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Reading the Fine Print! Managing Expectations and Allocating Risk through Proper Contract Review

By: Gregory Duff

I know, I know. Work orders, services descriptions and purchase orders are bad enough. Don't even talk about the warranties, remedies, indemnities or limitations of liability hiding in the fine print on the back of the purchase order. Unfortunately, as insignificant as the fine print may seem, the fine print – and specifically, those warranties, remedies, indemnities and limitations of liability – is often the most significant part of any written agreement with a vendor or service provider.

Fearing the fine print of most vendor or service provider contracts, hoteliers often don't realize the importance of a few key contract provisions found in nearly every form of contract. Only after something goes awry do hoteliers pull out the contract they signed months ago and realize the tremendous mistake they made in not reviewing and understanding the fine print. While each provision discussed in this article could fill an entire issue of this magazine, hoteliers armed with the few points outlined here (regardless of their sophistication or outside counsel budget) will take a big step toward effectively reviewing any proposed contract form and saving themselves hours of frustration in the future.

Warranties

While warranties come in many forms, a warranty is essentially a promise that the product or service purchased will do what the vendor or service provider says it will. Vendors and service providers typically go to great lengths to disclaim any and all forms of warranties in their contracts. These disclaimers often appear in large type (so the hotelier cannot claim he or she did not see the disclaimer) and fall under the heading "Warranty Disclaimer." *See Example No. 1 below.*

With a little prodding, however, most vendors and service providers will consider one or more of the following types of warranties (*each of which is incorporated in Example No. 2 below*):

- The product or service meets product or service specifications or design guidelines.
- The product or service has been manufactured (product) or provided (service) in accordance with relevant industry standards.
- The vendor or service provider's use of the technology contained in the product or service provided does not violate legally protected rights of other third parties.

Remedies

Remedies are what the hotelier can do if the vendor or service provider does not do what it says it will. Most vendors or service providers attempt to limit a hotelier's redress in the event the product or service purchased by the hotelier fails to meet a stated product or service warranty. *See Example No. 3 below.*

Vendors or service providers will often work with hoteliers who raise concerns about the remedies available to them by adding one or more of the following additional remedy options (*some of these options are reflected in the revisions in Example No. 4 below*):

- In the event the product or service fails, the hotelier may seek relief outside of the contract by suing the vendor or service provider in court.
- Replacement of the faulty product with a functional equivalent (not just a replacement product).
- A credit or refund of the fees paid for the faulty product or services.
- In the event the product or service is found to infringe or misappropriate another party's rights, the vendor or service provider will (a) purchase a license for the hotelier to continue using the product or service, or (b) modify or revise the product or service such that it no longer infringes the party's rights.

Indemnities

In essence, an indemnity obligates one party (often referred to as the indemnitor) to pay or reimburse certain costs of, and sometimes defend against, claims, damages or liabilities that might be brought or asserted against another party (referred to as the indemnitee) as a result of the indemnitor's bad acts. *See Example No. 5 below.*

Depending on the nature of the product or service being provided, a good indemnity provision should, at a minimum, include the following protections (*see Example No. 6 below*):

- Defense of the hotelier (in addition to indemnity) in the event the hotelier is sued as a result of the vendor or service provider's actions. Without this type of protection, the hotelier may be forced to defend the claim (including paying related attorneys' fees) and only receive reimbursement of its costs at the conclusion of the court action.
- Indemnity and defense against claims, demands or damages by both third parties (for example, a claim brought by a hotel guest) and damages suffered directly by the hotelier.
- Protection against the wide range of circumstances that might lead to a claim or demand being made against the hotelier or damages suffered by the hotelier, including (1) the negligent acts or omissions or willful misconduct by the vendor or service provider, (2) the vendor or service provider's failure to perform under the contract, and (3) infringement by the vendor or service provider of any legally protected right of a third party.

Limitations of Liability

Limitations of liability typically come in two forms, both of which are commonly found together in most contract forms: (1) an absolute refusal by the vendor or service provider to pay certain types of damages that a hotelier might suffer as a result of the vendor or service provider's bad acts, or (2) a cap on the amount of damages that the hotelier may recover against the vendor or service provider. *See Example No. 7 below.*

Absent complete removal of the limitations of liability (which few vendors or service providers will do), hoteliers should request that the vendor or service provider make at least two important changes (both changes are reflected in *Example No. 8 below*):

- Any limitation should apply equally to both the vendor or service provider and the hotelier.
- Indemnities and claims for breach by the vendor or service provider of other important obligations in the contract should be excluded from the limitation.

While no magazine article can replace the value of having a trusted lawyer review a proposed contract, spending 10 minutes to review the fine print on the back of your next work order armed with the points outlined above will save you hours of frustration.

Example No. 1. Warranty Disclaimer

- 1 Vendor disclaims and excludes all representations, warranties and conditions, whether express, implied or statutory, including but not limited to warranties or conditions of title, non-infringement, merchant ability and fitness for a particular purpose.

Example No. 2. Warranty Disclaimer

- 2 Vendor warrants that the software delivered to Hotelier under this Agreement will perform in accordance with the specifications and design standards set forth in Exhibit A. Vendor further warrants that the software has been manufactured in a professional manner consistent with the standards of the software industry and shall not infringe, or otherwise violate or misappropriate, any copyright, patent, trade secret or other proprietary right(s) held by any third party.

Example No. 3. Remedies

- 3 Hotelier's sole and exclusive remedy for breach of the warranties contained in this Agreement shall be the correction of any error reported to Vendor or replacement of the software.

Example No. 4. Remedy Options

- 4 *In addition to any other remedy at law or in equity, Hotelier's sole and exclusive remedies for breach of the warranties contained herein shall include (1) correction of any error reported to Vendor, (2) or replacement of the licensed program with a functional equivalent, or (3) a refund of all amounts paid by Hotelier to Vendor under the Agreement.*

example No. 5. Indemnities

- 5** Vendor shall indemnify Hotelier from and against any and all third-party claims and demands arising from any negligent acts or omissions or willful misconduct of Vendor.

example No. 6. Indemnity Protections

- 6** Vendor shall indemnify *and defend* Hotelier *and Hotelier's subsidiaries and affiliates and their respective owners, officers, employees and agents* from and against any and all third-party claims, *and losses, demands or damages (including reasonable attorneys' fees) arising, or alleged to arise, from (a) any negligent acts or omissions or willful misconduct of Vendor, (b) Vendor's performance or nonperformance of the obligations described in this Agreement, or (c) infringement or misappropriation by Vendor's software of any patent, copyright, trademark, trade secret or other proprietary right(s) held by any third party.*

example No. 7. Limitations of Liability

- 7** In no event shall Vendor be liable to Hotelier for any indirect, incidental, special or consequential damages, including, without limitation, damages from lost profits, revenue or goodwill, whether or not Vendor has been advised or is aware of the possibility of such damage. Vendor's total liability under this Agreement, for whatever cause, whether in an action in contract or in tort, will be limited to the fees paid by Hotelier to Vendor under this Agreement.

example No. 8. Limitations of Liability Protections

- 8** In no event shall ~~Vendor either party~~ be liable to ~~Hotelier-the other~~ for any indirect, incidental, special or consequential damages, including, without limitation, damages from lost profits, revenue or goodwill, whether or not ~~Vendor-such party~~ has been advised or is aware of the possibility of such damage. To the maximum extent permitted by law, ~~Service-Provider's each party's~~ total liability under this Agreement, for whatever cause, whether in an action in contract or in tort, will be limited to the fees paid by Hotelier to Vendor under this Agreement. *The foregoing limitation shall not apply to Vendor's indemnification obligations under Section ___ of this Agreement or to claims for breach by Vendor of its confidentiality obligations under Section ___ of the Agreement.*

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