# Five Surprising Clauses Discovered in Proposed Contracts

**It's true – what you don't know can hurt you. Closely reading the fine print and hyperlinks in contracts can reveal unacceptable clauses, terms, and risks. Here are some examples.**

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In-house counsel review hundreds of contracts each year for goods, services, off-site events, and just about anything else one can imagine. Flyspecking such documents can become tedious, leading to the understandable urge to just give the agreement a quick "once over" and move on.

When that urge to read superficially arises, experience teaches the importance of fortitude. It is a mistake to assume that if you've seen one series of boilerplate terms, you've seen them all. On the contrary, we have been surprised by what close reading reveals.

We started keeping track of some of the more surprising terms we found and share them now to alert you that what you don't read *can* hurt you.

## Clause 1 – Damage to Rented Venue

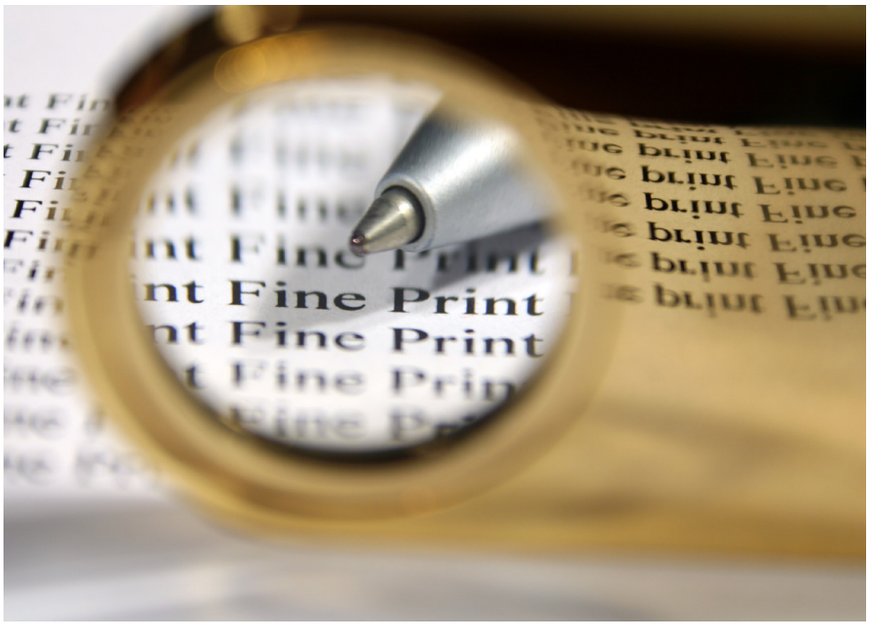
*In the event of an accident at my venue, you not only will pay for my damages, you also will reimburse me for the cost of my increased insurance premiums.*

No one is surprised to see a venue contract that requires the renting party to pay for damage done to the venue by the attendees. Indeed, we carry liability insurance for just such an occasion. We did not expect, however, to discover contract language also requiring us to pay for any additional premium costs in the future for *the venue's* insurance policy.

Here is the language making us the guarantor of future insurance premium increases:

"**Liability Insurance.** Lessee shall not do or permit to be done anything in or upon any portion of the premises or bring or keep anything therein or there upon which shall in any way conflict with the conditions of any insurance policy upon the building or property therein, or in any way increase any rate of insurance upon the building or property therein, and if any insurance rate shall be increased as aforesaid the Lessee shall forthwith on demand pay to the Center the amount by which the insurance premiums shall be so increased."

Thus, if we had signed the vendor's proposal containing the above-quoted Liability Insurance clause, and some incident occurred during our event that resulted in any unspecified increase in the lessor's property insurance premiums, the facility might have asserted we had the contractual obligation to pay such increase in the lessor's insurance premiums – in an unlimited amount for an unlimited time. We did not concur with this clause.



## Clause 2 – Exclusion in Indemnity Clause from Duty to Defend

*In the event of an accident on your property – due to my employee's fault – you will hold me harmless and also pay for all my damages.*

Indemnification clauses, and even mutual indemnification clauses, commonly appear in contracts. Each party agrees to stand behind its own conduct, protecting the other from costs arising from the negligent party's actions.

One wrinkle to watch for is an exclusion in the indemnity clause from the duty to defend. Because defense costs can be as material as the potential damages, be careful to look for such an exclusion from the other side's indemnity duties.

But the prize-winning indemnification clause we came upon was not only not mutual, it put the burden on us to cover both all damages we suffered from our vendor's negligence, and the damage suffered by the negligent vendor:

"**Indemnification.** To the fullest extent permissible by law, buyer shall indemnify, hold harmless and defend seller and its affiliates and their respective present or future affiliates and their respective present or future employees, officers, directors, shareholders, insurers, agents and representatives (collectively 'Indemnified Parties') from all claims, liabilities, damages, death (including, without limitation, death of seller's employees). Suits, proceedings, costs and expenses (including, without limitation, reasonable attorney's fees), fines, and penalties (collectively 'Losses'). In connection with this Agreement, regardless of cause ('Buyer's Indemnification Obligation'), to the fullest extent permissible by law, Buyer's Indemnification Obligation applies even if the Losses are the result or alleged result of the negligence, active or otherwise, of the Indemnified Parties."

Thus, to imagine an extreme case (which we should), were we to have signed the vendor's order form containing the above one-way-only indemnification clause, and the vendor's delivery driver then caused an accident killing both himself and one of our employees, we might have had the contractual obligation to pay: 1) the negligent vendor's cost of defending any resulting lawsuits, together with 2) any liability for damages to the accident victims – that is, not only our employee, but also the injuries to the vendor's negligent delivery driver. Again, we cannot take on that scope of responsibility.

The example above of a unilateral indemnification clause is egregiously unreasonable, but we found this very example. Thus, when reviewing and negotiating vendor contracts, it's important to ensure that *both* parties are held accountable for damages resulting from their own fault (that is, ordinary negligence). That is why our Terms & Conditions require vendors to carry adequate insurance (which is a requisite cost of doing business as a vendor) rather than allowing the vendor to transfer such risk to us.

## Clause 3 – Indemnity Clause Limiting Vendor's Liability for Damages

*If I cause an accident, I will cover your damages – but only up to the value of the goods I sold you.*

Continuing with the theme of problematic indemnity clauses, some vendors will offer indemnity with one hand while effectively taking it away with the other. For example, this clause came across our desk from a vendor whose business is the collection and disposal of hazardous waste, which limited the vendor's liability for damages it caused to the amount payable under the contract:

"**Limitation of Liability.** Should there arise any liability on the part of [vendor] for personal and/or property damage arising out of the use or installation of the [biological hazardous waste



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collection] system, and general, direct, incidental, exemplary, punitive and/or consequential damages, irrespective of cause, such liability shall be limited to the amount of fees payable to [vendor] under the parties' agreement, and this liability shall be exclusive."

Thus, if we had signed the vendor's proposal containing the above Limitation of Liability clause that capped damages at the contract cost, and if the vendor then caused significant personal injury or property damage in collecting and disposing of hazardous waste (an inherently risky commercial activity), we would only be entitled to damages not to exceed the fees payable under the parties' contract (in this case, a one-year contract renewable at $13,000 per annum).

In any event, our requirement that vendors accept liability for the direct damages they cause (as opposed to the more extensive incidental, special, punitive, or consequential damages) is reasonable if not generous, and any attempt by a vendor unreasonably to cap its liability for the direct damages caused by its own fault should be resisted, especially for vendor contracts that involve more than nominal risk.

The risk of inadvertently causing direct damages is inherent to all vendors' businesses, which is why adequate insurance coverage is a normal cost of doing business. Transferring all risk to the buyer (as opposed to the vendor's insurer) is not commercially reasonable and should not be accepted.

## Clause 4 – Clauses Granting Vendors Rights to Use Customer Trademarks

*If you buy our goods, you agree to join our public relations department.*

Because our trademarks have value, some vendors will include clauses granting themselves rights to use our marks:

"**Publicity.** Customer consents to [vendor] using Customer's trading name, trademarks and logos as a reference for marketing or promotional purposes on [vendor's] website, in presentations and in public and private communications with [vendor's] existing or prospective customers."

As you would expect, we struck this clause. We cannot give our brand value away for free, nor can we endorse products or services without extreme care.

A more stunning clause we found – in a hyperlink – would have committed our senior leaders to serve as the vendor's spokesperson:

"**Marketing.** Customer will (i) participate in press releases, blog posts and social media posts [vendor] seeks to issue to the media and the general public; (ii) make an executive level spokesperson (at VP level or above) available (a) for interviews with business reporters or analysts, either in person or via phone (as mutually agreed by both Parties) to drive media coverage or (b) to speak or demonstrate technology solutions at [vendor] events; and (iii) participate in the creation of a written story and/or video with executive quotes to be shared in marketing collateral to the media, influencers and other third parties."

It was good we checked the hyperlinks and struck this clause.

## Clause 5 – Competing Terms and Conditions in Hyperlinks

*What we agree to in the purchase order we take away in our hyperlinked terms and conditions.*

It has become increasingly common for vendor contracts (including seemingly brief or formulaic quotes, proposals, statements of work, and so on) to include competing terms and conditions in the form of hyperlinks. Such terms and conditions (sometimes referred to as "Terms of Use" or "Terms of Service") can be quite extensive, and sometimes quite surprising (as if the vendor may be anticipating that the buyer won't bother to read through the hyperlinked Terms of Use or Terms of Service).

For example, the following notice granting extraordinary power to the seller to negate our deal appeared in the hyperlinked Terms of Service in a three-year proposal submitted by a software application vendor:

**Notice.** "We may, at any time, in our sole discretion, (i) modify the Services, (ii) eliminate or discontinue any of the Services, (iii) terminate your access to the Services, without prior notice or liability, and (iv) decline access to the Services to any person for any reason."

The inherent problem is that vendor contracts that contain hyperlinked competing terms and conditions are not, by their very nature, static – even after the parties sign the hardcopy vendor contract – meaning the buyer's rights and obligations may unknowingly change *even after the parties have a fully executed vendor contract.*

Some vendors who insist on the need to change their hyperlinked terms and conditions during the term of the contract at issue will include notices to the following effect in their hyperlinked terms and conditions:

**Notice.** "We may revise and update these Terms of Use from time to time in our sole discretion. All changes are effective immediately when we post them, and apply to all access to and use of the [Service/Product] thereafter. Your continued use of the [Services/Product] following the posting of revised Terms of Use means that you accept and agree to the changes. You are expected to check this webpage from time to time so you are aware of any changes, as they are binding on you."

Expecting a buyer to monitor continuously all its vendors' hyperlinked terms and conditions to discover whether such vendors have made unacceptable changes is not commercially reasonable. There are a few potential means of resolving the hyperlinked competing terms and conditions conundrum:

1) Strike any reference to hyperlinked terms and conditions, explaining that the buyer cannot agree to dynamic terms that likely conflict with our terms and conditions;

2) Print a hard copy of the hyperlinked terms and conditions, mark the hard copy with the URL from which it was downloaded along with the date it was downloaded, and then edit appropriately for inclusion as an exhibit to the vendor contract with all hyperlinks stricken; or

3) Edit the vendor contract with language requiring the seller to give advance, actual notice to the buyer.

**Example.** "Vendor will provide buyer with thirty (30) days advance written notice prior to any change to the terms and conditions of this Agreement. If, in buyer's sole discretion, buyer deems such change to be materially adverse to its interests, buyer will have the right to terminate this Agreement without any penalty and will be entitled to the immediate pro rata return of any pre-paid fees."

## Conclusion

We hope the above examples will encourage continued close reading of the fine print and clicking through any embedded hyperlinks. At least until AI tools can catch clauses like those noted above, what you don't read can hurt you. **WL**