

## The Consequences of Waiving Consequential Damages

By: Brian P. Nally

On January 3, 2023, Judge Donald Nugent of the United States District Court of the Northern District of Ohio, applying Illinois law, granted Defendant TransUnion, LLC's Motion for Judgment as a Matter of Law, and overturned an \$18 million jury award in favor of Plaintiff Endless River Technologies, LLC.<sup>1</sup>

The lawsuit arose from a 2014 contract in which TransUnion and Endless River agreed to develop a "Quote Exchange." The Quote Exchange was designed to allow insurers to provide real-time comparison price quotes for insurance to consumers. Per the terms of the contract, TransUnion had the option to terminate the contract with 180 days prior notice if the Quote Exchange did not meet TransUnion's expectations. In addition, ownership of the source code for the Quote Exchange would revert to Endless River if TransUnion terminated the contract.

On October 4, 2017, TransUnion exercised its right to terminate the contract, but did not recognize Endless River's ownership of the Quote Exchange's source code and did not timely return it to Endless River after the contract was terminated. After extensive litigation and trial, the jury awarded Endless River \$18 million on its breach of contract claim.

In overturning the jury's damages award, the Court enforced a provision of the contract that barred recovery of any consequential or indirect damages, including lost profits or revenue. It held that the damages awarded to Endless River were consequential damages because they were not sufficiently foreseeable or contemplated under the contract. Indeed, the Court found that an additional "link in the causal chain" was required in order to connect consequential damages to the contract.<sup>2</sup>

In coming to this conclusion, the Court found that Endless River's damages calculation reflected lost market opportunities, *i.e.*, opportunities that Endless River might have realized through sale or marketing of the Quote Exchange. Judge Nugent specifically noted that the contract was not formed for the direct purpose of allowing Endless River to monetize the Quote Exchange, but rather, as a service contract to provide its expertise to TransUnion to assist in the development of the Quote Exchange. The contract did not discuss obtaining customers, did not define an expected amount of profit or minimum value, and did not impose on TransUnion any obligations post-termination. In addition, the contract relied on future transactions with third parties, not in existence at the time that the agreement was terminated.

The Court found that while Endless River might have been able to recover the direct damages arising out of its consulting fee under the contract, or even the value of the source code that TransUnion failed to return, it did not allege either as a basis for recovery. Accordingly, the Court reduced the jury's damages award to zero.

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<sup>1</sup> *Endless River Technologies LLC v. Trans Union LLC*, N.D. Ohio No. 1:18 CV 936, 2023 U.S. Dist. LEXIS 725 (Jan. 3, 2023).

<sup>2</sup> *Endless River Technologies LLC*, 2023 U.S. Dist. LEXIS 725, at \*14.

Following the Court's decision in *Endless River*, the decision has been cited by the U.S. District Court for the Middle District of Florida as supporting its similar holding that unlike direct damages, consequential damages require proof of an additional link in the causal chain in order to connect the damages to the contract.<sup>3</sup> Other federal district courts have also subsequently enforced consequential damages waiver provisions in parties' contract in finding that such provisions preclude the recovery of consequential damages on breach of contract claims, including the U.S. District Court for the Western District of New York<sup>4</sup> the U.S. District Court for the Eastern District of Washington<sup>5</sup>, the U.S. District Court for the Northern District of Iowa<sup>6</sup>, and the U.S. District Court for the Western District of Texas<sup>7</sup>, among others.

As courts continue to apply consequential damage waiver provisions to encompass a wide array of damages calculations, commercial entities should be aware of the consequences of such provisions on obtaining recovery. As this current trend shows, consequential damage waiver provisions, or even a lack of contemplation of consequential damages in parties' contracts could lead to the prohibition of recovery of consequential damages, even following a jury's award of such damages. Engaging experienced counsel is vital to understanding how to properly navigate the ever-changing landscape of commercial contracts as well as litigation of same.

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<sup>3</sup> *Local Access, LLC v. Peerless Network, Inc.*, M.D.Fla. No. 6:17-cv-236-WWB-EJK, 2023 U.S. Dist. LEXIS 223337, at \*15 (Dec. 15, 2023).

<sup>4</sup> *Up State Tower Co., LLC v. Southline Little League, Inc.*, W.D.N.Y. No. 1:19-cv-280, 2023 U.S. Dist. LEXIS 233752, at \*18 (Dec. 18, 2023)

<sup>5</sup> *Vijuve Inc. v. Kaspien Inc.*, E.D.Wash. No. 2:21-CV-00192-SAB, 2023 U.S. Dist. LEXIS 109948, at \*9 (June 26, 2023).

<sup>6</sup> *Walter J. French Co. v. State Farm Fire & Cas. Co.*, N.D.Iowa No. C22-108-LTS-KEM, 2024 U.S. Dist. LEXIS 7072, at \*8 (Jan. 12, 2024).

<sup>7</sup> *United States of Am. F/U/B Titan v. Tootle-Qri JV, Ltd. Liab. Co.*, W.D.Tex. No. SA-22-CV-129-FB (HJB), 2024 U.S. Dist. LEXIS 44628, at \*10-11 (Feb. 22, 2024).