

# Software Warranties and Liability\*

	Warranty	Sole and Exclusive Remedy	Limitation of Liability	Integration Clause
Concept	Software vendor may disclaim all warranties (including any implied warranties under the UCC) with respect to the performance of the software, or all warranties except those expressly stated in the contract.	Software vendor may effectively limit its exposure to damages by providing that the purchaser's sole and exclusive remedies are limited to repair or replacement of the defective software, or to the price paid for the software.	Software vendor may contract for limitations on its liability if the software later proves to be defective. One way to do this is to limit liability for certain types of damages.	Software vendor may use integration clause to protect itself against liability for statements made outside the contract. This clause is also known as "entire agreement" clause.
Sample Language	EXCEPT FOR THE ABOVE EXPRESS LIMITED WARRANTIES, VENDOR MAKES NO WARRANTIES, EXPRESS, IMPLIED, STATUTORY AND VENDOR SPECIFICALLY DISCLAIMS ANY IMPLIED WARRANTY OF MERCHANTABILITY, NONINFRINGEMENT OR FITNESS FOR A PARTICULAR PURPOSE.	Vendor's sole and exclusive liability and Customer's sole and exclusive remedy under the foregoing warranty shall be, at Vendor's election, to make commercially reasonable efforts to repair or replace the defective Software; or to refund the purchase price and terminate this Agreement.	IN NO EVENT WILL VENDOR BE LIABLE FOR ANY DAMAGES, INCLUDING LOSS OF DATA, LOST PROFITS, COST OF COVER OR OTHER SPECIAL, INCIDENTAL, CONSEQUENTIAL OR INDIRECT DAMAGES ARISING IN ANY WAY OUT OF THIS AGREEMENT, OR FROM THE USE OF THE SOFTWARE, HOWEVER CAUSED AND ON ANY THEORY OF LIABILITY.	This Agreement represents the entire agreement between the parties with respect to the subject matter hereof and supersedes all prior agreements and understandings with respect to the subject matter hereof.
Case Law	<ul style="list-style-type: none"> <li>• <i>Meeting Makers v. American Airlines</i> (1987)</li> <li>• <i>Sierra Diesel Injection Serv. v. Burroughs Corp.</i> (1989)</li> <li>• <i>Hunter v. Texas Instruments</i> (1986)</li> </ul>	<ul style="list-style-type: none"> <li>• <i>Office Supply Co. v. Basic/Four Corp.</i> (1982)</li> <li>• <i>RRX Industries, Inc. v. Lab-con, Inc.</i> (1985)</li> </ul>	<ul style="list-style-type: none"> <li>• <i>Harper Tax Services, Inc. v. Quick Tax Ltd.</i> (1988)</li> </ul>	<ul style="list-style-type: none"> <li>• <i>Kalil Bottling Corp. v Burroughs Corp.</i> (1980)</li> <li>• <i>Sierra Diesel Injection Serv. v. Burroughs Corp.</i> (1989)</li> </ul>
Notes and Limitations	<ul style="list-style-type: none"> <li>• Must be conspicuous (eg capital letters)</li> <li>• Generally upheld except in cases of "unconscionability"</li> <li>• Common to disclaim all implied warranties under the UCC</li> <li>• Under Magnuson-Moss, if a consumer good is covered by a written warranty, vendor cannot disclaim implied warranties arising under state law (but may still limit duration)</li> <li>• <b>Practice Tip:</b> provide limited warranty (and remedy) instead of disclaiming all warranties</li> </ul>	A limitation of remedies provision may not be upheld when the proffered remedy "fail[s] of its essential purpose" ie if vendor is unable to repair or replace the product. If a remedy fails of its essential purpose, a buyer may generally pursue the full range of contract remedies.	<ul style="list-style-type: none"> <li>• Another option is to provide for "liquidated damages"; but must be reasonable (UCC § 2-718(1))</li> <li>• Limitations on liability generally are upheld in the commercial setting, although may be narrowly construed. In addition, a plaintiff may assert the doctrine of "unconscionability" against enforcement of these provisions.</li> </ul>	Integration clauses are generally effective in voiding representations about the software made outside the contract (see <i>Sierra Diesel</i> for exception) except where there is fraud.

\* Adapted from Levy and Bell, "Software Product Liability: Understanding and Minimizing the Risks," Berkeley Technology Law Journal Vol. 5:1 (Spring 1990)