

Understanding the SaaS Deal:

What if Something Goes Wrong? Understanding Remedies and Limitations

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Reps/Warranties

- “Creature of Contract”
 - UCC-implied warranties may apply to on-prem software (but not SaaS)
 - SaaS does not fall cleanly into traditional “buckets” of intellectual property, such as copyright, trademark and patent



Reps/Warranties – Vendor

1

- Substantial conformance with documentation/specifications/attached documents
 - Could include RFP or other responsive documents

2

- Professional services will be provided in a professional and workmanlike manner

3

- Compliance with applicable law

4

- Unique warranties
 - e.g., regulatory issues, generative AI (GAI)
- **Duration:** typically, all times during the term (compare to SW)
- **Remedies:** replace/repair/refund v. breach of contract & associated damages

Service Level Agreements / Support

- Scope of Treatment
 - Uptime Guarantee (e.g., not less than 99.99%)
 - Support Response/Resolution Guarantees (vs. guidelines/targets)
 - Reporting guidelines
 - Force Majeure and carveouts
- Remedies
 - Credit structure for service level failures
 - Termination right for repeated failure



Reps/Warranties – Customer

1

- Ownership and rights to data inputted into SaaS and acquisition of user consents

2

- Compliance with laws



Warranty Disclaimers

- UCC Article 2 implied warranties
- Third-party materials
 - Addressing third-party agreements/warranties
- Results
 - Error-free / without interruption
- Ownership of Feedback;
Customer Data/Confidential
Information



Limitation of Liability - Liability Type

Typical: Limited to direct damages only; ideally mutual.

e.g., “In no event will either party be liable under this agreement under any legal or equitable theory, including breach of contract, tort (including negligence), strict liability, and otherwise, for any consequential, incidental, indirect, exemplary, special, enhanced, or punitive damages whether arising out of breach of contract, tort (including negligence), or otherwise...”

What are **direct damages**?

- Typically, non-controversial ...
- **But see Data Breach:** Notices to affected consumers, credit monitoring, and many other data breach damages are consequential. Thus, consider whether to carveout from liability type as well.



Limitation of Liability - Liability Caps

Typical: Market standard cap is somewhere between **12-36 months'** subscription fees paid or payable to vendor in the trailing period.

e.g., “In no event shall either party’s liability under this agreement...exceed total amounts paid to Provider under this Agreement in the 12-month period preceding the event giving rise to the claim...”

Standard exclusions from cap:

i. Bodily injury or physical damage to tangible property

ii. Gross negligence

iii. Damage and loss caused by confidentiality obligations

iv. Infringement of intellectual property rights (for discussion re: indemnity) or

v. Indemnity obligations/cyber breaches

Limitation of Liability – “Super Caps” Covering Data Breaches

- In response to carve-outs or exceptions to LOLs, many vendors suggest “super caps”
- Type of information being processed (PII, SPI and/or PHI), confidential or proprietary will determine the amount of cap negotiated by the parties
- Negotiation process
 - Who blinks first?
- Cybersecurity Addendum
 - Information Security Program Requirements
 - Breach Notice/Root Cause Analysis/Control of Data Breach response/Cyber Audits/Insurance/Disaster Recovery Plans/Equitable Relief



Limitations of Liability vs. Indemnification

- Protecting assets and limiting client liabilities
- The battle between LOLs and Indemnities
- Liability can't be limited unless it's created
- When protecting PII, SPI and/or PHI at rest, while being processed or in transmission, the scope of your indemnity clause is essential



Scope of Indemnity



Coverage of Claims

- Defend, Indemnify and Hold Harmless
- Direct v. Third-party Claims
- Types of damages (direct, consequential, punitive and/or attorneys' fees)
- Scope of Coverage (e.g., IP infringement, breach of contract, violation of law)

Causation

- “Caused by,” “resulting from,” “solely resulting from” or “arising from or related to” the acts of the Service Provider

Carve Outs and Carve Ins



EXAMPLE LANGUAGE:

The Indemnification obligation in this Section will not apply to the extent the underlying allegation arises from:

- Modifications to the Services or Deliverables [**not authorized or made by Consultant**][in violation of this Agreement];
- Combinations of the Services or Deliverables with other products, services, software or methods [**not required for Customer's use of the Services or Deliverables**][in violation of this Agreement]; or
- [Compliance with designs or instructions provided by Customer in writing].

Carve Outs and Carve Ins

EXAMPLE LANGUAGE:

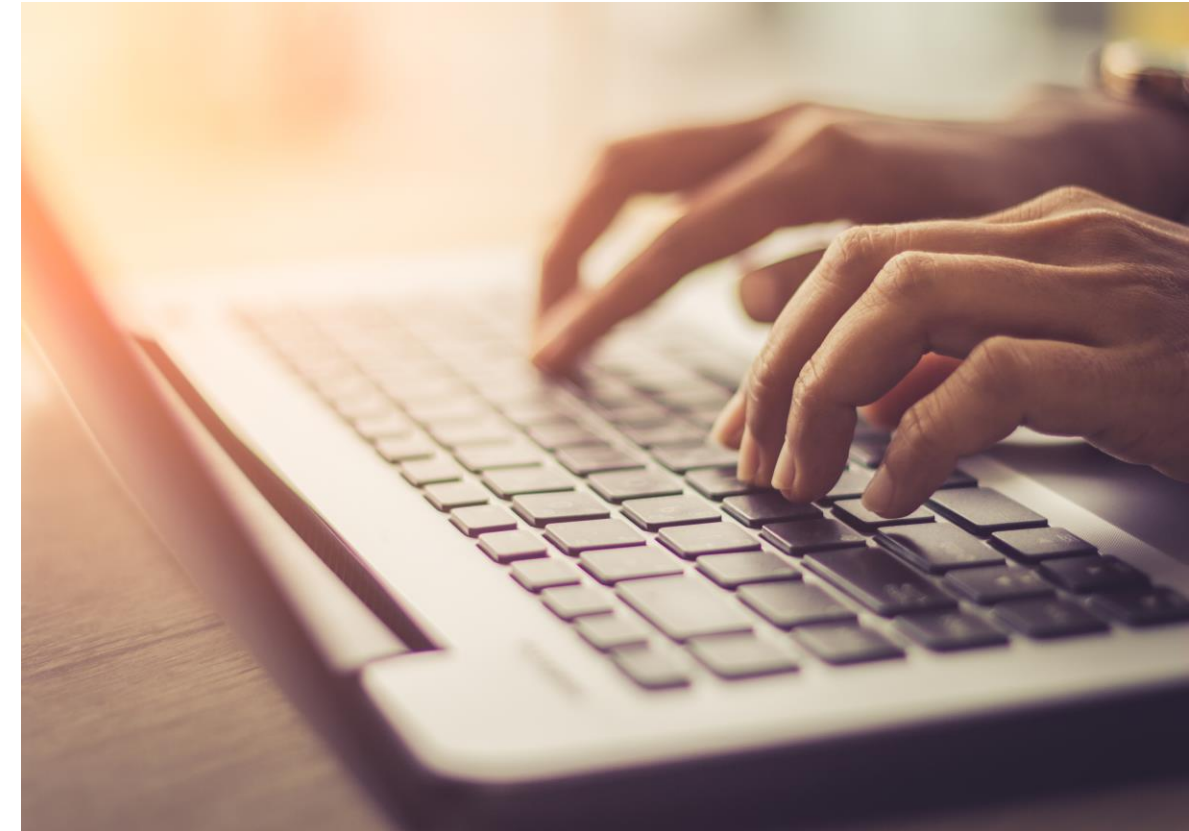
The Indemnification obligation in this Section will not apply to the extent the underlying allegation arises **solely** from **(and would not exist but for)**:

- Modifications to the Services or Deliverables [**not authorized or made by Consultant**][**in violation of this Agreement**]; or
- Combinations of the Services or Deliverables with other products, services, software or methods [**not required for Customer's use of the Services or Deliverables**][**in violation of this Agreement**].



Suspension Rights in SaaS Agreements

- When there is a dispute – “Waterfall” of options
- Suspension is a limited remedy (short of termination) for situations where users fail to comply with some or all terms
- **Negotiation Points**
 - Notice and cure
 - Scope limitations
 - Reinstatement
- **Data removal/deletion**



Termination Rights in SaaS Agreements

- Termination of MSA vs. certain SOW/Work Orders
- Traditional Options
 - 1) Termination for convenience / Breach
 - 2) SLA Remedies (credits / termination)
- Negotiation Points
 - Early termination fees
 - Timing and form of breach notice
 - Time to cure
 - Post-Termination Assistance



Choice of Law and Venue



Arbitration is becoming popular

- American Arbitration Association and regional ADR providers
- Where? Virtual? AAA Model Order & Procedures
- Option for equitable relief
- Jurisdiction? Judge or jury? Law?
- “Courts of the State of Delaware”
- Where in Delaware? Dover or Wilmington.

Questions?



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