



## Using Contractual Provisions to Manage Customer Expectations

Julie Machal-Fulks  
Scott & Scott, LLP

# Agenda

- Importance of “Boilerplate”
- Reselling others’ products or services
  - Partner requirements
  - Understanding their obligations
- Specific Contractual Provisions
  - Limitation of Liability
  - Indemnification
  - Warranties
  - Data Security
- How Much are You Willing to Risk?
- How to Use Your Contract as a Differentiator

# Importance of “Boilerplate” Language

- Imposes obligations on you and your client
- Many companies sign without understanding all the obligations
- You may put yourself in a situation where your risks with your customers or channel partners outweigh your revenue
- Try to avoid legalease

# Reselling Others' Products Or Services – Partner Requirements

- IBM
  - Ability to enter your customers' facilities to ensure compliance
- Oracle
  - Participating in Oracle Partner Network and Agreement that they can change terms at any time with no notice to you
- Microsoft
  - Must include certain provisions in your agreements with end users

# Reselling Others' Products Or Services – Understanding Partner Obligations

- What happens when your partner refuses to take on any potential liability?
- Read undertakings carefully and ensure that you understand which part of the risk you are bearing

# Specific Contractual Provisions

## – Limitation of Liability

- How much each of you are willing to pay if something goes wrong
- Should it be tied to payments for services
- Other methods of calculating the limits of liability
- What limits have the channel partners imposed on their liability to you?

# Specific Contractual Provisions – Indemnification

- Obligation to pay for third-party claims asserted against the other party to the contract
- Is the indemnification subject to the limitation of liability?
- What kinds of claims are included/excluded?
- Should the indemnity provisions be reciprocal?

# Specific Contractual Provisions – Warranties

- More important in cloud services agreements than on-premises or traditional managed services agreements
- What is the remedy for breach of a warranty?
- Is a breach of warranty subject to the limitation of liability?
- What is a reasonable warranty for an MSP?



# Specific Contractual Provisions – Data Security

- Who is responsible for ensuring data security
- Is data breach or loss subject to the limitation of liability?
- Is the customer subject to HIPAA or GLBA
- What safeguards do you have in place to protect the data and should you contractually obligate yourself to continue them?

# How Much are you Willing to Risk?

- Can you calculate the value of the monetary risks in the agreements if everything goes wrong?
- Does the revenue exceed the risks by a lot?
- Do you have insurance to cover the most costly and most likely risks?
- Is your customer being reasonable about the risks they want you to cover?

# How to Use your Contract as a Differentiator

- If possible, know how your competitors' agreements differ from yours
- Point out all the unique provisions you include that protect the customer
- Use an easily understandable, thorough agreement
- Include some provisions you are willing to give up in negotiations