

# Tips for Service Providers: Your Standard Form Contract Should be More Than an Afterthought

Date: April 05, 2013

Author: Varoujan Arman

Blaneys Commercial Litigation Update

Original Newsletter(s) this article was published in: Commercial Litigation Update: April 2013

Are you a small service provider that does not have a written contract with your customers or a one pager you drafted yourself? Counsel can suggest a few simple improvements to your standard form contract that may go a long way to improving your relations with customers and minimizing your risk. Budgeting a modest up front cost for this purpose is a sound investment for any service provider.

## Limitation of Liability

A major consideration for any service contract is a provision which sets out the maximum possible exposure in the case of any claim. There are a few general categories for such clauses. The most restrictive form limits the liability of the service provider to the amount paid for the service. Another form limits the liability to the amount of insurance coverage the service provider has in place to cover certain claims. A third form is a hybrid of the prior two, where liability is limited to the lesser of the amount paid for the service or the available insurance coverage.

Courts generally treat limitation of liability clauses as onerous provisions that must be specifically drawn to the attention of the other party. A reasonable, well-worded and prominent limitation of liability clause may stop a disgruntled party from even suing and if not, should limit the service provider's exposure.

## Scope of Services

Although it may seem like a basic point, service providers should precisely define what services are being offered. This will protect from claims that something more is deliverable to the customer after performance. This section of a contract may even state that certain additional services are *not* included, particularly where the "add on" service is an ancillary service that could be reasonably expected by the purchaser. Consider a basic example: a purchaser of

services for the development of a website may assume that the price paid includes the initial launch costs and hosting fees for the website, particularly where the developer also has those capabilities. If the inclusion of those ancillary services was not intended, the contract should indicate that they are excluded.

Similarly, contracts for services of an ongoing duration should clearly set out the length of the engagement, how the contract will expire and if applicable, the means by which either party may terminate or renew the relationship.

### Default and Curative Provisions

In order to minimize the risk of customers terminating a contract for alleged non-performance and then refusing to pay for services rendered, the service provider should include a clause requiring customers to provide notice of any complaints and a reasonable opportunity to cure the defect before the customer can terminate the contract.

### Guarantees and Warranties

Contracts should also be clear as to what guarantees or warranties, if any, are offered for the service provided. If none are offered, then they should be excluded by use of an “exclusion clause”. Businesses that offer services to individual consumers should also be aware of the application of Ontario's *Consumer Protection Act* (“CPA”), which imposes a basic guarantee, which may not be waived in writing, that the services be of a reasonably acceptable quality. The CPA also contains rules governing estimates, unfair practices and imposes additional rules on agreements for specific categories of services. Care should be taken to ensure that contractual provisions do not conflict with the CPA.

### Copyright

Providers of services which include the creation of original artistic works, such as written text, designs, artwork for promotional materials, photographs, sound, video and other media should consider what rights are being transferred to the purchaser. In Canada, copyright protection arises automatically upon creation of the work, regardless of whether the author includes the copyright symbol. Under a contract of service, the purchaser normally becomes the owner of the copyright. However, unless expressly waived in writing, the author of the work retains the right of attribution - to be identified as the author or to remain anonymous. Parties should ensure that what is intended is set out in the contract to avoid future ambiguity and disputes.

### Goals and Results

A simple but well-drafted service agreement will achieve a number of goals. First and foremost, it will convey a professionalism and attention to detail to the customer, helping strengthen new or growing business relationships. It will make it clear to customers what they should expect to receive and what obligations their service provider is or is not prepared to assume so that they can plan accordingly or seek to negotiate additional terms. In some cases, good contractual language may make a disgruntled customer think twice before commencing legal action. In the event of a lawsuit, a strong contractual defence will assist in achieving a more favourable

settlement earlier on in the litigation (thereby saving the time and expense of a trial) or will enhance the chances of success at trial.