheld when it is part of a bargain between business concerns that have dealt with each other at arms length in a commercial setting. *Atlas Mutual Insurance Co. v. Moore Dry Kiln Co.*, 589 P.2d 1134 (Or. Ct. App. 1979). Oregon courts have generally refused to uphold limitation of liability clauses where the defendant's conduct constituted gross negligence. *Elsken v. Network Multi-Family Security Corp.*, 838 P.2d 1007 (Okla. 1992).

**State and Local Government Contracts.** We did not identify any cases discussing the enforceability of limitations of liability in public contracts.

### Exclusions of Certain Types of Damages

**Commercial Contracts.** Oregon will not alter the bargained-for allocation of risk. The parties may not only shift the allocation, but may also divide the risk or burden. Or. Rev. Stat. § 72.3030 (2006). Consequential damages may be limited or excluded in commercial contracts, unless such limitation or exclusion is unconscionable. Or. Rev. Stat. § 72.7190 (2006); *Gaha v. Taylor-Johnson Dodge*, 632 P.2d 483 (Or. Ct. App. 1981). Oregon will not allow punitive damages in a civil action unless malice, or conscious, reckless, or conscious indifference to the health, safety and welfare of others is proven by clear and convincing evidence. Or. Rev. Stat. § 31.730 (2006); *Stranahan v. Fred Myer, Inc.*, 958 P.2d 854 (Or. 1998) (reversed on other grounds).

**State and Local Government Contracts.** The tort liability of the state is limited to one hundred thousand dollars per person and five hundred thousand dollars for any number of claims arising from a single occurrence. The state may not be held liable for punitive damages. Or. Rev. Stat. § 30.270 (2006); *Faro v. Highway Division*, 951 P.2d 716 (Or. 1998).

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** Under Oregon law, a disclaimer of warranties is valid if it is in writing and conspicuous." *Agristor Credit Corp. v. Schmidlin*, 601 F. Supp. 1307 (D. Or. 1985). Oregon enforces contractual limitations of remedies, as long as they do not fail of their essential purpose. Or. Rev. Stat. § 72.7190 (2006); *State v. Campbell*, 442 P.2d 215 (Or. 1968).

**State and Local Government Contracts.** We did not identify any cases discussing disclaimers or limitations of warranty in public contracts.

### Mandatory Dispute Resolution Procedures

When the state enters into a valid contract, it consents to be sued on that contract in an ordinary action at law. *DeLong v. Oregon State Highway Commission*, 233 F. Supp. 7 (D. Or. 1964).

## Pennsylvania

### Limitations of Liability

**Commercial Contracts.** In Pennsylvania, limitations of liability clauses are enforceable so long as such a provision is not unconscionable. Furthermore, Pennsylvania will enforce limitation of liability clauses when contained in sales contracts negotiated between sophisticated parties and when no personal injury or property damage is involved. *Valhal Corp. v. Sullivan Associates, Inc.*, 44 F.3d 195 (3<sup>rd</sup> Circ. 1995); 13 Pa. Cons. Stat. Ann. § 2719 (West 2005); *Borden, Inc. v. Advent Ink Co.*, 701 A.2d 255 (Pa. Super. Ct. 1997). However, while a limitation of liability clause may relieve the beneficiary of liability for the effects of his or her negligent conduct, it will not preclude recovery for damages caused by willful or wanton conduct. *Valley Forge Convention & Visitors Bureau v. Visitor's Services, Inc.*, 28 F. Supp. 2d 947 (E.D. Pa. 1998).

**State and Local Government Contracts.** The enforceability of limitations of liability in public contracts seems to operate the same as in private contracts. See, *Valley Forge Convention & Visitors Bureau v. Visitor's Services, Inc.*, 28 F. Supp. 2d 947 (E.D. Pa. 1998). Additionally, when the state contracts like an individual, it is bound like an individual. *Western Saving-Fund Society v. City of Philadelphia*, 31 Pa. 175 (Pa. 1858).

### Exclusions of Certain Types of Damages

**Commercial Contracts.** Contractual provisions eliminating liability for special, indirect or consequential damages are generally valid and enforceable. *New York State Electric & Gas Corp. v. Westinghouse Electric Corp.*, 564 A.2d 919 (Pa. Super. Ct. 1989). Consequential damages may be limited or excluded in commercial contracts, unless such limitation or exclusion is unconscionable. 13 Pa. Cons. Stat. § 2719 (West 2005); *Jim Dan, Inc. v. O.M. Scott & Sons Co.*, 785 F. Supp. 1196 (W.D. Pa. 1992). Pennsylvania enforces contractual limitations of remedies, as long as they do not fail of their essential purpose. 13 Pa. Cons. Stat. § 2719 (West 2005); *Honrberger v. General Motors Corp.*, 929 F. Supp. 884 (E. D. Pa. 1996). If a limited remedy fails of its essential purpose, consequential damages may be recovered by the buyer, despite any clause in the contract excluding them. *Caudill Seed and Warehouse Co., Inc. v. Prophet 21, Inc.*, 123 F. Supp. 2d 826 (E.D. Pa. 2000). Pennsylvania generally will not allow punitive damages for breach of contract, unless there is an independent tort claim. *Johnson v. Hyundai Motor America*, 698 A.2d 631 (Pa. Super. Ct. 1997); *Grode v. Mutual Fire, Marine, and Inland Insurance Co.*, 623 A.2d 933 (Pa. Commw. Ct. 1993).

**State and Local Government Contracts.** On public contracts, punitive damages are also not recoverable in breach of contract actions. *Board v. Bell Telephone Co. of Pennsylvania*, 60 Lanc. L.R. 497 (Pa. Com. Pl. 1967). Liquidated damages in public contracts are enforced the same as in private contracts. *Department of Transportation v. Mitchell*, 535 A.2d 581 (Pa. 1987).

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** A disclaimer of warranties will be enforced if it is conspicuous and is "bargained-for." A disclaimer may be denied enforcement if it is unconscionable, i.e., if it is a one-sided or harsh agreement. 13 Pa. Cons. Stat. § 2316 (West 2005); *Ridgeway v. Erie Housing Authority*, 59 Erie C.L.J. 24 (Pa. Com. Pl. 1975).

State and Local Government Contracts. Limitations of warranties recoverable for breach of contract in public contracts seem to be treated the same as in private contracts. See, *Warminster Township Municipal Authority v. Berlanti Construction Co.*, 13 Bucks 527 (Pa. Com. Pl. 1964); *Ridgeway v. Erie Housing Authority*, 59 Erie C.L.J. 24 (Pa. Com. Pl. 1975).

### Mandatory Dispute Resolution Procedures

Contract claims against the state are not precluded by sovereign immunity. *Ference v. Booth & Flinn Co.*, 88 A.2d 413 (Pa. 1952); *Miller v. Department of Environmental Resources*, 578 A.2d 550 (Pa. Commw. Ct. 1990). The appropriate measure of damages for breach by the state is the net amount of losses caused and gains prevented by the breach. *Department of Transportation v. Herbert R. Imbt, Inc.*, 630 A.2d 550 (Pa. Commw. Ct. 1993). In suing the state, statutory provisions on judiciary and judicial procedure need to be followed. See, 42 Pa. Cons. Stat. Ann. §101 et seq. (West 2005).

## Rhode Island

### Limitations of Liability

**Commercial Contracts.** Rhode Island generally upholds limitations of liability as long as such clauses are not unconscionable. *Star-Shadow Productions, Inc. v. Super 8 Sync Sound Systems*, 730 A.2d 1081 (R.I. 1999). *Ostalkiewicz v. Guardian Alarm, Inc.*, 520 A.2d 563 (R.I. 1987). We found no cases regarding clauses limiting gross negligence liability.

**State and Local Government Contracts.** We did not identify any cases discussing the enforceability of limitations of liability in public contracts.

### Exclusions of Certain Types of Damages

**Commercial Contracts.** Rhode Island will not alter the bargained-for allocation of risk. The agreement may not only shift the allocation but may also divide the risk or burden. R.I. Gen. Laws § 6A-2-303 (2006). Consequential damages may be limited or excluded in commercial contracts, unless such limitation or exclusion is unconscionable. R.I. Gen. Laws § 6A-2-719 (2006). Rhode Island generally will not allow punitive damages for breach of contract, unless there is proof of malice, willfulness or wantonness. *Sherman v. McDermott*, 329 A.2d 195 (R.I. 1974).

**State and Local Government Contracts.** Clauses excluding damages are enforced in public contracts. See, *Psaty & Furman, Inc. v. Housing Authority of Providence*, 68 A.2d 32 (R.I. 1949). Damages in tort actions against the state of Rhode Island are limited to \$100,000. R.I. Gen. Laws § 9-31-2 (2006). Punitive damages are not available against the state. *Graff v. Mott*, 695 A.2d 486 (R.I. 1997).

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** A disclaimer of warranties will be enforced if it is conspicuous and is “bargained-for.” A disclaimer may be denied enforcement if it is unconscionable, i.e., if it is a one-sided or harsh agreement. *East Side Prescription Center, Inc. v. E.P. Fournier, Co.*, 585 A.2d 1176 (R.I. 1991). A conspicuous limitation of liability clause that is not unconscionable can effectively waive implied warranties. See, *Star-Shadow Productions, Inc. v. Super 8 Sync Sound System*, 730 A.2d 1081 (R.I. 1999). Rhode Island enforces contractual limitations of remedies, as long as they do not fail of their essential purpose. R.I. Gen. Laws § 6A-2-719 (2006).

**State and Local Government Contracts.** We did not identify any cases discussing limitations of warranties recoverable for breach of contract in public contracts.

### Mandatory Dispute Resolution Procedures

Sovereign immunity remains the law, and statutes waiving such immunity must be express and are strictly construed. *Andrade v. State*, 448 A.2d 1293 (R.I. 1982). The state has waived sovereign immunity for all tort actions, and can be liable in the same manner as a private individual or corporations (except for monetary limitations discussed above). R.I. Gen. Laws § 9-31-1 (2006); *Verity v. Danti*, 585 A.2d 65 (R.I. 1991). Sovereign immunity is also waived for public works contract claims. R.I. Gen. Laws § 37-13.1-1 (2006). When a claimant is given the right to sue the state, or in tort actions against the state, the action must be instituted within three years from the date of the act in question or the accrual of the tort claim. R.I. Gen. Laws § 9-1-25 (2006).

## South Carolina

### Limitations of Liability

**Commercial Contracts.** South Carolina generally upholds limitations of liability and contractual disclaimers as a matter of commercial law. *Purvis v. Consolidated Energy Products Co.*, 674 F.2d 217 (4<sup>th</sup> Cir. 1982); S.C. Code Ann. § 36-2-719 (Law. Co-op. 2005). While acknowledging that exemptions from all liability for gross negligence have consistently been invalidated in other states, one South Carolina court has upheld such a limitation where the contract provision mirrored the state's workers' compensation law. *Wilson v. Builders Transport*, 498 S.E.2d 674 (S.C. Ct. App. 1998).

**State and Local Government Contracts.** We did not identify any cases discussing the enforceability of limitations of liability in public contracts.

### Exclusions of Certain Types of Damages

**Commercial Contracts.** South Carolina will not alter the bargained-for allocation of risk. The agreement may not only shift the allocation but may also divide the risk or burden. S.C. Code Ann. § 36-2-303 (Law. Co-op. 2005). Consequential damages may be limited or excluded in commercial contracts, unless such limitation or exclusion is unconscionable. S.C. Code Ann. § 36-2-719 (Law. Co-op. 2005); *Laidlaw Environmental Services, Inc. v. Honeywell*, 966 F. Supp. 1401 (D. S.C. 1996). South Carolina enforces contractual limitations of remedies, as long as they do not fail of their essential purpose. S.C. Code Ann. § 36-2-719 (Law. Co-op. 2005); *Hill v. BASF Wyandotte Corp.*, 696 F.2d 287 (4<sup>th</sup> Cir. 1982). If a limited remedy clause fails of its essential purpose, this state determines whether a limitation on consequential damages will be upheld on a case-by-case basis, weighing factors such as the type of goods involved, the parties, the allocation of risk, and the precise nature and purpose of the contract. *Waters v. Massey Ferguson*, 775 F.2d 587 (4<sup>th</sup> Cir. 1985). South Carolina will allow an award of punitive damages for breach of contract only if such breach is accompanied by a fraudulent act. *Cooksey v. Beaumont Mfg. Co.*, 9 S.E.2d 790 (S.C. 1940).

**State and Local Government Contracts.** We did not identify any cases discussing limitations of damages recoverable for breach of contract in public contracts.

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** A disclaimer of warranties will be enforced if it is conspicuous and "bargained for." *Valtrol, Inc. v. General Connectors Corp.*, 884 F.2d 149 (4<sup>th</sup> Cir. 1989).

**State and Local Government Contracts.** We did not identify any cases discussing disclaimers or limitations of warranty in public contracts.

### Mandatory Dispute Resolution Procedures

Claimants may sue the state directly in actions affecting boards, commissions and agencies of the state. S.C. Code Ann. § 15-77-50 (Law. Co-op. 2005). In a contract action against the state, presenting claims to the appropriate agency is not the exclusive remedy; the circuit court has jurisdiction. *Kinsey Construction Co., Inc. v. South Carolina Dept. of Mental Health*, 249 S.E.2d 900 (S.C. 1978)(overruled on other grounds); *McCall v. Batson*, 329 S.E.2d 741 (S.C. 1984). However, the Tort Claims Act is the exclusive civil remedy

available for any tort committed by a governmental entity within the scope of official duties. S.C. Code Ann. § 15-78-20 (Law. Co-op. 2005).

## South Dakota

### Limitations of Liability

**Commercial Contracts.** South Dakota generally upholds limitations of liability, as long as they are not unconscionable. *Johnson v. John Deere Co.*, 306 N.W.2d 231 (D. S.C. 1981); S.D. Codified Laws § 57A-2-718 (Michie 2006); S.D. Codified Laws § 57A-2-719 (Michie 2006). We found no cases regarding clauses limiting gross negligence liability.

**State and Local Government Contracts.** We did not identify any cases discussing the enforceability of limitations of liability in public contracts.

### Exclusions of Certain Types of Damages

**Commercial Contracts.** South Dakota will not alter the bargained-for allocation of risk. The agreement may not only shift the allocation but may also divide the risk or burden. S.D. Codified Laws § 57A-2-303 (Michie 2006). Consequential damages may be limited or excluded in commercial contracts, unless such limitation or exclusion is unconscionable. S.D. Codified Laws § 57A-2-719 (Michie 2006); *Johnson v. John Deere Co.*, 306 N.W.2d 231 (D. S.C. 1981). South Dakota enforces contractual limitations of remedies, as long as they do not fail of their essential purpose. S.D. Codified Laws § 57A-2-719 (Michie 2006); *Hartzell v. Justus Co., Inc.*, 693 F.2d 770 (8<sup>th</sup> Cir. 1982). If a limited remedy fails of its essential purpose, consequential damages may be recovered by the buyer, despite any clause in the contract excluding them. *Ehlers v. Chrysler Motor Corp.*, 226 N.W.2d 157 (S.D. 1975). South Dakota generally will not allow punitive damages for breach of contract, unless there is a separate and distinct tort proven, e.g., fraud. *Grynberg v. Citation Oil & Gas Corp.*, 573 N.W.2d 493 (S.D. 1997).

**State and Local Government Contracts.** We did not identify any cases discussing limitations of damages recoverable for breach of contract in public contracts.

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** A disclaimer of warranties will be enforced if it is conspicuous and is “bargained-for” and sets out with particularity what is being waived. A disclaimer may be denied enforcement if it is unconscionable i.e., if it is a one-sided or harsh agreement. S.D. Codified Laws § 57A-2-316 (Michie 2006); *Rynders v. DuPont*, 21 F.3d 835 (8<sup>th</sup> Cir. 1994).

**State and Local Government Contracts.** No implied warranty will arise when the government, in good faith, presents all material facts to the contractor. *Mooney's, Inc. v. S.D. Department of Transportation*, 482 N.W.2d 43, 46 (S.D. 1992).

### Mandatory Dispute Resolution Procedures

Contract claims against the state are not precluded by sovereign immunity. *Wilson v. Hogan*, 473 N.W.2d 492 (S.D. 1991). Tort and contract actions against the state must be commenced within one year after arising. S.D. Codified Laws § 21-32-2 (Michie 2006).

## Tennessee

### Limitations of Liability

**Commercial Contracts.** Generally, limitations of liability are valid so long as they are not unconscionable. *Contour Medical Technologies v. Flexcon Co.*, 1998 Tenn. App. LEXIS 314. An express release, waiver, or exculpatory words by which one party agrees to assume the risk of harm arising from another party's negligent conduct will be enforced by the courts so long as it does not extend to liability for willful or gross negligence and does not otherwise offend public policy. *Perez v. McConkey*, 872 S.W.2d 897 (Tenn. 1994).

**State and Local Government Contracts.** Tennessee law permits limitations of liability in state and local government contracts so long as such limitations are authorized by the Commissioner of Finance and Administration. Tenn. Code Ann. § 12-4-119 (2005). Under that statute, the limitations cannot be authorized for an amount less than two times the value of the contract. *Id.* Tennessee courts have also held that the law governing contracts between private individuals also governs the government's rights and liabilities under public contracts. *Clark v. State*, 47 Tenn. 306 (Tenn. 1869). For purposes of determining liability, the state is treated as a private individual. *Hames v. State*, 808 S.W.2d 41 (Tenn. 1991).

### Exclusions of Certain Types of Damages

**Commercial Contracts.** Tennessee will not alter the bargained-for allocation of risk. The agreement may not only shift the allocation but may also divide the risk or burden. Tenn. Code Ann. § 47-2-303 (2005). Consequential damages may be limited or excluded in commercial contracts, unless such limitation or exclusion is unconscionable. Tenn. Code Ann. § 47-2-719 (2005); *Aquascene, Inc. v. Noritsu Am. Corp.*, 831 F. Supp. 602 (M.D. Tenn. 1993). Tennessee law provides for punitive damages where there is evidence of fraud, malice, gross negligence, or oppression. *Guilbert v. Phillips Petroleum Co.*, 503 F.2d 587 (6<sup>th</sup> Cir. 1974).

**State and Local Government Contracts.** The state of Tennessee can only be held liable for actual damages. Tenn. Code Ann. § 9-8-307 (2005).

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** A disclaimer of warranties will be enforced if it is conspicuous and is "bargained-for." A disclaimer may be denied enforcement if it is unconscionable, i.e., if it is a one-sided or harsh agreement. Tenn. Code Ann. § 47-2-316 (2005); *Mitchell v. White Motor Credit Corp.*, 627 F. Supp. 1241 (M.D. Tenn. 1986). Tennessee enforces contractual limitations of remedies, as long as they do not fail of their essential purpose. Tenn. Code Ann. § 47-2-719 (2005); *Benco Plastics, Inc. v. Westinghouse Electric Corp.*, 387 F. Supp. 772 (E.D. Tenn. 1974).

**State and Local Government Contracts.** We did not identify any cases discussing limitations of warranty for breach of contract in public contracts.

### Mandatory Dispute Resolution Procedures

Contract claims, and certain types of tort claims, against the state are not precluded by sovereign immunity. *Norman v. Tennessee State Bd. of Claims*, 533 S.W.2d 719 (Tenn. 1975). Contractual claims against the state must be heard by the Tennessee Claims Commission. Tenn. Code Ann. § 9-8-307 (2005). Tort awards

against the state are capped at \$300,000 damages for any one person. *Austin v. State*, 831 S.W.2d 789 (Tenn. Ct. App. 1991).

## Texas

### Limitations of Liability

**Commercial Contracts.** Texas upholds limitations of liability clauses, even when a suit is based on negligence, so long as the clause specifically takes into account any loss through negligence (i.e., the clause covers only what is specifically disclaimed), and there is no disparity of bargaining power between the parties. *Fox Electric Co. v. Tone Guard Security*, 861 S.W.2d 79 (Tex. Ct. App. 1993). This rule also applies to disclaimers of gross negligence. *Valero Energy Corp. v. M.W. Kellogg Construction Co.*, 866 S.W.2d 252 (Tex. Ct. App. 1993).

**State and Local Government Contracts.** We did not identify any cases discussing the enforceability of limitations of liability in public contracts. Texas courts, however, have held that the law governing contracts between private individuals also governs the government's rights and liabilities under public contracts. *Federal Sign v. Texas Southern University*, 951 S.W.2d 401 (Tex. 1997); *Board of Regents of University of Texas v. S&G Construction Co.*, 529 S.W.2d 90 (Tex. App. 1975).

### Exclusions of Certain Types of Damages

**Commercial Contracts.** Texas will not alter the bargained-for allocation of risk. The agreement may not only shift the allocation but may also divide the risk or burden. Tex. Bus. & Com. Code Ann. § 2.303 (West 2003). Agreements to stipulate damages are binding. *Birdwell v. Ferrell*, 746 S.W.2d 338 (Tex. Ct. App. 1988). Consequential damages may be limited or excluded in commercial contracts, unless such limitation or exclusion is unconscionable. Tex. Bus. & Com. Code Ann. § 2.719 (West 2003). Texas generally will not allow punitive damages for breach of contract, unless there is proof of that defendant acted fraudulently, maliciously, willfully, or with gross negligence. *Boorhem-Fields, Inc. v. Burlington Northern Railroad*, 884 S.W.2d 530 (Tex. App. 1994); *Shelton Insurance Agency v. St. Paul Mercury Insurance Co.*, 848 S.W.2d 739 (Tex. App. 1993).

**State and Local Government Contracts.** We did not identify any cases discussing the enforceability of exclusions of damages in public contracts.

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** A disclaimer of warranties will be enforced if it is conspicuous and is "bargained-for." A disclaimer may be denied enforcement if it is unconscionable, i.e., if it is a one-sided or harsh agreement. Tex. Bus. & Com. Code Ann. § 2.316 (West 2003); *John Deere v. Tenberg*, 445 S.W.2d 40 (Tex. App. 1969). Texas enforces contractual limitations of remedies, as long as they do not fail of their essential purpose. Tex. Bus. & Com. Code Ann. § 2.719 (West 2003).

**State and Local Government Contracts.** We did not identify any cases discussing limitations of warranties recoverable for breach of contract in public contracts.

### Mandatory Dispute Resolution Procedures

The state of Texas may not be sued without its consent. *Hosner v. DeYoung*, 1 Tex. 764 (Tex. 1847). Thus, the state, in the absence of contrary constitutional or statutory provisions, is not liable for the torts of its officers, agents, or employees. *State v. Isbell*, 94 S.W.2d 423 (Tex. 1936). While the state is bound to contracts it makes, and may be liable on such contracts, it cannot be sued for breach of contract without its

clear and unambiguous consent. *Fort Worth Indep. Sch. Dist. v. City of Fort Worth*, 22 S.W.3d 831 (Tex. 2000). Therefore, all breach of contract claims against the state must follow the dispute resolution procedures set forth in Texas statutes, and any administrative decisions may not be appealed to the courts. *Federal Sign v. Texas Southern Univ.*, 951 S.W.2d 401 (Tex. 1997).

## Utah

### Limitations of Liability

**Commercial Contracts.** In the context of private contracts, Utah allows parties to fashion their own remedies. Any limitations or exclusions of liability are presumptively valid absence allegations or proof of fraud, or unless circumstances cause the limited remedy to fail of its essential purpose. *Lamb v. Bangart*, 525 P.2d 602 (Utah 1974).

**State and Local Government Contracts.** We did not identify any cases discussing the enforceability of limitations of liability in public contracts. Utah courts, however, have held that the law governing contracts between private individuals also governs the government's rights and liabilities under public contracts. *Newcomb v. Ogden City Public School Teachers' Retirement Commission*, 243 P.2d 941 (Utah 1952); *Campbell Building Co. v. State Road Commission*, 70 P.2d 857 (Utah 1937).

### Exclusions of Certain Types of Damages

**Commercial Contracts.** In the context of private contracts, parties may fashion their own remedies. *Lamb v. Bangart*, 525 P.2d 602 (Utah 1974). Consequential damages may be limited or excluded unless such limitation or exclusion is unconscionable. Utah Code Ann. §70A-2-719 (2006).

We did not identify any cases discussing punitive damages for breach of contract. However, Utah law provides that punitive damages may be awarded only if compensatory or general damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others. Utah Code Ann. §78-18-1 (2006). There is no general statutory cap on punitive damages. Exemplary or punitive damages may not be recovered from the state. Utah Code Ann. §63-30-22 (2006).

**State and Local Government Contracts.** Exemplary or punitive damages may not be recovered from the State. Utah Code Ann. §63-30-22 (2000).

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** In the context of contracts between private parties for the sale of goods, Utah upholds disclaimers and limitations of warranty. *Lamb v. Bangart*, 525 P.2d 602 (Utah 1974); Utah Code Ann. §70A-2-316 (2006). Disclaimers must be conspicuous and easy to read.

**State and Local Government Contracts.** We did not identify any cases discussing disclaimers or limitations of warranty in public contracts.

### Mandatory Dispute Resolution Procedures

All breach of contract claims against the state must follow the dispute resolution procedures set forth in the Utah statutes. Adverse decisions of a contracting officer may be appealed to the Procurement Appeals Board, and then to the Court of Appeals. Utah Code Ann. §63-56-54 (2006). Immunity from suit of each governmental entity is waived as to any contractual obligation. Utah Code Ann. §63-30d-301 (2006).

## Vermont

### Limitations of Liability

**Commercial Contracts.** Vermont generally upholds limitations of liability. However, limitations of liability that are found to be unconscionable will not be enforced. 9A V.S.A. §2-719 (2006). We found no cases discussing limitations of liability for gross negligence. Courts will, however, give heightened scrutiny to contractual disclaimers of negligence liability and will construe them strictly against the party relying on them. Disclaimers are viewed as exculpatory and must possess a greater degree of clarity to be effective than would be required for other types of contract provisions. *Clorith V. Colgan v. Agway, Inc.*, 553 A.2d 143 (Vt. 1988); *Fairchild Square Co. v. Green Mt. Bagel Bakery*, 658 A.2d 31 (Vt. 1995).

**State and Local Government Contracts.** We did not identify any cases discussing the enforceability of limitations of liability in public contracts.

### Exclusions of Certain Types of Damages

**Commercial Contracts.** Parties in Vermont may limit damages e.g. consequential damages. 9A V.S.A. §2-719 (2006); *Wilk Paving, Inc. v. Southworth-Milton, Inc.*, 649 A.2d 778 (Vt. 1994); 9A V.S.A. §2-316(2006). Vermont will allow limitations of damages so long as the limit or exclusion is not unconscionable. Punitive damages are generally not recoverable for breach of contract actions. However, in rare cases, punitive damages will be allowed where the breach “has the character of a willful and wanton or fraudulent tort.” *Murphy v. Stowe Club Highlands*, 761 A.2d 688 (Vt. 2000).

**State and Local Government Contracts.** We did not identify any cases discussing exclusions of damages in public contracts. However, Vermont does have maximum liability amounts in tort actions against the state. 12 V.S.A. §5601 (2006).

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** In the context of contracts between private parties, disclaimers of warranty will be enforced if they are clear and conspicuous. A disclaimer may be denied enforcement if it is unconscionable. *Wilk Paving, Inc. v. Southworth-Milton, Inc.*, 649 A.2d 778 (Vt. 1994); 9A V.S.A. §2-316(2006).

**State and Local Government Contracts.** We did not identify any cases discussing disclaimers or limitations of warranty in public contracts.

### Mandatory Dispute Resolution Procedures

We did not discover any mandatory dispute resolution procedures in Vermont. The state of Vermont is immune for governmental functions for which no private analog exists. Under the private analog analysis, the state waives its immunity only to the extent a plaintiff’s cause of action is comparable to a recognized cause of action against a private person. The test is whether the factual allegations satisfy the necessary elements of a cause of action against the state comparable to one that may be maintained against a private person. *Powers v. Office of Child Support*, 795 A.2d 1259 (Vt. 2002).

## Virginia

### Limitations of Liability

**Commercial Contracts.** Virginia upholds limitations of liability, as long as they are not unconstitutional, and do not violate statutory law or public policy. *Environtech Corp. v. Halco Engineering, Inc.*, 234 Va. 583 (Va. 1988). We found no cases regarding clauses limiting gross negligence liability.

**State and Local Government Contracts.** We did not identify any cases discussing the enforceability of limitations of liability in public contracts. Virginia courts, however, have held that the law governing contracts between private individuals also governs the government's rights and liabilities under public contracts. *Wiecking v. Allied Medical Supply Corp.*, 391 S.E.2d 258 (Va. 1990).

### Exclusions of Certain Types of Damages

**Commercial Contracts.** Generally, Virginia will not alter the bargained-for allocation of risk, or stipulation of damages. *Welch v. McDonald*, 8 S.E. 711 (Va. 1888). Consequential damages may be limited or excluded in commercial contracts, unless the limitation or exclusion is unconscionable. Va. Code Ann. § 8.2-719 (Michie 2006). A plaintiff may recover punitive damages only upon proving that the defendant from whom such damages are sought acted toward the plaintiff with oppression, malice, willfulness or wantonness, via an independent tort. *Kamjar Corp. v. Haley*, 299 S.E.2d 514 (Va. 1983); *Gasque v. Mooers Motor Car Co., Inc.*, 313 S.E.2d 384 (Va. 1984). Punitive damages cannot exceed \$350,000 for all defendants. Va. Code Ann. § 8.01-38.1 (Michie 2006).

**State and Local Government Contracts.** We did not identify any cases discussing the enforceability of exclusions of damages in public contracts.

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** A disclaimer of warranties will be enforced if it is conspicuous. A provision is deemed to be conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A disclaimer may be denied enforcement if it is unconscionable, i.e., if it is a one-sided or harsh agreement. *Armco, Inc. v. New Horizon Development Co. of Virginia*, 331 S.E.2d 456 (Va. 1985).

**State and Local Government Contracts.** We did not identify any cases discussing limitations of warranties recoverable for breach of contract in public contracts.

### Mandatory Dispute Resolution Procedures

Sovereign immunity has no application to contract actions. *Wiecking v. Allied Medical Supply Corp.*, 391 S.E.2d 258 (Va. 1990). Claims for damages for breach of contract against the Commonwealth or one of its departments must be submitted to the contracting agency, and if disallowed may be asserted only in the Circuit Court of the City of Richmond. Va. Code Ann. § 2.2-814 (Michie 2006).

## Washington

### Limitations of Liability

**Commercial Contracts.** Washington generally upholds limitations of liability, as long as they are not unconscionable, and the parties' intentions are clearly expressed. *Marr Enterprises, Inc. v. Lewis Refrigeration Co.*, 556 F.2d 951 (9<sup>th</sup> Cir. 1977); *Ketel v. Hovick*, 287 P.2d 739 (Wash. 1955). Factors that weigh into a determination of unconscionability include whether each party has a reasonable opportunity to understand the contract terms, whether the contract terms were conspicuous, the prior course of dealings between the parties, and the usage of trade. *United Van Lines v. Hertz Penske Truck Leasing, Inc.*, 710 F. Supp. 283 (D. Wash. 1989). We found no cases regarding clauses limiting gross negligence liability.

**State and Local Government Contracts.** We did not identify any cases discussing the enforceability of limitations of liability in public contracts. Washington courts have held, however, that the state is liable, like private individuals, on contract obligations. *Architectural Woods, Inc. v. State*, 598 P.2d 1372 (Wash. 1979).

### Exclusions of Certain Types of Damages

**Commercial Contracts.** Washington disfavors limitations on remedies for breach and provides for their deletion if they would act to deprive a party of reasonable protection or if they are unconscionable. *Schroeder v. Fageol Motors, Inc.*, 544 P.2d 20 (Wash. 1975); Wash. Rev. Code Ann. § 62A.2-719 (West 2000). Washington determines whether a limited remedy clause fails of its essential purpose, on a case-by-case basis, weighing factors such as the type of goods involved, the parties, the allocation of risk, and the precise nature and purpose of the contract. *Milgard Tempering, Inc. v. Selas Corp.*, 902 F.2d 703 (9<sup>th</sup> Cir. 1990); *Fiorito Brothers, Inc. v. Freuhauf Corp.*, 747 F.2d 1309 (9<sup>th</sup> Cir. 1984). Washington generally will not allow punitive damages, unless such damages are expressly authorized by statute. Punitive damages for contract claims and applicable tort claims are not so authorized. *Schmalenberg v. Tacoma News, Inc.*, 87 Wash. App. 579 (Wash. Ct. App. 1997).

**State and Local Government Contracts.** We did not identify any cases discussing limitations of damages recoverable for breach of contract in public contracts.

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** A disclaimer of warranties will be enforced if it is conspicuous and is "bargained-for." Wash. Rev. Code Ann. § 62A.2-316 (West 2006). Under Washington law, the seller has the burden of showing that the exclusion was explicitly negotiated, and that such explicit negotiation was set forth with particularity. *Schroeder v. Fageol Motors, Inc.*, 544 P.2d 20 (Wash. 1975).

**State and Local Government Contracts.** The same rules apply to disclaimers of warranty for state contracts as with private contracts. *Baker v. City of Seattle*, 484 P.2d 405 (Wash. 1971).

### Mandatory Dispute Resolution Procedures

Highly detailed procedures for bringing claims against the state of Washington are delineated in Revised Code of Washington Annotated 4.92 (West 2006).

## West Virginia

### Limitations of Liability

**Commercial Contracts.** West Virginia upholds limitations of liability, but strictly construes their terms. *United States v. Marietta Mfg. Co.*, 53 F.R.D. 390 (S.D. W.Va. 1971). Contract clauses limiting gross negligence liability are effective only if the circumstances clearly indicate that such was the plaintiff's intention. *Murphy v. North Am. River Runners, Inc.*, 412 S.E.2d 504 (W. Va. 1991).

**State and Local Government Contracts.** We did not identify any cases discussing the enforceability of limitations of liability in public contracts. West Virginia courts, however, have held that the law governing contracts between private individuals also governs the government's rights and liabilities under public contracts. *State v. Sims*, 43 S.E.2d 805 (W. Va. 1947). Additionally, Article 10, § 6 of the West Virginia Constitution provides that "the state shall not assume or become responsible for the debts or liabilities of any county, city, township, corporation or person." W.V. Const. art. X, § 6 (1872). Based on this provision, it is believed that permitting a vendor to limit liability would contravene the West Virginia Constitution since the state would be assuming any liabilities that exceed the cap.

### Exclusions of Certain Types of Damages

**Commercial Contracts.** Consequential damages may be limited or excluded in commercial contracts, unless such limitation or exclusion is unconscionable. W. Va. Code § 46-2-719 (2006). West Virginia generally will not allow punitive damages for breach of contract, unless there are allegations and proof of malice, wantonness or oppression. *Warden v. Bank of Mingo*, 341 S.E.2d 679 (W. Va. 1985). Punitive damages may be recovered in tort actions only when there are aggravating circumstances. *Short v. Grange Mutual Casualty Co.*, 307 F. Supp. 768 (S.D. W.Va. 1969).

**State and Local Government Contracts.** We did not identify any cases discussing limitations of damages recoverable for breach of contract in public contracts.

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** A disclaimer of warranties will be enforced if it is conspicuous and is "bargained-for." A disclaimer may be denied enforcement if it is unconscionable, i.e., if it is a one-sided or harsh agreement. W. Va. Code § 46-2-316 (2006); *Casillas v. Tuscarora Land Co.*, 412 S.E.2d 792 (W. Va. 1991). West Virginia enforces contractual limitations of remedies, as long as they do not fail of their essential purpose. W. Va. Code § 46-2-719 (2000).

**State and Local Government Contracts.** We did not identify any cases discussing limitations of warranties recoverable for breach of contract in public contracts.

### Mandatory Dispute Resolution Procedures

Contract claims against the state are not precluded by sovereign immunity. *State v. Sims*, 43 S.E.2d 805 (W. Va. 1947). Other claims may not be brought against the state unless authorized by statute or other valid act of legislature, and in those cases, the state's interest must be immediate and direct. *Coal & Coke R. Co. v. Conley*, 67 S.E. 613 (W. Va. 1910).

## Wisconsin

### Limitations of Liability

**Commercial Contracts.** Wisconsin generally upholds limitations of liability, as long as they are made in good faith, between parties of equal bargaining power, and are not unconscionable. *Daanan & Janssen, Inc. v. Cedarapids, Inc.*, 573 N.W.2d 842 (Wis. 1997); Wisc. Stat. § 402.719 (2006). We found no cases regarding clauses limiting gross negligence liability.

**State and Local Government Contracts.** We did not identify any cases discussing the enforceability of limitations of liability in public contracts. However, contracts made with the state are construed in the same manner as those made between private parties. *Metzel v. State*, 16 Wis. 347 (Wis. 1863).

### Exclusions of Certain Types of Damages

**Commercial Contracts.** Subject to the requirements of good faith and unconscionability, a manufacturer can negotiate with its distributors and purchasers to disclaim or limit its liability for economic losses. *Douglas-Hanson Co., Inc. v. BF Goodrich Co.*, 598 N.W.2d 262 (Wis. Ct. App. 1999). Consequential damages may be limited or excluded in commercial contracts, unless such limitation or exclusion is unconscionable. Wisc. Stat. § 402.719 (2006). Wisconsin courts have held that punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable. *Loehrke v. Wanta Builders, Inc.*, 445 N.W.2d 717 (Wis. Ct. App. 1989).

**State and Local Government Contracts.** We did not identify any cases discussing exclusions of damages in public contracts.

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** A disclaimer of warranties will be enforced if it is conspicuous and is “bargained-for.” A disclaimer may be denied enforcement if it is unconscionable, i.e., if it is a one-sided or harsh agreement. *Fire Insurance Exchange v. Cincinnati Insurance Co.*, 610 N.W.2d 98 (Wis. Ct. App. 2000). Additionally, disclaimers of warranties will be strictly interpreted. *Dobratz v. Thomson*, 468 N.W.2d 654 (Wis. 1991). Wisconsin enforces contractual limitations of remedies, as long as they do not fail of their essential purpose. Wisc. Stat. § 402.719 (2006); *Rich Products Corp. v. Kemutec, Inc.*, 66 F. Supp.2d 973 (E.D. Wis. 1999).

**State and Local Government Contracts.** We did not identify any cases discussing limitations of warranties recoverable for breach of contract in public contracts.

### Mandatory Dispute Resolution Procedures

The legislature shall direct by law in what manner and in what courts suits may be brought against the state; the legislature has the exclusive right to consent to a suit against the state. W.S.A. Const. Art. IV, § 27. The state has consented to suit with the establishment of a specific claims procedure, under which a party may present a claim to the state claims board, which first holds a hearing and then makes a recommendation to the legislature to grant or deny the claim. If the legislature refuses to allow a claim against the state, the claimant may then bring an action against the state. Wisc. Stat. §§ 16.007, 775.01 (2006).

## Wyoming

### Limitations of Liability

**Commercial Contracts.** Wyoming upholds limitations of liability, as long as they are conspicuous, so that they may serve as bases for bargains. *Stauffer Chemical Co. v. Curry*, 778 P.2d 1083 (Wyo. 1989). We found no cases regarding clauses limiting gross negligence liability.

**State and Local Government Contracts.** We did not identify any cases discussing the enforceability of limitations of liability in public contracts.

### Exclusions of Certain Types of Damages

**Commercial Contracts.** Wyoming will not alter the bargained-for allocation of risk. The agreement may not only shift the allocation but may also divide the risk or burden. Wyo. Stat. Ann. § 34.1-2-303 (Michie 2006). Consequential damages may be limited or excluded in commercial contracts, unless such limitation or exclusion is unconscionable. Wyo. Stat. Ann. § 34.1-2-719 (Michie 2006); *Ogle v. Caterpillar Tractor Co.*, 716 P.2d 334 (Wyo. 1986). Wyoming generally will not allow punitive damages for breach of contract, unless there is proof of oppression, fraud, malice, or willful and wanton misconduct. *McCullough v. Golden Rule Insurance Co.*, 789 P.2d at 855 (Wyo. 1990).

**State and Local Government Contracts.** The liability of the state is limited to two hundred fifty thousand dollars per person and five hundred thousand dollars for any number of claims arising from a single occurrence. The state may not be held liable for punitive damages. Wyo. Stat. Ann. § 1-39-118 (Michie 2006).

### Disclaimers/Limitations of Warranty

**Commercial Contracts.** A disclaimer of warranties will be enforced if it is conspicuous and is “bargained-for.” A disclaimer may be denied enforcement if it is unconscionable, i.e., if it is a one-sided or harsh agreement. Wyo. Stat. Ann. § 34.1-2-316 (Michie 2006). Additionally, disclaimers of warranties will be strictly interpreted. *Quality Acceptance Corp. v. Million & Albers, Inc.*, 367 F. Supp. 771 (D. Wyo. 1973). Wyoming enforces contractual limitations of remedies, as long as they do not fail of their essential purpose. Wyo. Stat. Ann. § 34.1-2-719 (Michie 2006); *Ogle v. Caterpillar Tractor Co.*, 716 P.2d 334 (Wyo. 1986).

**State and Local Government Contracts.** We did not identify any cases discussing limitations of warranties recoverable for breach of contract in public contracts.

### Mandatory Dispute Resolution Procedures

Contract claims against the state are not precluded by sovereign immunity. Wyo. Stat. Ann. § 1-39-104 (Michie 2006). Tort and contract actions against the state must be commenced within two years after arising, and must be presented to the department of administration. Wyo. Stat. Ann. § 1-39-113 (Michie 2006); *Weston County Hosp. Joint Powers Board v. Westates Construction Co.*, 841 P.2d 841 (Wyo. 1992).

## Conclusion

Contracting parties are generally free to allocate the risks of a contract as they see fit as long as minimum adequate remedies are provided. Nonetheless, courts have a tendency to invalidate or strictly construe those contract provisions that deal with a party's own negligence, fraud, or unlawful conduct. With respect to those states that will not enforce a damages limitation if a buyer is left with no remedy, it appears that clients can best protect themselves by clearly stating that both parties to the contract are aware of the risks that they entered into and understand that consequential damages can be recovered only if such a limitation is found to be unconscionable by a court of law.

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