

Limiting Risks in Information Technology Contracts – An Analysis of Indemnification versus Insurance¹

In the age of the Internet, information technology contracts have become a common reality for almost every business. Companies have information technology contracts in place for: network access, email and/or web hosting, software licenses, hardware licenses, system agreements and even security or privacy protection for the company's information. As with any type of contract, the parties need to cover the basic terms: definition of services, license rights, fees, confidentiality, and any representations or warranties to be given. The parties also consider the risks, both legal and business related, to determine what limits, if any, need to be included to protect against known or predictable risks.

Without addressing the risks and the right to shift the obligation and/or burden of the risk to one party or the other, the parties will likely end up in court litigating who's responsible when one of the risks is realized. Many companies insure themselves against known risks, e.g. Commercial General Liability or Errors & Omissions. Insurance contracts help protect the company from the possible bad act of an employee or agent, or other damages for which the company may be liable.

Likewise in information technology contracts, the parties may require that the performing party carry certain levels of insurance coverage for those types of insurance policies likely to cover the liabilities in the contract. For example, if a small software vendor licensed its software to a Fortune 50 client, depending on the relevance of the software to the client's business, it would be possible that the damages from the Fortune 50 client could exceed the total value of the vendor's business. To protect against this type of risk, the client might mandate that the vendor carry \$X million in coverage for CGL, E&O, etc.

There is still the risk that a third party might bring a claim that affects one of the parties to the contract. For example, a third party might claim that the vendor's software infringed the third party's copyright in the software programming code used in the software sold to client. This claim would impact the vendor, but the claim could also be brought against the client as an additional infringer for using the purported infringing software.

The purpose of an indemnification provision is to shift the burden of a risk to that party which has the ability to eliminate, reduce or control the risk. In a third party claim for copyright infringement, only the software vendor who created the software, would have the ability to control against the risk of copyright infringement. This is a typical example where the parties would choose to shift the risk so the vendor would agree to "indemnify, defend and hold harmless" the client from any such third party intellectual property claims.

1. Generally

Insurance contracts are often referred to as "contracts of indemnity" even though in the information technology world insurance and indemnity provisions are two very distinct and separate things. The case law interpreting insurance contracts may also provide an insight into how a court might interpret an indemnity agreement between two parties. In many cases, courts have borrowed from case law interpreting insurance contracts to provide a useful framework for

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interpreting indemnity agreements or provisions. Some of these concepts are discussed below.

Yet in several respects, insurance contracts are very different from indemnity agreements or provisions. While an insurance contract is written by an insurance company whose primary business is to assume specific risks of loss in consideration of a premium, an indemnity agreement is usually set up as a risk-sharing agreement between two contracting parties where indemnification is provided ancillary to and in furtherance of some other independent transactional relationship between the parties.² Because of this, insurance concepts will not always govern indemnity provisions. For example, in an insurance contract, any ambiguity regarding the terms of the insurance contract is resolved in favor of the insured.³ In contrast, when courts apply traditional contract principles in construing an indemnity provision,⁴ an ambiguity is construed against the party who drafted the contract or the indemnitee, if the contract was mutually negotiated.⁵ Indemnity provisions are generally strictly construed if they attempt to shift causal fault from one party to another.⁶

Parties to an information technology contract must also consider if they want to include first party indemnification obligations. For example, a Fortune 50 company may be in a position to demand that a software vendor indemnify it if the vendor breaches a contract obligation such as a representation, warranty or confidentiality. Generally speaking, such first party indemnifications obligations are harder to acquire and primarily serve as an incentive for the parties to resolve such claims between themselves as the cost for litigating the claims would be borne by the alleged infringing vendor. See below for example provisions.

2. The Duty to Defend

2.1. Insurance Contracts

In most insurance contracts, the insurer agrees to: (i) indemnify or pay certain covered losses for which the policyholder is responsible; and (ii) defend the policyholder from lawsuits for which the policy provides coverage through retaining and compensating an attorney. These dual obligations are commonly referred to as the "duty to indemnify" and the "duty to defend". The duty to defend and the duty to indemnify are separate obligations. Both of these duties rest on contract. The duty to defend is distinct from and broader than the duty to indemnify.⁷ Thus, even though the underlying action produces a result that does not trigger a duty to indemnify under an insurance policy, the insured still may have a duty to defend.⁸

² See generally *Stickovich v. City of Cleveland*, 757 N.E.2d 50, 62 (Ohio Ct. App. 2001); *Dietz-Britton v. Smythe Cramer Co.*, 743 N.E.2d 960, 973 (Ohio Ct. App. 2001) (explaining difference between insurance contracts and risk-shifting agreements that are not insurance contracts).

³ *Reinsurance Ass'n of Minn. v. Timmer*, 641 N.W.2d 302 (Minn. Ct. App. 2002); *Griffin v. Shelter Mut. Ins. Co.*, 18 S.W.3d 195, 199-200 (Tenn. 2000); *Fryman v. Pilot Life Ins. Co.*, 704 S.W.2d 205, 206 (Ky. 1986); *Ramsay v. Md. Am. Gen. Ins. Co.*, 533 S.W.2d 344 (Tex. 1976).

⁴ *United States v. Seckinger*, 397 U.S. 203 (1970); *Martin & Pitz Assocs., Inc. v. Hudson Constr. Servs., Inc.*, 602 N.W.2d 805 (Iowa 1999); *Cozzi v. Owens Corning Fiber Glass Corp.*, 164 A.2d 69 (N.J. Super. Ct. App. Div. 1960) (applying general contract principles).

⁵ See *Topp Copy Prods., Inc. v. Singletary*, 626 A.2d 98, 99 (Pa. 1993) (ambiguities must be construed against indemnitee); *Batson-Cook Co. v. Ga. Marble Setting Co.*, 144 S.E.2d 547 (Ga. Ct. App. 1965).

⁶ *Smith v. Tenneco Oil Co.*, 803 F.2d 1386 (5th Cir. 1986); *Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 548 N.E.2d 903, 905 (N.Y. 1989); *Fretwell v. Protection Alarm Co.*, 764 P.2d 149 (Okla. 1988); *Lewis v. Dunn Leasing Corp.*, 244 S.E.2d 706, 709 (N.C. Ct. App. 1978). But see *Applied Indus. Materials Corp. v. Mallinckrodt, Inc.*, 102 F. Supp. 2d 934 (N.D. Ill. 2000) (holding that the Illinois Supreme Court would not likely mandate strict construction of all indemnity agreements).

⁷ *Erie Ins. Exch. v. Muff*, 851 A.2d 919, 925-26 (Pa. Super. Ct. 2004); *Hecla Mining Co. v. N.H. Ins. Co.*, 811 P.2d 1083, 1089 (Colo. 1991); *Brown v. State Auto. & Cas. Underwriters*, 293 N.W.2d 822, 825 (Minn. 1980). See also, *Westfield Ins. Co. v. Factfinder Marketing Research, Inc.*, --- N.E.2d ----, 2006 WL 2457695 (Ohio App. 1 Dist. 2006).

⁸ See, e.g., *Kirk v. Mt. Airy Ins. Co.*, 951 P.2d 1124 (Wash. 1998); *Mains v. State Auto. Mut. Ins. Co.*, 698 N.E.2d 488, 491 (Ohio Ct. App. 1997); *Boston Ins. Co. v. Maddux Well Serv.*, 459 P.2d 777 (Wyo. 1967).

As a general rule, the obligation to defend is generally determined by comparing the complaint with the terms of the policy language.⁹ This applies even where the allegations of a complaint are groundless or frivolous.¹⁰ If any part of the lawsuit is arguably within the scope of coverage, the insurer must defend the lawsuit.¹¹ If any claim is arguably covered, the insurer must provide a defense against all claims. Some liability policies do not provide a duty to defend. Others provide that the insurer will reimburse the policyholder for legal fees incurred in defending an action covered by the policy.

2.2. Indemnity Contracts

Similar principles would likely guide the interpretation of an indemnity provision. If the indemnitor undertakes a "duty to defend", then the indemnitor would be expected to defend the indemnitee against the claim through appointment of an attorney or reimbursement of defense costs. In contrast, if the indemnitor has only agreed to indemnify (and not specifically to defend the indemnitee) the obligation to indemnify would arise only when the indemnitee sustains an actual loss.¹² This means that the indemnitee must make payment on an underlying claim, judgment or settlement in order to trigger the indemnitor's obligation to indemnify or reimburse the indemnitee. If the indemnification provision provides for indemnification against liability, the indemnitor's obligations arise as soon as liability is fixed.¹³

3. Notice of a Claim

3.1. Insurance Contracts

In an insurance context, a policyholder must "tender the defense" to the insurer. Generally, the policyholder need only give notice of the lawsuit to the insurer and an opportunity to defend.¹⁴ Once notice is given, the insurer may have the responsibility to contact the insured to determine whether the assistance of the insurer is needed.¹⁵ Without a proper tender, the duty to defend is not invoked and the insurer cannot be responsible for defense costs incurred by the policyholder.¹⁶ To ensure it is proper, the tender of defense should be in writing, attach the claim or lawsuit, and ask the insurer to defend the claim or lawsuit.

Policy provisions that impose a duty to defend on the insurer also have the effect of giving the insurer exclusive control over the litigation.¹⁷ Even where an insurer does not have a

⁹ *Am. Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842 (Tex. 1994); *Garvis v. Employers Mut. Cas. Co.*, 497 N.W.2d 254, 256 (Minn. 1993); *Am. Nat'l Prop. & Cas. Co. v. Gray*, 803 S.W.2d 693 (Tenn. Ct. App. 1990).

¹⁰ *Krevolin v. Dimmick*, 467 A.2d 948 (Conn. Super. Ct. 1983); *Hodges v. State Farm Mut. Auto Ins. Co.*, 488 F. Supp. 1057 (D.S.C. 1980); *Chipokas v. Travelers Indem. Co.*, 267 N.W.2d 393 (Iowa 1978).

¹¹ *Ohio Cas. Ins. Co. v. Clark*, 583 N.W.2d 377 (N.D. 1998); *Auto-Owners Ins. Co. v. City of Clare*, 521 N.W.2d 480 (Mich. 1994); *White Mountain Cable Constr. Co. v. Transamerica Ins. Co.*, 631 A.2d 907 (N.H. 1993).

¹² *Larson Mach., Inc. v. Wallace*, 600 S.W.2d 1 (Ark. 1980) (stating indemnitee must show actual loss by payment or satisfaction of judgment or by other payment under compulsion); *F. J. Schindler Equip. Co. v. Raymond Co.*, 418 A.2d 533 (Pa. Super. Ct. 1980) (holding indemnitee must pay damages to third party).

¹³ See *Trim v. Clark Equip. Co.*, 274 N.W.2d 33 (Mich. Ct. App. 1978) (noting indemnitee need only show potential liability to injured parties and that settlement is reasonable); *Williams v. Johnston*, 442 P.2d 178 (Idaho 1968) (right to indemnification arises when liability to third party is established).

¹⁴ *Home Ins. Co. v. Nat'l Union Fire Ins. of Pittsburgh*, 658 N.W.2d 522, 532-33 (Minn. 2003); *Towne Realty, Inc. v. Zurich Ins. Co.*, 548 N.W.2d 64 (Wis. 1996) (insert parenthetical); *White Mountain Cable Constr. Co. v. Transamerica Ins. Co.*, 631 A.2d 907 (N.H. 1993) (holding that tender was sufficient where insurer had notice of complaint within six months of its filing).

¹⁵ *Home Ins. Co.*, 658 N.W.2d at 533-34.

¹⁶ See *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 739 (Minn. 1997) (policyholder generally cannot recover costs of defense before tender of the claim).

¹⁷ *Am. Ins. Group v. Risk Enter. Mgmt., Ltd.*, 761 A.2d 826, 829 (Del. 2000); *Safeco Ins. Co. v. Ellinghouse*, 725 P.2d 217, 226 (Mont. 1986). Even where the insurer does not have a duty to defend, some policy provisions may give the insurer a right to defend. Under those circumstances, the insured must give notice to the insurer because the insurer has

duty to defend, the insured should provide the insurer with notice of the claim because the duty to indemnify is usually conditioned on the right to control litigation.¹⁸

3.2. Indemnity Contracts

In an indemnity context, unless an indemnity agreement contains a specific provision to the contrary, an indemnitee may not be required to give the indemnitor notice of claims against the indemnitee.¹⁹ If, however, the parties contractually established that proper notice was a condition precedent to liability under an indemnification provision, an indemnitee's failure to give notice to the indemnitor may bar the indemnitee's claim.²⁰

4. Settlement

4.1. Insurance Contracts

In an insurance context, the insurer generally retains the right to control settlement through its policy provisions. If, however, the insurer unjustifiably refuses to defend or otherwise disputes the existence of insurance coverage, the insured may make a reasonable settlement without losing its right to recover from the insurer under the policy.²¹ Under those circumstances, some jurisdictions provide that the policyholder may have the right to enter into a stipulated judgment in which the policyholder acknowledges that there is a potential that judgment may be entered against him and stipulates to entry of judgment for a specific amount.²² Judgment is entered on that amount, and the injured claimant agrees not to execute judgment and allows the claimant to proceed in an action against the insurer. If an insurer is defending under a reservation of rights, the insurer generally is entitled to notice before the agreement is completed.²³ If an insurer has made an outright denial of coverage, the insurer may lose its right to notice.²⁴

4.2. Indemnity Contracts

In an indemnity context, the rules are similar. If the indemnitor has accepted its indemnity obligations, the indemnitor would control settlement. If the indemnitor has denied its obligations or failed to approve settlement of the claim, the indemnitee generally has the right to enter into a reasonable settlement without consultation with the indemnitor.²⁵ This holds true

the right and must be given the opportunity to control potential litigation. See, e.g., *Ohio Cas. Ins. Co. v. Carman Cartage Co.*, 636 N.W.2d 862 (Neb. 2001).

¹⁸ See *M&M Elec., Inc. v. Commercial Union Ins. Co.*, 670 N.Y.S.2d 909 (N.Y. App. Div. 1998) (noting insurer's ability to pay is normally coupled with the insurer's right to control the defense of its insured to protect its financial interests) (citing 7C John Appleman, *Insurance Law and Practice* § 4681).

¹⁹ *ELRAC, Inc. v. Cruz*, 699 N.Y.S.2d 647 (N.Y. Civ. Ct. 1999). But see *Rothey v. Walker Bank & Trust Co.*, 754 P.2d 1222 (Utah 1988) (noting that while notice is not generally necessary to invoke the indemnitor's liability, rules of estoppel may apply); *Morris v. Schlumberger, Ltd.*, 445 So. 2d 1242 (La. Ct. App. 1984) (equitable principles of equity apply where contract is silent on issues of tender and notification).

²⁰ *Am. Home Assur. Co. v. Int'l Ins. Co.*, 684 N.E.2d 14, 16 (N.Y. 1997) (stating absent a valid excuse, a failure to satisfy notice requirement vitiates the policy); *McLin v. Leigh*, 598 N.E.2d 731 (Ohio Ct. App. 1991). But see *Alcazar v. Hayes*, 982 S.W.2d 845, 850 (Tenn. 1998) (noting modern trend considers whether the insurer has been prejudiced by untimely notice).

²¹ *Henning v. Cont'l Cas. Co.*, 254 F.3d 1291 (11th Cir. 2001); *Sanderson v. Ohio Edison Co.*, 635 N.E.2d 19 (Ohio 1994); *Nixon v. Liberty Mut. Ins. Co.*, 120 S.E.2d 430 (N.C. 1961).

²² See *Medd v. Fonder*, 543 N.W.2d 483 (N.D. 1996); *Miller v. Shugart*, 316 N.W.2d 729, 733-34 (Minn. 1982); *Damron v. Sledge*, 460 P.2d 997 (Ariz. 1969).

²³ See *State Farm Mut. Auto. Ins. Co. v. Peaton*, 812 P.2d 1002, 1011 (Ariz. Ct. App. 1990); *Miller v. Shugart*, 316 N.W.2d 729, 732-33 (Minn. 1982).

²⁴ *D.E.M. & J.J.M. v. Allickson*, 555 N.W.2d 596, 602 (N.D. 1996); *Ins. Co. of N. Am. v. Spangler*, 881 F. Supp. 539 (D. Wyo. 1995); *Brownsdale Co-op. Ass'n v. Home Ins. Co.*, 473 N.W.2d 339, 341-42 (Minn. Ct. App. 1991).

²⁵ *Sequa Coatings Corp. v. N. Ind. Commuter Transp. Dist.*, 796 N.E.2d 1216, 1230 (Ind. Ct. App. 2003); *ELRAC, Inc. v. Cruz*, 699 N.Y.S.2d 647 (N.Y. Civ. Ct. 1999).

even where the indemnity provision provides that the indemnitor cannot consummate a settlement without the indemnitor's consent.²⁶ In general, however, the indemnitee owes a duty of good faith to its indemnitor. Any act by the indemnitee that prejudices the indemnitor's rights will release the indemnitor's obligations to the extent of the prejudice.²⁷

5. Defenses to indemnity obligations

There are problems with indemnification provisions because there are certain defenses a indemnitor can use to avoid its obligation to indemnify and defend. For example, there are contract defenses based on "public policy" grounds, including: shifting punitive damages, causal nexus (contract of insurance), and indemnification against fault. A court may also consider "unconscionability" grounds for holding the provision unenforceable, but this is more difficult to assert in a mutually negotiated contract.

A court may also look to "consumer considerations" to determine if the enforcement of the provision would be appropriate. This is especially true under a unilateral business-to-consumer license situation. The consumer considerations assessment is in some aspect a blend of public policy and unconscionability grounds for ruling a provision is void and unenforceable. In general this is a rule that an exculpatory clause (e.g., indemnification and/or cap on damages) may be unenforceable if the indemnitee provided a public service.²⁸

6. Sample Provisions

6.1. Examples of insurance provisions:

6.1.1. First Example:

Insurance. Licensor shall maintain (and cause its permitted subcontractors, if any, to maintain) insurance coverage with carriers acceptable to CUSTOMER and in the amounts set forth below. Licensor shall furnish to CUSTOMER either a certificate showing compliance with these insurance requirements or certified copies of all insurance policies within 10 days of CUSTOMER's written request. The certificate will provide that CUSTOMER will receive 30 days' prior written notice from the insurer of any termination or reduction in the amount or scope of coverage. Licensor's furnishing of certificates of insurance or purchase of insurance shall not release Licensor of its obligations or liabilities under this contract.

(a) Workers' Compensation: statutory limits for the state(s) in which this Agreement is to be performed (or evidence of authority to self insure);

(b) Employer's Liability: \$500,000 each accident for bodily injury by accident and \$500,000 each employee for bodily injury by disease;

(c) Commercial General Liability covering liability arising from premises, operations, independent contractors, products/completed operations, personal injury and advertising injury, and liability assumed under an insured contract: \$5,000,000 each occurrence;

(d) Automobile Liability (including owned, non-owned and hired vehicles): \$1,000,000 each accident; and

²⁶ *Luton Mining Co. v. Louisville & N. R. Co.*, 123 S.W.2d 1055, 1060 (Ky. 1938).

²⁷ *New Amsterdam Cas. Co. v. Lundquist*, 198 N.W.2d 543, 549 (Minn. 1972) (indemnitee had duty to minimize loss and communicate offers of settlement); *Wolthausen v. Trimper*, 105 A. 687, 690 (Conn. 1919) (noting indemnitee's duty to act in good faith and use ordinary care).

²⁸ *Yang v. Voyagaire Houseboats, Inc.*, 701 N.W.2d 783, 790-91 (Minn.2005). See also, *Johanns v. Minnesota Mobile Storage, Inc.*, 720 N.W.2d 5 (Minn.App.,2006).

(e) Errors & Omissions/Professional Liability: Limits of not less than \$1,000,000 per occurrence.

6.1.2. Second Example:

Without limiting Vendor's liability to Customer or its Affiliates under this Agreement, Vendor, at its sole cost and expense, will maintain adequate insurance coverage for Vendor Personnel to protect Customer and its Affiliates from any losses or claims which may arise out of the performance of Services under this Agreement. Such coverage will include (i) statutory workers' compensation and employers liability insurance with limits not less than \$500,000 each accident for bodily injury by accident or \$500,000 each employee for bodily injury by disease, disability and unemployment insurance for all Vendor Personnel, (ii) commercial general liability insurance (including contractual liability coverage, broad form property damage liability and personal, bodily and advertising injury liability) covering all Vendor Personnel engaged in the performance of Services hereunder, with limits of at least \$5,000,000 each occurrence, (iii) professional liability insurance covering Vendor and Vendor Personnel with a limit of not less than \$1,000,000 per occurrence, (iv) internet liability insurance including, without limitation, unauthorized access, unauthorized use, virus transmission, denial of service, personal injury, advertising injury, failure to protect privacy and intellectual property infringement covering the liability of Vendor and the liability of Customer and its Affiliates arising out of the design and development of the systems used to operate and maintain the Services with a minimum limit of not less than \$5,000,000 per occurrence, and (v) automobile liability insurance, covering Vendor Personnel engaged in the performance of Services hereunder with limits of at least \$2,000,000 each accident. Vendor will add Customer as an "additional insured" to Vendor's commercial general liability and automobile liability policies. Vendor will ensure that the insurance carrier and/or Vendor will provide thirty (30) days advance written notice to Customer before termination, change or cancellation takes effect of any coverage under such policies evidenced on such certificate, regardless of whether cancelled by Vendor or the insurance carrier. Such insurance will be primary and noncontributory to any insurance maintained by Customer. Vendor will submit certificates of insurance to Customer on Customer's request.

All of the insurance policies required to be obtained pursuant to this Agreement will be with companies licensed to do business in the state where the Services will be performed and rated no less than Standard and Poor's AAAa to Claims Paying Ability or BBq to Qualified Solvency Rating as to financial rating and no less than A- as to Policy Holder's Rating in the current edition of Best's Insurance Guide (or with an association of companies each of the members of which are so rated). The foregoing requirements as to the types and limits of insurance coverage to be maintained by Vendor and any approval or waiver of said insurance by Customer is not intended to and will not in any manner limit or qualify the liabilities and obligations otherwise assumed by Vendor pursuant to this Agreement, including but not limited to the provisions concerning the indemnification obligations of Vendor.

6.1.3. Third Example:

Upon execution of this License Agreement, Vendor shall provide Licensee with a certificate of its respective insurance coverage with the limits clearly defined, which limits shall be no less than \$1,000,000 per occurrence and \$3,000,000 in the aggregate. In addition, Vendor shall maintain such respective insurance coverage during the term of this License Agreement.

6.1.4. Fourth Example: (blend of insurance and indemnity)

Insurance. Vendor agrees to carry and maintain in force at all times during the term of this Agreement the lines of insurance coverage with minimum policy limits as follows: (a) Workers' Compensation – Statutory with limits as prescribed by applicable state law and Employment Practices Liability with limits of \$1,000,000.00, per accident and in the aggregate; (b) Commercial General Liability with limits of \$5,000,000.00, combined single limit bodily injury and

property damage, per occurrence and in the aggregate; and (c) Business Automobile Liability with limits of \$1,000,000.00, combined single limit, each accident; and Professional (Errors and Omissions) liability coverage with a minimum combined single limit of \$1,000,000. Vendor agrees to provide to Licensee certificates of insurance evidencing coverage upon Licensee's request. Vendor agrees to indemnify and hold Licensee harmless from all claims, losses, expenses, fees (including attorneys' fees), costs and judgments that may be asserted against Licensee that result from the acts or omissions of Vendor or Vendors's employees, agents or subcontractors.

6.2. Examples of indemnity provisions:

6.2.1. First Example:

In the event an injunction is sought or obtained against use of the Vendor System or in Vendor's reasonable opinion is likely to be sought or obtained, Vendor shall within a commercially reasonable time, at its option and expense, either (a) procure for Client the right to continue to use the infringing Vendor System as set forth in this Agreement, (b) replace or modify the same to make its use non-infringing while being capable of performing the similar function without degradation of performance, or (c) if neither of the foregoing options is commercially reasonable, Vendor may terminate Client's use of such infringing material and, at Client's request and direction, will terminate Client's use of any other Services that is dependent upon or are materially interrelated with the infringing material. Vendor shall have no indemnity obligation to Client under this Section to the extent the claim(s) of infringement is based upon: (i) any use of the Vendor System, Services, or Documentation by Client in material breach of this Agreement, (ii) any use of the Vendor System, Services or Documentation by Client in conjunction with any third party product, data, hardware or software not provided or recommended by Vendor, or (iii) any Client Content. In the event Client is enjoined from using all or any part of the Vendor System through no fault of its own, Client shall be entitled to a pro-rata refund of fees paid in advance under this Agreement.

6.2.2. Second Example:

COMPANY Indemnification. COMPANY will indemnify, defend, and hold harmless VENDOR and its directors, officers, partners, employees and Contractors (the "VENDOR Indemnified Parties") against any and all losses, liabilities, judgments, awards and costs (including reasonable legal fees and expenses) in any claim, action, suit or proceeding (individually and collectively, "Claim") arising out of an allegation that the Services, whether individually or in combination with any other work, infringes any federal or state law or regulation.

VENDOR Indemnification. VENDOR will indemnify, defend, and hold harmless COMPANY and its affiliates, directors, officers, partners, employees and agents (the "COMPANY Indemnified Parties") against any and all losses, liabilities, judgments, awards and costs (including reasonable legal fees and expenses) in any Claim arising out of an allegation that the VENDOR Software infringes any third party's Intellectual Property Rights. If a court or a settlement enjoins the use of the VENDOR Software, or if in VENDOR's reasonable opinion, the VENDOR Software is likely to become the subject of a claim of infringement, VENDOR will have the option of (i) modifying the VENDOR Software so that it becomes non-infringing, (ii) substituting a substantially equivalent non-infringing Technology, (iii) obtaining for COMPANY a license to continue using the VENDOR Software at no additional cost or liability to COMPANY, or (iv) if no non-infringing substitute is possible, VENDOR may terminate this Agreement immediately.

COMPANY will indemnify, defend and hold harmless the VENDOR Indemnified Parties from and against any and all Claims relating to personal injury, bodily injury or death or damage to tangible personal property to the extent arising directly out of any negligent or wrongful act or omission of COMPANY, its employees, contractors or Contractors in the course of performing

COMPANY's obligations hereunder.

6.2.3. Third Example:

INDEMNITIES. INFRINGEMENT. Vendor, at its sole expense, agrees to defend, indemnify and hold harmless Client against any claim and all liability, suits, losses, damages and fees (including reasonable attorney fees when Vendor is unable to provide counsel), arising out of the use of the Licensed Products, in connection with any allegations that the Licensed Products or Modifications infringes a copyright, patent, trademark, trade secret, or other proprietary right of a third party. Client will notify Vendor in writing within thirty (30) days of the claim and will provide Vendor with the information, reasonable assistance and authority to enable Vendor to perform Vendor's obligations under this paragraph. Vendor has sole control of the defense and all related settlement negotiations. Vendor shall have no liability for any claims of infringement to the extent that such claims result from the use of the Licensed Products in conjunction with non-Vendor software or other non-Vendor products or upon a use of the Licensed Products in a manner not contemplated by the Published Product Specifications. Nothing in this provision shall be construed as a limitation on Client's ability to retain legal counsel at its own expense to monitor the proceedings. The obligations of Vendor stated in this section survive termination where there has been termination of use, expiration, non-renewal, or rescission of this Agreement provided Client is using the latest version of the Software at the time of termination.

Vendor further agrees that if Client is prevented from using the Licensed Product(s) due to an actual or claimed infringement of any patent, copyright or other intellectual property right, then at Vendor's option and sole expense and except as provided in the paragraph above, Vendor shall promptly either:

- (i) procure for Client, at Vendor's expense, the right to continue to use the Licensed Product(s);
- (ii) replace or modify the Licensed Product(s) at Vendor's expense so that the Licensed Product(s) become non-infringing, but functionally-equivalent and compatible; or
- (iii) in the event that neither (i) or (ii) are reasonably feasible, Client may terminate the Agreement as to the infringing Licensed Product(s) and Vendor will refund: (a) Client's License Fees for the infringing Licensed Product(s) amortized over a five (5) year straight-line depreciation period from the execution of the Agreement; and (b) the Customer Support and Enhancement Fees paid by Client for that Licensed Product(s) based on the then-current subscription period. Said refund will not bar Client from pursuing any other remedies provided under the terms of this Agreement.

6.2.4. Fourth Example:

Vendor shall defend, indemnify and hold harmless Client against any and all liability, suits, claims, losses, damages and fees (including reasonable attorney's fees), arising out of the use of the Software, in connection with any allegations that the Software infringes any patent, copyright, trademark, trade secret, or violates any other proprietary right of a third party. Vendor shall be given reasonably prompt notice of such claim, and given information, reasonable assistance (except financial), and sole authority to defend or settle the claim. The obligations of Vendor stated in this section survive termination, expiration, non-renewal, or rescission of this Agreement.

6.2.5. Fifth Example:

Defense and Indemnification Obligations. Licensor agrees to indemnify, defend and hold harmless CUSTOMER its Affiliates, successors, officers, directors, shareholders, employees, agents and Third Party Service Providers ("Indemnified Parties") from and against all losses, liabilities, judgments, awards, damages, expenses, costs, and fees, including reasonable attorneys' fees, arising from: (a) any claim, lawsuit, action or proceeding (each a "Claim") brought against an Indemnified Party by a third party (other than an Affiliate) alleging that the Software

and/or Developed Work infringes any copyright, trademark, patent or other proprietary right or misappropriates any trade secret; (b) any Claim brought against an Indemnified Party by a third party arising out of any breach by Licensor of any of the terms and conditions of this Agreement; (c) the death or bodily injury of any agent, employee, customer or business invitee of an Indemnified Party caused by Licensor or its Agents; (d) the damage, loss or destruction of any tangible property of an Indemnified Party caused by Licensor or its Agents; or (e) any Claim by Licensor's Agents against an Indemnified Party for benefits and/or labor practices including any claims for discrimination, harassment, wages, benefits, retaliation, wrongful termination, or any other employment and/or labor related cause of action whatsoever, to the extent that such Claims arise from, are related to, or are connected with the working conditions or the work or Support or Professional Services performed under this Agreement. An Indemnified Party shall provide Licensor: (i) reasonably prompt written notice of the existence of such Claim; (ii) control over the defense or settlement of such Claim, provided that Licensor shall not settle such Claim without the Indemnified Party's prior written consent, which consent shall not be unreasonably withheld, and provided that the Indemnified Party shall have the right to participate in the defense of any such Claim at its expense and through counsel of its choosing; and (iii) non-financial assistance at Licensor's request to the extent reasonably necessary for the defense of such Claim. A failure by an Indemnified Party under this Section 8.1, shall only affect Licensor's obligations under this Section to the extent such failure materially prejudices Licensor's ability to defend a Claim under this Section.

7. Conclusion

The parties are generally free to shift the burden of risks to the party capable of controlling such a risk through an indemnification provision, but in analyzing this shift, courts will strictly construe against the drafter of the contract and/or indemnitee. Limiting risk by mandating certain levels of insurance coverage and requiring your company to be added as beneficiary is a cleaner level of coverage as a court will decide an ambiguity in favor of the insured. Insurance, however, requires the benefited party to jump through certain hoops (e.g. notice, tender, etc.) and still the first assessment will be to assess the claim to determine if it is covered by the particular policy. In either case, the parties should clearly understand the benefits and limits of risk reduction through insurance or indemnification. The biggest benefit to such provisions may ultimately be that the liable party has an incentive to settle without taking the matter to court.