

## 7 Key Elements of Effective Terms of Use: Limitation of Liability

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As we discussed in previous posts in this series, most effective **Terms of Use** (also known as Terms of Service (TOS)) address seven key concepts: (1) the uses of the website and its services which are permitted by the website operator; (2) the manner in which user-created content is handled by the website operator; (3) an appropriate disclaimer of warranties which might otherwise apply to the website content or services; (4) a provision limiting the liability of the website operator for certain types of conduct; (5) a reference to the website's privacy policy or explanation of how information belonging to website users is collected, maintained, and used; (6) an explanation of which state's law governs the Terms of Use and where and how disputes between the website operator and a user will be resolved; and (7) a provision describing how and under what circumstances the terms of the Terms of Use may be modified.

In this series of posts, we are identifying and briefly describing each of the seven key elements of effective Terms of Use. This week's element is:

**4. Limitation of Liability.** In **Terms of Use**, **limitation of liability** provisions permit the website operator to limit the amount and type of damages for which it can be held legally responsible, as long as the limitation comply with applicable state law. Generally, state law requires that a limitation of liability provision in Terms of Use, or any other contract, be reasonable, clear, and conspicuous.

Generally, Terms of Use limit the liability of the website operator for claims brought by a website user to some multiple or factor of the amount paid by the user to the website operator. For instance, Google and Facebook limit their liability to the amount paid by the user to use Google services:

TO THE EXTENT PERMITTED BY LAW, THE TOTAL LIABILITY OF GOOGLE, AND ITS SUPPLIERS AND DISTRIBUTORS, FOR ANY CLAIMS UNDER THESE TERMS, INCLUDING FOR ANY IMPLIED WARRANTIES, IS LIMITED TO THE AMOUNT YOU PAID US TO USE THE SERVICES (OR, IF WE CHOOSE, TO SUPPLYING YOU THE SERVICES AGAIN).

WE WILL NOT BE LIABLE TO YOU FOR ANY LOST PROFITS OR OTHER CONSEQUENTIAL, SPECIAL, INDIRECT, OR INCIDENTAL DAMAGES ARISING OUT OF OR IN CONNECTION WITH THIS STATEMENT OR FACEBOOK, EVEN IF WE HAVE BEEN

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ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. OUR AGGREGATE LIABILITY ARISING OUT OF THIS STATEMENT OR FACEBOOK WILL NOT EXCEED THE GREATER OF ONE HUNDRED DOLLARS (\$100) OR THE AMOUNT YOU HAVE PAID US IN THE PAST TWELVE MONTHS.

Saturday Market Project takes a similar approach, limiting its liability to the amount paid by the website user to Saturday Market Project during the 12 months preceding the event giving rise to the claimed liability. It also seeks to eliminate Saturday Market Project's liability for consequential damages:

10.5 IN NO EVENT WILL COMPANY BE LIABLE FOR ANY SPECIAL, INCIDENTAL, INDIRECT, OR CONSEQUENTIAL DAMAGES WHATSOEVER ARISING FROM YOUR ACCESS OR USE OF, OR INABILITY TO ACCESS OR USE, THE SITE.

10.6 IN NO EVENT WILL COMPANY BE LIABLE FOR ANY DAMAGES WHATSOEVER ARISING IN ANY WAY FROM ANY ACT OR OMISSION BY ANY OTHER PERSON INCLUDING, WITHOUT LIMITATION, ANY CONTENT PROVIDED, OR REPRESENTATION MADE, BY ANY OTHER PERSON.

10.7 WITHOUT LIMITING THE FOREGOING, IN NO EVENT WILL COMPANY BE LIABLE FOR ANY DAMAGES WHATSOEVER ARISING IN ANY WAY FROM ANY PRODUCT OFFERED OR SOLD BY ANY MARKETPLACE SELLER BY OR ANY REPRESENTATION MADE BY ANY MARKETPLACE SELLER.

10.8 IN ANY EVENT, COMPANY'S ENTIRE LIABILITY TO YOU UNDER ANY PROVISION OF THIS AGREEMENT OR ARISING FROM THE ACCESS OR USE OF THE SITE BY YOU OR ANY OTHER USER WILL BE LIMITED TO THE AMOUNT ACTUALLY PAID BY YOU TO COMPANY PURSUANT TO THIS AGREEMENT DURING THE 12 MONTHS PRECEDING THE EVENT GIVING RISE TO SUCH LIABILITY.

Obviously, a website operator imposing a contractual limitation of its liability to its customer is able to avoid costly and potentially enterprise-ending litigation and offer services to its users at a much lower cost (since it's risk of each transaction is much reduced). In that way, properly drafted limitation of liability provisions in Terms of Use benefit both website operators and users.

This is the fourth in a series of posts describing the seven key elements of effective website Terms of Use. In the next installment, we will address the fifth key element of effective Terms of Use: privacy policies.

[To read part 1, click here.](#)

[To read part 2, click here.](#)

[To read part 3, click here.](#)

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