

Computer Law News

A Publication of the Minnesota State Bar Association Computer Law Section

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REPORT FROM THE CHAIR

by Katheryn A. Andresen

• *Bonnabeau, Salyers, Stites & Doe, LLC*



Thank you for participating in this year's various section events, including the noon-time CLEs, the membership drive events at each of the Twin Cities area law schools, and even the council forms and ballots for this year's elections. Members are always welcome to join us at our regularly scheduled Council meetings held on the second Tuesday of September – April, as well as the Annual Meeting in May. The meeting format this year was a half-hour council meeting followed by a speaker. Please feel free to contact me or anyone on the council if you have any comments or suggestions on how we can improve the section to meet your needs.

The new Chair and the rest of the Executive Committee along with all Council members will be elected during our annual meeting to be held on Thursday, May 26, 2005. The meeting will be at the Town & Country Club, 300 Mississippi River Blvd N., St. Paul (St. Paul side of Lake Street Bridge). Happy hour socializing will start at 4:30, there will be a brief meeting for the elections at 5:00 and the speaker should start his presentation at 5:30. The section will apply for CLE credit. Food and drinks will be provided.

It has been a pleasure serving as Chair of the section this year. Congratulations and Good Luck to next year's Chair, Executive Committee, and Council Members.

2005 SCHEDULE OF EVENTS

Thurs., May 26	Annual Meeting	Town & Country Club 300 Mississippi River Blvd N., St. Paul
Summer Recess		
Tues., Sept. 13	Section Meeting	11:30 at MSBA HQ, City Center
Thurs., Oct. 6	Computer Law Institute	Minnesota CLE, City Center
Tues., Oct. 11	Section Meeting	11:30 at MSBA HQ, City Center
Tues., Nov. 8	Section Meeting	11:30 at MSBA HQ, City Center

EDITOR'S REPORT

by Damien A. Riehl

The Newsletter continues to have the good fortune of obtaining timely articles and relevant caselaw updates. If you would like to contribute an article or case that may be of interest to our members, please let me know at Damien_Riehl@mnd.uscourts.gov. And also please contact us if you have any suggestions on how we can make this publication address your needs more



fully. We look forward to a great year, including another informative Computer Law Institute, informative CLEs, and enlightening meetings.

TREASURER'S REPORT by Kari J. Wangenstein • *Best Buy*

The Computer law Section operates on a fiscal calendar from July 1 to June 30 and continues to be financially sound. The beginning year balance was \$4,891.27 which doubled with this year's membership dues of \$4,984.50. The balance as of February 28, 2005 was \$6,922.77. The Council approved a \$1000 budget for the Annual Meeting.

MEMBERSHIP COMMITTEE REPORT

The membership committee has helped the section participate in at least three student outreach events recently. In January, Carolyn Sandberg represented the Computer Law section at a Hamline Law School career event.

On February 5, Carolyn Sandberg represented the Computer Law Section at Hamline University School of Law in an event to discuss careers in the law, featuring a panel of attorneys from different types and legal practices. The event gave the approximately 90 students in attendance a chance to ask about different types of practices in terms of size, location, setting, and practice areas.

Kate Andresen and Steven Lieske represented the section at an event held on February 17th at the State Bar Association offices for students at all four of the local law schools. It was a very successful event with 70-100 students attending.

On March 31, Steve Buckingham, Charlie Johnson, Chris Hilberg, and Steven Lieske participated in a meeting at the Hamline Law School that was co-sponsored by the Computer Law Section and Hamline's SIPLA group. The meeting enabled 12 students to spend 2 hours with the section members over lunch to informally discuss careers in computer law.

COMPUTER LAW SECTION ANNUAL MEETING NOTICE

Thursday, May 26

Town & Country Club

300 Mississippi River Blvd. North,
Saint Paul, MN (NE corner of Lake Street Bridge)

4:30 – Social networking

5:00 – Annual Meeting and election of Officers and Council

5:30 – CLE: "E-Discovery Implications in the 21st Century: Perspectives from the Microsoft Antitrust Cases" by Michael E. Jacobs, *Zelle, Hofmann, Voelbel, Mason & Gette LLP*. (1.0 hour Standard CLE credit to be applied for)

CASE LAW UPDATE
by Christopher Hilberg
• *Dorsey & Whitney LLP*

Coca-Cola Co. v. Purdy,
[D. Minn., 1/28/05]

William Purdy registered over 60 domain names that incorporated the trademarks Coca-Cola, McDonald's, Pepsi, and The Washington Post. The sites, with domain names such as <drinkcoke.org> and <mymcdonalds.com>, featured pictures that purported to be dismembered, aborted fetuses along with links to fund-raising appeals. In an earlier stage of the case, the Eighth Circuit concluded that Purdy's use of the domain names violated the Anticybersquatting Consumer Protection Act. It affirmed the lower court's entry of a preliminary injunction for the ACPA violation.



Here, the district court took up the issue of whether Purdy's use of the domain names violated the Lanham Act by infringing the trademarks on which they were based. In examining the first and second of the six likelihood of confusion factors used in the Eighth Circuit, the court concluded that the marks are strong and famous, and Purdy's domain names are identical to them. Although the parties do not offer competitive goods and services, the court determined the third factor is met because "Defendants intended to redirect Plaintiffs' audience and customers to view content of their choosing." The court concluded that the fourth factor, whether the alleged infringer intended to pass off its goods as those of the mark owner, is also met because Purdy registered the domain names with a bad faith intent to harness the goodwill of those marks to promote his own messages and causes. In support of the fifth factor, evidence of actual confusion, the trademark owners cited two examples. One was a Coca-Cola customer who contacted the company to complain about the images on Purdy's site and vowed never to drink the cola again. Another was an e-mail intended for an employee of Washingtonpost. Newsweek Interactive Co. ("WNIC") that was accidentally sent to <wpni.org>, one of Purdy's Websites.

Finally, the court considered the sixth factor, whether the degree of purchaser care can eliminate any likelihood of confusion that would otherwise exist between the products. Agreeing with the court in *Brookfield Communications Inc. v. West Coast Entertainment Corp.*, 147 F.3d 1036 (9th Cir. 1999), the district court observed, "Several courts have noted that quick and effortless nature of 'surfing' the Internet makes it unlikely that consumers can avoid confusion through the exercise of due care." The court entered summary judgment for the trademark owners on their trademark infringement claims. The claims for common law trademark infringement, false representation, and deceptive trade practices were denied because the plaintiffs provided only "cursory discussion" of those counts and failed to sufficiently develop them.

Agfa Monotype Corp. v. Adobe Sys., Inc.
[N.D. Ill., 1/13/05]

A U.S. District Court for the Northern District of Illinois ruled that, under the DMCA, data embedded in an electronic document in PDF format specifying how copyrighted typefaces accompanying the document may be used are not effective measures to control access to or use of the typefaces that were circumvented by a version of Adobe Acrobat.

Plaintiff Agfa Monotype Corp. develops software that permits computer users to make use of copyrighted TrueType typefaces in electronic documents. TrueType is a format for such electronically encoded fonts that can be used by programs and is defined by a publicly available standard. Defendant's Adobe Acrobat allows users to view documents in "portable electronic document," or PDF, which allows the receiver of an electronic document to view that document in exactly the same form as the creator saw when creating the document. The TrueType typeface is embedded in the document, so that the receiver may view the document in that typeface, even if he does not own the typeface. When triggered, the embedded typeface data is temporarily transferred to the user's computer. The software decides whether to embed a typeface within a document by accessing the "embedding bits," which is a small amount of data that is part of the typeface software itself. The embedding bits indicate whether the typeface owner authorizes embedding of the typeface and indicates the level of use that is authorized. Adobe Acrobat reads these embedding bits and activates features for the computer user accordingly.

A PDF document may also include "forms fields," or blanks, for the receiver to fill in and return. In 2001, Adobe created and distributed version 5.0 of the Acrobat program. This version included the "Any Font Feature," which allowed the receiver to fill in forms in a PDF document using an embedded typeface, including Plaintiff's, even if the embedding bits indicated that the typeface was authorized for "print and preview" only, not "editable." Agfa brought suit against Adobe, claiming that the Any Font Feature violated the anticircumvention provisions of the DMCA. Agfa moved for summary judgment.

Denying a motion for summary judgment, the court rejected the plaintiff's claim that the 2001 version of the Acrobat violated the DMCA's anticircumvention provisions by allowing recipients of PDF documents to fill in the text boxes of PDF forms they had received using the typeface specified by the creator of the document. The court concluded that the Plaintiff had failed to demonstrate that, as required by Section 1201, Acrobat was designed primarily for the purpose of circumventing a technological control related to use of the typefaces. The court emphasized that the purpose of the software was to allow a sender to create a document that when accessed by the recipient would appear identical to the sender's version.

Sutter Ins. Co. v. Applied Sys. Inc.,
[CA7, 12/28/04]

Parties dispute interpretation of a software development agreement that called for a sizeable payment for the "base" application and much smaller fees for each "line of business" application. Software developer Applied delivered the first line of business application to Sutter, which generally worked as promised. Only then did Sutter realize that Applied lacked the technical expertise to adapt its billing software for Sutter's other lines of business. Sutter revoked the contract and sued for breach, pointing to language in which Allied represented that its software would conform to Sutter's billing needs. Allied argued that Sutter got what it contracted for: the agreement only referenced one line-of-business application, and Applied delivered that one in good working order. Payment of the base fee did not hinge on the delivery of any further programs. District Court rejected Sutter's claims.

Judge Posner determined that the agreement supports the inference that the licensor committed itself to creating multiple applications and not just the first one that sparked the contract. Though the software developer did honor its commitment as to the one and only line of business application cited in the contract, the developer's inability to deliver on further line of business applications may constitute a breach of contract. Specifically, Posner reached this conclusion based largely on the pricing scheme of the contract, which called for a \$300,000 base system fee and \$35,000 for each "line of business" application. Although Sutter had 28 lines of business and only one of them was mentioned in a schedule to the

agreement, Posner asserts that it would not be commercially reasonable for a sophisticated company to spend over \$350,000 on software that would service only its smallest line of business. More likely, Posner reasoned, the two-part pricing structure was used to prod Sutter to commission other work for its other lines of business so that it could spread out the fixed base fee over multiple lines and thus reduce the average cost of billing insurance premiums. That strategy invites the implication that Allied could deliver on those other applications. Posner concluded, "These considerations support an inference that Applied was committing itself to adapt [its software] to all of Sutter's lines ..."

Vacated and remanded.

NTP Inc. v. Research In Motion Ltd.,
[CAFC, 12/14/04]

NTP is the owner of patents directed toward an "electronic mail system with RF communications to mobile processors." (e.g., U.S. Patent No. 5,436,960). NTP sued RIM, maker of the BlackBerry for patent infringement. The district court granted summary judgment to NTP on several patent claims finding that the BlackBerry infringed some of the claims. The remaining claims were decided by the jury, which also found in favor of NTP and awarded damages to in the amount of approximately \$23 million, which the court increased.

The Federal Circuit reviewed and found that the language of 35 U.S.C. § 271(a) does not preclude a finding of infringement of the accused system as used "within the United States," even though a component of system is physically located abroad. The court reasoned that § 271(a) applies to a wireless e-mail transmission system alleged to infringe patents in suit, even though the system employs "relay" component located in Canada, since all other components of system are located in United States, and since control and beneficial use of accused system occur in United States.

New York State Bar Ass'n Comm. on Professional Ethics,
[Op. 782, 12/8/04]

The Committee on Professional Ethics for the NYSBA stated that attorneys must exercise reasonable care to prevent the disclosure of clients' confidences and secrets contained in hidden "metadata" in electronic documents sent to opposing counsel or other third parties. The level of care varies with the particular circumstances, the committee said, including what the document is about and who it's going to.

The ethics committee noted that commonly used word-processing software permits recipients of electronically transmitted documents to view "metadata," which is hidden information generated during the course of creating and editing the documents. Metadata may reveal who worked on a document, the name of the organization that created or worked on it, information about prior versions of the document, recent revisions, and comments inserted in the document during drafting or editing. The hidden text may reflect editorial comments, strategy considerations, legal issues raised by the client or the lawyer, or legal advice provided by the lawyer. Accordingly, such information may reveal a client confidence or secret.

The committee observed New York's Code of Professional Responsibility prohibits lawyers from "knowingly" revealing a client confidence or secret, except in limited circumstances, and requires that a lawyer use reasonable care to prevent employees, associates, and others whose services the lawyer uses from disclosing the confidences and secrets of one client to another. Rule 1.6 of Minnesota Rules of Professional Conduct requires the same.

The committee did not go so far as to say that a lawyer has an affirmative duty to remove metadata whenever documents are exchanged with opposing counsel or disclosed to the public. Rather, the committee merely noted, "While exercising reasonable care under DR 4-101 may, in certain circumstances, require the lawyer to remove metadata (for example,

where the lawyer knows that the metadata reflects client confidences and secrets, or that the document is being sent to an aggressive and technologically savvy adversary), in general the level of care required varies with the particular circumstances of the transmission," the opinion states.

Storage Tech. Corp. v. Cisco Sys. Inc.,
[CA8 1/26/05]

Storage Technology Corp. sought \$450 million in damages from Cisco for, inter alia, interference with contractual relations and inducement to breach employment contract. Several former Storage Tech engineers joined a startup company, NuSpeed, which was subsequently acquired by Cisco Systems in a stock-for-stock transaction. Storage Tech based its damages on the price that Cisco paid for the NuSpeed, alleging that the former Storage Tech employees had gained knowledge at Storage Tech which they used at NuSpeed. The court observed that damages based on the former employees' financial gain are generally permitted under Minnesota law. However, here Storage Tech made no effort to parse out how much of the purchase price was attributable to the contributions of the ex-employees as opposed to other factors. Cisco's testimony indicated that it purchased NuSpeed Internet Systems Inc. because it was the first-to-market with a promising new technology. The Eighth Circuit ruled that the former employer's claim for inducement to breach employment contract against the purchaser of a company founded by ex-employees also fails as a matter of law where damages are based solely on the total purchase price of the new company.

The total purchase price is too speculative a yardstick to use where, as here, other factors beyond the contributions of the ex-employees determined the overall price paid for the company, the court ruled in affirming the grant of summary judgment in favor of the defendant, Cisco Systems Inc. Because Storage Tech did not account for this and other factors, such as the contributions of NuSpeed employees who had no affiliation with Storage Tech, damages based on the acquisition price of the company were too speculative.

SCO Group Inc. v. IBM Corp.,
[D.Utah, 1/18/05]

The District of Utah ruled that IBM must provide to the SCO Group all versions and changes to its homegrown, Unix-based operating systems because that code is "clearly relevant" to SCO's breach of license claim.

United States v. Carlson,
[E.D.Pa.1/6/04]

A jury convicted a Allan Eric Carlson of fraud for hacking into computers to launch spam that flooded sportswriters' e-mail accounts with messages critical of the Phillies baseball team. Carlson falsified the return addresses of the e-mails, most often using e-mail addresses of the Philadelphia Phillies organization and sportswriters employed by Philadelphia Newspapers Inc. Defendant was found guilty of 52 counts of computer fraud and 27 counts of identity fraud.

The case is likely the first in which an identity fraud statute was used against an e-mail spammer. The CAN-SPAM Act was not in effect at the time Carlson's activities occurred, but would probably not have applied anyhow because there was no commercial motive.

THE PITFALLS OF INDEMNIFICATION CLAUSES

- Paula Duggan Vraa, *Rider Bennett Egan & Arundel LLP*
- Joseph P. Beckman, *DR Contract Administration Group*
- Kathryn A. Andresen, *Bonnabeau, Salyers, Stite & Doe LLC*
- Daniel S. Kleinberger, *William Mitchell College of Law*
- Christina L. Kunz, *William Mitchell College of Law*

Insurance Contracts and Indemnity Contracts

Insurance contracts are often referred to as “contracts of indemnity”. There is an abundance of case law interpreting insurance contracts that provides a useful source for predicting how a court may interpret an indemnity agreement between two parties. In many cases, courts have borrowed from case law interpreting insurance contracts to provide a useful framework for interpreting indemnity agreements. Some of these concepts are discussed below.

Yet in several respects, insurance contracts are very different from indemnity agreements. While an insurance contract is written by an insurance company whose primary business is to assume specific risks of loss in consideration of a premium, an indemnity agreement is usually set up as a risk-sharing agreement between two contracting parties where indemnification is provided ancillary to and in furtherance of some other independent transactional relationship between the parties.¹ Because of this, insurance concepts will not always govern indemnity agreements. For example, in an insurance contract, any ambiguity regarding the terms of the insurance contract is resolved in favor of the insured.² In contrast, outside the insurance context, courts generally apply traditional contract principles when construing indemnity agreements.³ Indemnity agreements are generally strictly construed if they attempt to shift causal fault from one party to another.⁴ Generally, courts construe ambiguities in such agreements against the party who drafted the contract and the indemnitee.⁵

¹ See generally *Stickovich v. City of Cleveland*, 757 N.E.2d 50, 62 (Ohio Ct. App. 2001); *Dietz-Britton v. Smythe Cramer Co.*, 743 N.E.2d 960, 973 (Ohio Ct. App. 2001) (explaining difference between insurance contracts and risk-shifting agreements that are not insurance contracts).

² *Reinsurance Ass'n of Minn. v. Timmer*, 641 N.W.2d 302 (Minn. Ct. App. 2002); *Griffin v. Shelter Mut. Ins. Co.*, 18 S.W.3d 195, 199-200 (Tenn. 2000); *Fryman v. Pilot Life Ins. Co.*, 704 S.W.2d 205, 206 (Ky. 1986); *Ramsay v. Md. Am. Gen. Ins. Co.*, 533 S.W.2d 344 (Tex. 1976).

³ *United States v. Seckinger*, 397 U.S. 203 (1970); *Martin & Pitz Assocs., Inc. v. Hudson Constr. Servs., Inc.*, 602 N.W.2d 805 (Iowa 1999); *Cozzi v. Owens Corning Fiber Glass Corp.*, 164 A.2d 69 (N.J. Super. Ct. App. Div. 1960) (applying general contract principles).

⁴ *Smith v. Tenneco Oil Co.*, 803 F.2d 1386 (5th Cir. 1986); *Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 548 N.E.2d 903, 905 (N.Y. 1989); *Fretwell v. Protection Alarm Co.*, 764 P.2d 149 (Okla. 1988); *Lewis v. Dunn Leasing Corp.*, 244 S.E.2d 706, 709 (N.C. Ct. App. 1978). But see *Applied Indus. Materials Corp. v. Mallinckrodt, Inc.*, 102 F. Supp. 2d 934 (N.D. Ill. 2000) (holding that the Illinois Supreme Court would not likely mandate strict construction of all indemnity agreements).

⁵ See *Topp Copy Prods., Inc. v. Singletary*, 626 A.2d 98, 99 (Pa. 1993) (ambiguities must be construed against indemnitee); *Batson-Cook Co. v. Ga. Marble Setting Co.*, 144 S.E.2d 547 (Ga. Ct. App. 1965).

The Duty to Defend

1. Insurance Contracts

In most insurance contracts, the insurer agrees to (1) indemnify or pay certain covered losses for which the policyholder is responsible and (2) defend the policyholder from lawsuits for which the policy provides coverage through retaining and compensating an attorney. These dual obligations are commonly referred to as the "duty to indemnify" and the "duty to defend". The duty to defend and the duty to indemnify are separate obligations. Both of these duties rest on contract. The duty to defend is distinct from and broader than the duty to indemnify.⁶ Thus, even though the underlying action produces a result that does not trigger a duty to indemnify under an insurance policy, the insured still may have a duty to defend.⁷

As a general rule, the obligation to defend is generally determined by comparing the complaint with the terms of the policy language.⁸ This applies even where the allegations of a complaint are groundless or frivolous.⁹ If any part of the lawsuit is arguably within the scope of coverage, the insurer must defend the lawsuit.¹⁰ If any claim is arguably covered, the insurer must provide a defense against all claims. Some liability policies do not provide a duty to defend. Others provide that the insurer will reimburse the policyholder for legal fees incurred in defending an action covered by the policy.

2. Indemnity Contracts

Similar principles would likely guide the interpretation of an indemnity agreement. If the indemnitor undertakes a "duty to defend", then the indemnitor would be expected to defend the indemnitee against the claim through appointment of an attorney or reimbursement of defense costs. In contrast, if the indemnitor has only agreed to indemnify (and not specifically agreed to undertake defense of the indemnitee), the obligation to indemnify would arise only when the indemnitee sustains an actual loss.¹¹ This means that the indemnitee must make payment on an underlying claim, judgment or settlement to trigger the indemnitor's duty to reimburse the indemnitee. If the indemnification agreement provides for indemnification against liability, the indemnitor's obligations arise as soon as liability is fixed.¹²

⁶ *Erie Ins. Exch. v. Muff*, 851 A.2d 919, 925-26 (Pa. Super. Ct. 2004); *Heda Mining Co. v. N.H. Ins. Co.*, 811 P.2d 1083, 1089 (Colo. 1991); *Brown v. State Auto. & Cas. Underwriters*, 293 N.W.2d 822, 825 (Minn. 1980).

⁷ See, e.g., *Kirk v. Mt. Airy Ins. Co.*, 951 P.2d 1124 (Wash. 1998); *Mains v. State Auto. Mut. Ins. Co.*, 698 N.E.2d 488, 491 (Ohio Ct. App. 1997); *Boston Ins. Co. v. Maddux Well Serv.*, 459 P.2d 777 (Wyo. 1967).

⁸ *Am. Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842 (Tex. 1994); *Garvis v. Employers Mut. Cas. Co.*, 497 N.W.2d 254, 256 (Minn. 1993); *Am. Nat'l Prop. & Cas. Co. v. Gray*, 803 S.W.2d 693 (Tenn. Ct. App. 1990).

⁹ *Krevolin v. Dimmick*, 467 A.2d 948 (Conn. Super. Ct. 1983); *Hodges v. State Farm Mut. Auto Ins. Co.*, 488 F. Supp. 1057 (D.S.C. 1980); *Chipokas v. Travelers Indem. Co.*, 267 N.W.2d 393 (Iowa 1978).

¹⁰ *Ohio Cas. Ins. Co. v. Clark*, 583 N.W.2d 377 (N.D. 1998); *Auto-Owners Ins. Co. v. City of Clare*, 521 N.W.2d 480 (Mich. 1994); *White Mountain Cable Constr. Co. v. Transamerica Ins. Co.*, 631 A.2d 907 (N.H. 1993).

¹¹ *Larson Mach., Inc. v. Wallace*, 600 S.W.2d 1 (Ark. 1980) (stating indemnitee must show actual loss by payment or satisfaction of judgment or by other payment under compulsion); *F. J. Schindler Equip. Co. v. Raymond Co.*, 418 A.2d 533 (Pa. Super. Ct. 1980) (holding indemnitee must pay damages to third party).

¹² See *Trim v. Clark Equip. Co.*, 274 N.W.2d 33 (Mich. Ct. App. 1978) (noting indemnitee need only show potential liability to injured parties and that settlement is reasonable); *Williams v. Johnston*, 442 P.2d 178 (Idaho 1968) (right to indemnification arises when liability to third party is established).

Notice of a Claim

3. Insurance Contracts

In an insurance context, a policyholder must "tender the defense" to the insurer. Generally, the policyholder need only give notice of the lawsuit to the insurer and an opportunity to defend.¹³ Once notice is given, the insurer may have the responsibility to contact the insured to determine whether the assistance of the insurer is needed.¹⁴ Without a proper tender, the duty to defend is not invoked and the insurer cannot be responsible for defense costs incurred by the policyholder.¹⁵ To ensure it is proper, the tender of defense should be in writing, attach the claim or lawsuit, and ask the insurer to defend the claim or lawsuit.

Policy provisions that impose a duty to defend on the insurer also have the effect of giving the insurer exclusive control over the litigation.¹⁶ Even where an insurer does not have a duty to defend, the insured should provide the insurer with notice of the claim because the duty to indemnify is usually conditioned on the right to control litigation.¹⁷

4. Indemnity Contracts

In an indemnity context, unless an indemnity agreement contains a specific provision to the contrary, an indemnitee may not be required to give the indemnitor notice of claims against the indemnitee.¹⁸ If, however, the parties contractually established that proper notice was a condition precedent to liability under an indemnification provision, an indemnitee's failure to give notice to the indemnitor may bar the indemnitee's claim.¹⁹

¹³ *Home Ins. Co. v. Nat'l Union Fire Ins. of Pittsburgh*, 658 N.W.2d 522, 532-33 (Minn. 2003); *Towne Realty, Inc. v. Zurich Ins. Co.*, 548 N.W.2d 64 (Wis. 1996) (insert parenthetical); *White Mountain Cable Constr. Co. v. Transamerica Ins. Co.*, 631 A.2d 907 (N.H. 1993) (holding that tender was sufficient where insurer had notice of complaint within six months of its filing).

¹⁴ *Home Ins. Co.*, 658 N.W.2d at 533-34.

¹⁵ See *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 739 (Minn. 1997) (policyholder generally cannot recover costs of defense before tender of the claim).

¹⁶ *Am. Ins. Group v. Risk Enter. Mgmt., Ltd.*, 761 A.2d 826, 829 (Del. 2000); *Safeco Ins. Co. v. Ellinghouse*, 725 P.2d 217, 226 (Mont. 1986). Even where the insurer does not have a duty to defend, some policy provisions may give the insurer a right to defend. Under those circumstances, the insured must give notice to the insurer because the insurer has the right and must be given the opportunity to control potential litigation. See, e.g., *Ohio Cas. Ins. Co. v. Carman Cartage Co.*, 636 N.W.2d 862 (Neb. 2001).

¹⁷ See *M&M Elec., Inc. v. Commercial Union Ins. Co.*, 670 N.Y.S.2d 909 (N.Y. App. Div. 1998) (noting insurer's ability to pay is normally coupled with the insurer's right to control the defense of its insured to protect its financial interests) (citing 7C John Appleman, *Insurance Law and Practice* § 4681).

¹⁸ *ELRAC, Inc. v. Cruz*, 699 N.Y.S.2d 647 (N.Y. Civ. Ct. 1999). But see *Rothey v. Walker Bank & Trust Co.*, 754 P.2d 1222 (Utah 1988) (noting that while notice is not generally necessary to invoke the indemnitor's liability, rules of estoppel may apply); *Morris v. Schlumberger, Ltd.*, 445 So. 2d 1242 (La. Ct. App. 1984) (equitable principles of equity apply where contract is silent on issues of tender and notification).

¹⁹ *Am. Home Assur. Co. v. Int'l Ins. Co.*, 684 N.E.2d 14, 16 (N.Y. 1997) (stating absent a valid excuse, a failure to satisfy notice requirement vitiates the policy); *McLin v. Leigh*, 598 N.E.2d 731 (Ohio Ct. App. 1991). But see *Alcazar v. Hayes*, 982 S.W.2d 845, 850 (Tenn. 1998) (noting modern trend considers whether the insurer has been prejudiced by untimely notice).

Settlement

5. Insurance Contracts

In an insurance context, the insurer generally retains the right to control settlement through its policy provisions. But if the insurer unjustifiably refuses to defend or otherwise disputes the existence of insurance coverage, the insured may make a reasonable settlement without losing its right to recover from the insurer under the policy.²⁰ Under those circumstances, some jurisdictions provide that the policyholder may have the right to enter into a stipulated judgment in which the policyholder acknowledges that there is a potential that judgment may be entered against him and stipulates to entry of judgment for a specific amount.²¹ Judgment is entered on that amount, and the injured claimant agrees not to execute judgment and allows the claimant to proceed in an action against the insurer. If an insurer is defending under a reservation of rights, the insurer generally is entitled to notice before the agreement is completed.²² If an insurer has made an outright denial of coverage, the insurer may not be entitled to notice.²³

6. Indemnity Contracts

In an indemnity context, the rules are similar. If the indemnitor has accepted its indemnity obligations, the indemnitor would control settlement. If the indemnitor has denied its obligations or failed to approve settlement of the claim, the indemnitee generally has the right to enter into a reasonable settlement without consultation with the indemnitor.²⁴ This holds true even where the indemnity agreement provides that the indemnitor cannot consummate a settlement without the indemnitor's consent.²⁵ In general, however, the indemnitee owes a duty of good faith to its indemnitor. Any act by the indemnitee that prejudices the indemnitor's rights will release the indemnitor's obligations to the extent of the prejudice.²⁶

Indemnification Clause Bank: Sample 1

ARTICLE VII. LIMITATION OF LIABILITY

7.1 **REMEDY EXCLUSIONS.** NEITHER PARTY SHALL BE LIABLE TO THE OTHER PURSUANT TO THIS AGREEMENT FOR ANY AMOUNTS REPRESENTING LOSS OF PROFIT, LOSS OF BUSINESS OR OTHER INDIRECT, CONSEQUENTIAL, EXEMPLARY, OR PUNITIVE DAMAGES OF THE OTHER PARTY.

²⁰ *Henning v. Cont'l Cas. Co.*, 254 F.3d 1291 (11th Cir. 2001); *Sanderson v. Ohio Edison Co.*, 635 N.E.2d 19 (Ohio 1994); *Nixon v. Liberty Mut. Ins. Co.*, 120 S.E.2d 430 (N.C. 1961).

²¹ See *Medd v. Fonder*, 543 N.W.2d 483 (N.D. 1996); *Miller v. Shugart*, 316 N.W.2d 729, 733-34 (Minn. 1982); *Damron v. Sledge*, 460 P.2d 997 (Ariz. 1969).

²² See *State Farm Mut. Auto. Ins. Co. v. Peaton*, 812 P.2d 1002, 1011 (Ariz. Ct. App. 1990); *Miller v. Shugart*, 316 N.W.2d 729, 732-33 (Minn. 1982).

²³ *D.E.M. & J.J.M. v. Allickson*, 555 N.W.2d 596, 602 (N.D. 1996); *Ins. Co. of N. Am. v. Spangler*, 881 F. Supp. 539 (D. Wyo. 1995); *Brownsdale Co-op. Ass'n v. Home Ins. Co.*, 473 N.W.2d 339, 341-42 (Minn. Ct. App. 1991).

²⁴ *Sequa Coatings Corp. v. N. Ind. Commuter Transp. Dist.*, 796 N.E.2d 1216, 1230 (Ind. Ct. App. 2003); *ELRAC, Inc. v. Cruz*, 699 N.Y.S.2d 647 (N.Y. Civ. Ct. 1999).

²⁵ *Luton Mining Co. v. Louisville & N. R. Co.*, 123 S.W.2d 1055, 1060 (Ky. 1938).

²⁶ *New Amsterdam Cas. Co. v. Lundquist*, 198 N.W.2d 543, 549 (Minn. 1972) (indemnitee had duty to minimize loss and communicate offers of settlement); *Wolthausen v. Trimpert*, 105 A. 687, 690 (Conn. 1919) (noting indemnitee's duty to act in good faith and use ordinary care).

7.2 **DOLLAR CAP.** THE LIMIT OF EITHER PARTY'S LIABILITY (WHETHER IN CONTRACT, TORT, NEGLIGENCE, STRICT LIABILITY IN TORT, BY STATUTE OR OTHERWISE) TO THE OTHER PARTY OR ANY THIRD PARTY CONCERNING PERFORMANCE OR NON-PERFORMANCE BY SAID PARTY, IN ANY MANNER RELATED TO THIS AGREEMENT, FOR ANY AND ALL CLAIMS SHALL NOT EXCEED AN AMOUNT EQUAL TO TWO (2) TIMES THE TOTAL FEES PAID AND PAYABLE BY LICENSEE TO LICENSOR UNDER THIS AGREEMENT.

7.3 **Exclusions.** The limitations or exculpations of liability set forth in Sections 7.1 and 7.2 above shall not apply to (a) either party's liability (i) for claims, demands, loss, damage or expense relating to bodily injury or death of any person or damage to real and/or personal property, or (ii) resulting from its gross negligence or willful, wanton, or reckless misconduct; (b) Licensor's liability under Article VIII (Indemnification) and (c) either party's breach of its obligations under Article X (Confidentiality/Data Security).

ARTICLE VIII. INDEMNIFICATION

8.1 **Defense and Indemnification Obligations.** Licensor agrees to indemnify, defend and hold harmless Licensee and its Affiliates and their respective successors, officers, directors, shareholders, employees, agents and Third Party Service Providers from and against all losses and liabilities and all damages, expenses, costs, and fees, including reasonable attorneys' fees, arising from: (a) any claim, suit, action or proceeding (each a "Claim") brought against Licensee by a third party (other than an Affiliate) alleging that the Software infringes any copyright, trademark, patent or other proprietary right or misappropriates any trade secret; (b) any Claim brought against Licensee by a third party arising out of any breach by Licensor of any of the terms and conditions of this Agreement; (c) the death or bodily injury of any agent, employee, customer or business invitee of Licensee; or (d) the damage, loss or destruction of any tangible property of Licensee. Licensee shall provide Licensor: (i) reasonably prompt written notice of the existence of such Claim; (ii) control over the defense or settlement of such Claim, provided that Licensor shall not settle such Claim without Licensee's prior written consent, which consent shall not be unreasonably withheld, and provided that Licensee shall have the right to participate in the defense of any such Claim at its expense and through counsel of its choosing; and (iii) non-financial assistance at Licensor's request to the extent reasonably necessary for the defense of such Claim.

8.2 **Infringement Claim Remedies.** In the event an injunction is sought or obtained against use of the Software or Documentation or in Licensor's reasonable opinion is likely to be sought or obtained, Licensor shall within a commercially reasonable time, at its option and expense, either (a) procure for Licensee and Affiliates the right to continue to use the infringing Software or Documentation as set forth in this Agreement, (b) replace or modify the infringing Software or Documentation to make its use non-infringing while being capable of performing the same function without degradation of performance, or (c) if neither of the foregoing options is commercially reasonable, Licensor may terminate such infringing License(s) and, at Licensee's request and direction, will terminate any other Licenses that are dependent upon or are materially interrelated with the infringing Licenses, and upon such termination, Licensor shall issue to Licensee the refund set forth in Section 6.5. Licensor shall have no indemnity obligation to Licensee or its Third Party Service Providers under Section 8.1(a) to the extent the claim(s) of Infringement is based upon (i) a modification of the Software by Licensee, a Licensee Affiliate, or a Third Party Service Provider at Licensee's direction; or (ii) the continued use of the Software by Licensee or an Affiliate for greater than a reasonable period of time after a non-infringing alternative with equivalent or better functionality and performance has been made available by Licensor for installation at Licensor's sole expense.

Indemnification Clause Bank: Sample 2

15 LIMITATION OF LIABILITY

(a) NEITHER PARTY SHALL BE LIABLE UNDER THIS AGREEMENT TO THE OTHER OR ANY THIRD PARTY FOR ANY INDIRECT, SPECIAL, INCIDENTAL, PUNITIVE OR CONSEQUENTIAL DAMAGES (INCLUDING WITHOUT LIMITATION DAMAGES FOR LOSS OF GOODWILL, WORK STOPPAGE, COMPUTER FAILURE OR MALFUNCTION, LOST OR CORRUPTED DATA, LOST PROFITS, LOST BUSINESS OR LOST OPPORTUNITY), OR ANY OTHER SIMILAR DAMAGES, EVEN IF THE OTHER PARTY HAS BEEN INFORMED OF THE POSSIBILITY THEREOF.

(b) EXCEPT AS PROVIDED HEREAFTER, EACH PARTY'S TOTAL LIABILITY FOR ANY LOSS, COST, CLAIM OR DAMAGES OF ANY KIND ARISING OUT OF OR RELATED TO AN ORDER CONFIRMATION MADE UNDER THIS AGREEMENT SHALL NOT EXCEED AN AMOUNT EQUAL TO THE AMOUNT OF THE FEES PAID OR PAYABLE BY CUSTOMER TO LICENSOR UNDER THIS AGREEMENT. THIS LIMITATION ON LIABILITY WAS AND IS AN EXPRESS PART OF THE BARGAIN BETWEEN LICENSOR AND CUSTOMER AND WAS A CONTROLLING FACTOR IN THE SETTING OF THE FEES PAYABLE TO LICENSOR HEREUNDER.

(c) NOTHING IN THIS SECTION SHALL APPLY TO: (i) EITHER PARTY'S LIABILITY (A) FOR CLAIMS, DEMANDS, LOSS, DAMAGE OR EXPENSE RELATING TO BODILY INJURY OR DEATH OF ANY PERSON OR DAMAGE TO PERSONAL PROPERTY, OR (B) RESULTING FROM ITS GROSS NEGLIGENCE OR WILLFUL, WANTON, OR RECKLESS MISCONDUCT; (ii) LICENSOR'S LIABILITY UNDER SECTION 17 (INDEMNIFICATION); AND (iii) EITHER PARTY'S LIABILITY TO THE OTHER IN CONNECTION WITH AN INFRINGEMENT OF SECTION 16 (CONFIDENTIALITY) OF THIS AGREEMENT.

17. INDEMNIFICATION

(a) Licensor shall indemnify, defend and hold harmless Customer and its Affiliates and their respective successors, officers, directors, shareholders, employees, agents and Third Party Service Licensors from and against all liabilities, damages, expenses, costs, and fees, awarded against Customer (including, without limitation, reasonable costs and legal fees thereby incurred by Customer) arising out of (i) any third party suit, claim or other legal action alleging that the use of the Software, Services, or Documentation infringes any copyright, trademark, United States patent, or other proprietary right, or misappropriates any trade secret; ("Legal Action"). Notwithstanding the foregoing, Licensor shall have no indemnification obligations with regard to any Legal Action arising out of: (i) combination of the Software with software or products not supplied, or approved in writing by Licensor; (ii) any repair, adjustment, modification or alteration to the Software by Customer or any third party, unless approved in writing by Licensor; (iii) any breach by Customer of its obligations under this Agreement; or (iv) any refusal by Customer to install and use a non-infringing version of the Software offered by Licensor under Section 7(b). Section 7(b) and this Section 17(a) state the entire liability of Licensor with respect to any intellectual property infringement by the Software.

(b) Notice of Legal Action. Customer shall give Licensor: (i) reasonably prompt written notice to Licensor of any Legal Action, (ii) shall furnish copies to Licensor of all communications, notices and/or other actions relating to any Legal Action, and (iii) non-financial assistance at Licensor's request to the extent reasonably necessary for the defense of such Legal Action. Customer shall give Licensor the sole control over the defense or settlement of any Legal Action. Licensor shall conduct its defense at all times in a manner which is not adverse to Customer's interests. Customer shall have the right to participate in the defense of any such Legal Action and may employ its own counsel to assist it with respect to any such claim, provided that Customer shall bear all costs of engaging its own counsel, unless engagement of counsel is necessary because of a conflict of interest with Licensor or its counsel, or because Licensor fails to assume control of the defense.

Indemnification Clause Bank: Sample 3

ARTICLE 7. LIMITATION OF LIABILITY

7.1. REMEDY EXCLUSIONS. NEITHER PARTY SHALL BE LIABLE TO THE OTHER PURSUANT TO THIS AGREEMENT FOR ANY INCIDENTAL, CONSEQUENTIAL, SPECIAL, INDIRECT, EXEMPLARY OR PUNITIVE DAMAGES OF THE OTHER PART (WHETHER IN CONTRACT, TORT, NEGLIGENCE, STRICT LIABILITY IN TORT, BY STATUTE OR OTHERWISE), EVEN IF THAT PARTY HAD BEEN ADVISED ABOUT OR SHOULD HAVE BEEN AWARE OF THE POSSIBILITY OF SUCH DAMAGES.

7.2. LICENSOR'S LIABILITY CAP. THE LIMIT OF LICENSOR'S LIABILITY (WHETHER IN CONTRACT, TORT, NEGLIGENCE, STRICT LIABILITY IN TORT, BY STATUTE OR OTHERWISE) TO LICENSEE CONCERNING PERFORMANCE OR NON-PERFORMANCE BY LICENSOR, IN ANY MANNER RELATED TO THIS AGREEMENT, FOR ANY AND ALL CLAIMS SHALL NOT EXCEED (A) FIVE MILLION DOLLARS (\$5,000,000) OR (B) AN AMOUNT EQUAL TO THE TOTAL FEES PAID AND OWING BY LICENSEE TO LICENSOR UNDER THIS AGREEMENT, WHICHEVER IS GREATER.

7.3. LICENSEE'S LIABILITY CAP. THE LIMIT OF LICENSEE'S LIABILITY (WHETHER IN CONTRACT, TORT, NEGLIGENCE, STRICT LIABILITY IN TORT, BY STATUTE OR OTHERWISE) TO LICENSOR CONCERNING PERFORMANCE OR NON-PERFORMANCE BY LICENSEE, IN ANY MANNER RELATED TO THIS AGREEMENT, FOR ANY AND ALL CLAIMS SHALL NOT EXCEED (A) FIVE MILLION DOLLARS (\$5,000,000) OR (B) THE TOTAL FEES PAID AND OWING BY LICENSEE TO LICENSOR UNDER THIS AGREEMENT, WHICHEVER IS LESS.

7.4. Exclusions. The limitations or exculpations of liability set forth in Sections 7.2 and 7.3 above shall not apply to either party's liability resulting from its gross negligence or willful, wanton, or reckless misconduct. Notwithstanding the foregoing, the limitations or exculpations of liability set forth in Section 7.1 above shall not apply to (a) Licensor's breach of its obligations under Article 10 (Confidentiality/Data Security) and (b) Licensor's liability under Section 8.1(iv) below; provided Licensor's liability will not exceed the liability cap set forth in Section 7.2 above. In addition, and notwithstanding any terms to the contrary, the limitations or exculpations of liability set forth in Section 7.2 above shall not apply to Licensor's liability under Sections 8.1(i), 8.1(ii) and 8.1(iii) below. For the avoidance of doubt, any amounts which are required to be paid to a third party, whether by judgment or settlement, arising from Claims under Sections 8.1(i), 8.1(ii) and 8.1(iii) will be deemed direct damages.

ARTICLE 8. INDEMNIFICATION

8.1. Defense and Indemnification Obligations. Licensor agrees to indemnify, defend and hold harmless Licensee, Third Party Service Providers, Authorized Users, Regular Named Users, and Custom Users and their respective successors, officers, directors, shareholders, employees, agents (each an "Indemnified Party") from and against all losses and liabilities and all damages, expenses, costs, and fees, including reasonable attorneys' fees, arising from: (i) any claim, suit, action or proceeding (each a "Claim") brought against an Indemnified Party by a third party (other than an Affiliate) alleging that the Software, Deliverables, and/or Developed Work infringes any copyright, trademark, patent or other proprietary right or misappropriates any trade secret; (ii) any Claim brought against an Indemnified Party by a third party arising out of any breach by Licensor of any warranty in this Agreement; (iii) the death or bodily injury of any agent, employee, customer or business invitee of an Indemnified Party; or (iv) the damage, loss or destruction of any tangible personal property or real property of an Indemnified Party. The Indemnified Party shall provide Licensor: (A) reasonably prompt written notice of the existence of such Claim; (B) control over the defense or settlement of such Claim, provided that Licensor shall not settle such Claim without the Indemnified Party's prior written consent, which consent shall not be unreasonably withheld, and provided that the Indemnified Party shall have the right to participate in the defense of any such Claim at its expense and through counsel of its choosing; and (C) non-financial assistance at Licensor's request to the extent reasonably necessary for the defense of such Claim. A failure by an Indemnified Party under this Section 8.1, shall only affect Licensor's obligations under this Section 8.1 to the extent such failure materially prejudices Licensor's ability to defend a Claim under this Section 8.1.

Infringement Claim Remedies. In the event an injunction is sought or obtained against use of the Software, Documentation, Deliverables, and/or Developed Work or in Licensor's reasonable opinion is likely to be sought or obtained, Licensor shall within a reasonable time, at its option and expense, either (a) procure for the Indemnified Party right to continue to use the infringing Software, Documentation, Deliverables, and/or Developed Work as set forth in this Agreement, (b) replace or modify the infringing Software, Documentation, Deliverables, and/or Developed Work to make its use non-infringing while being capable of performing the same function without material degradation of performance, or (c) if neither of the foregoing options are possible, LICENSEE may terminate the Agreement, any Schedule(s) and/or portion(s) thereof, upon notice and without further opportunity to cure, pursuant to Section 9.2(a). In the event that LICENSEE elects to terminate under subsection (c) above, then, in addition to any other remedies set forth in this Agreement or at law and/or in equity, Licensor agrees to pay the Indemnified Party's damages in the form of the costs incurred by the Indemnified Party in acquiring replacement software and systems. These damages will not exceed the total fees paid under this Agreement, pro-rated under a five-year straight-line depreciation calculated from the date of the first Invocation and ending upon the date Licensor's obligations first set forth above in this Section 8.2 arise. Licensor shall have no indemnity obligation to an Indemnified Party or its Third-Party Service Providers under Section 8.1(i) to the extent the claim(s) of Infringement is based upon (i) a modification of the Software, not based on the Documentation or otherwise directed or approved by Licensor, by the Indemnified Party, or at the Indemnified Party's direction; or (ii) the continued use of the Software by the Indemnified Party for greater than a reasonable period of time after a non-infringing alternative with equivalent or better functionality and performance, including compatibility with the Indemnified Party's configuration and implementation of the Software, has been made available by Licensor for installation at Licensor's sole expense. The provisions of this Article 8 shall survive the termination, non-renewal, rescission or expiration of this Agreement.

Indemnification Clause Bank: Sample 4

3. EXCLUSIVE WARRANTY REMEDIES.

For any breach of warranties contained in Section 2 of this Article, Client's exclusive remedy and Licensor's entire liability shall be as follows:

- (A) **LICENSED PRODUCTS.** The correction of errors in the Licensed Products that cause breach of warranty, or if Licensor is unable to provide such correction, Client shall be entitled to terminate this Agreement as it relates to the non-conforming Licensed Products and receive a refund of the License Fees paid for the non-conforming Licensed Product(s).
- (B) **SERVICES.** The re-performance of the Services, or if Licensor is unable to perform the Services as warranted, Client shall be entitled to recover the fees paid to Licensor for the unsatisfactory Services.
- (C) **CUSTOMER SUPPORT AND SOFTWARE ENHANCEMENTS.** The correction of errors in the Licensed Products that cause breach of warranty, or if Licensor is unable to provide such correction, Client shall be entitled to terminate this Agreement as it relates to the non-conforming Licensed Products and receive a refund of the Customer Support and/or Software Enhancements Fees paid for the non-conforming Licensed Products for the then current Subscription Period.

4. INDEMNITIES. INFRINGEMENT. Licensor, at its sole expense, agrees to defend, indemnify and hold harmless Client against any claim and all liability, suits, losses, damages and fees (including reasonable attorney fees when Licensor is unable to provide counsel), arising out of the use of the Licensed Products, in connection with any allegations that the Licensed Products or Modifications infringes a copyright, patent, trademark, trade secret, or other proprietary right of a third party. Client will notify Licensor in writing within thirty (30) days of the claim and will provide Licensor with the information, reasonable assistance and authority to enable Licensor to perform Licensor's obligations under this paragraph. Licensor has sole control of the defense and all related settlement negotiations. Licensor shall have no liability for any claims of infringement to the extent that such claims result from the use of the Licensed Products in conjunction with non-Licensor software or other non-Licensor products or upon a use of the Licensed Products in a manner not contemplated by the Published Product Specifications. Nothing in this provision shall be construed as a limitation on Client's ability to retain legal counsel at its own expense to monitor the proceedings. The obligations of Licensor stated in this section survive termination where there has been termination of use, expiration, non-renewal, or rescission of this Agreement provided Client is using the latest version of the Software at the time of termination.

Licensor further agrees that if Client is prevented from using the Licensed Product(s) due to an actual or claimed infringement of any patent, copyright or other intellectual property right, then at Licensor's option and sole expense and except as provided in the paragraph above, Licensor shall promptly either:

- (i) procure for Client, at Licensor's expense, the right to continue to use the Licensed Product(s);
- (ii) replace or modify the Licensed Product(s) at Licensor's expense so that the Licensed Product(s) become non-infringing, but functionally-equivalent and compatible; or
- (iii) in the event that neither (i) or (ii) are reasonably feasible, Client may terminate the Agreement as to the infringing Licensed Product(s) and Licensor will refund: (a) Client's License Fees for the infringing Licensed Product(s) amortized over a five (5) year straight-line depreciation period from the execution of the Agreement; and (b) the Customer Support and Enhancement Fees paid by Client for that Licensed Product(s) based on the then-current subscription period. Said refund will not bar Client from pursuing any other remedies provided under the terms of this Agreement.

Indemnification Clause Bank: Sample 5

Limitation of Liability. IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER PARTY FOR REPROCUREMENT COSTS, LOST PROFITS, BUSINESS INTERRUPTION, LOSS OF USE, OR INCIDENTAL, SPECIAL, INDIRECT, EXEMPLARY, OR CONSEQUENTIAL DAMAGES OF ANY NATURE, EVEN IF IT HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IN NO EVENT SHALL SELLER'S LIABILITY ARISING IN CONNECTION WITH ANY PRODUCT(S) SOLD OR TO BE SOLD UNDER THE AGREEMENT (WHETHER SUCH LIABILITY ARISES FROM A CLAIM UNDER CONTRACT, WARRANTY, OR OTHERWISE) EXCEED THE ACTUAL AMOUNT PAID BY CUSTOMER TO SELLER FOR THE LOT OF PRODUCT(S) INVOLVED IN SUCH CLAIM. THIS LIMITATION OF LIABILITY SHALL NOT APPLY TO SELLER'S OBLIGATIONS OF INDEMNIFICATION HEREUNDER, TANGIBLE PROPERTY DAMAGE, DAMAGES ARISING FROM TORTIOUS CONDUCT AND BREACHES OF ANY CONFIDENTIALITY OBLIGATION. THE LIMITATIONS IN THIS SECTION SHALL NOT BE DEEMED TO PRECLUDE ANY LIABILITY WHICH, UNDER APPLICABLE PRODUCTS LIABILITY LAW, CANNOT LEGALLY BE PRECLUDED BY CONTRACT.

Indemnification. Seller shall indemnify, defend, and hold harmless Customer from any and all suits, liability, claims, losses, damages and fees (including reasonable attorney's fees), arising out of the use of the Product(s), in connection with any allegations that the Product(s) infringes any patent, copyright, trademark, trade secret or violates any other proprietary right of a third party. Seller shall be given reasonably prompt notice of such claim and given information, reasonable assistance (except financial), and sole authority to defend or settle the claim. The obligations of the Seller stated in this provision survive termination, expiration, non-renewal, or rescission of this Agreement. Customer, at its option and expense, may be represented by its own counsel in any such proceeding. Seller shall have no obligations or liability pursuant to this section or otherwise in connection with any actual or alleged patent infringement based on (i) use of any Products in combination with any product, part, or accessory not sold by Seller specifically for use with such Product , (ii) use of any Product in a manner not recommended by Seller or for which it was not designed, (iii) any Product that has been modified or altered in any way by anyone other than an employee or authorized agent of Seller, (iv), in the case of a pharmaceutical Product, any labeling not supplied by Seller or use of the Product except as specifically recommended in Seller's labeling of the Product, (v) in the case of a bulk pharmaceutical Product, any formulation of the Product, and (vi) any Product manufactured in accordance with specifications supplied by Customer or by any party other than Seller. Customer shall indemnify Seller for any and all expenses, direct or indirect, arising when any patent infringement is alleged or threatened because of goods made in compliance with specifications supplied by Customer.

THIS SECTION STATES SELLER'S SOLE AND EXCLUSIVE LIABILITY FOR ANY CLAIM OF ANY THIRD PARTY BY WAY OF INFRINGEMENT OR THE LIKE.

Indemnification Clause Bank: Sample 6

SECTION 4 – WARRANTIES

Each party hereby represents and warrants that: (i) it has full right, power and authority to enter into and fully perform its obligations under this Agreement; (ii) the execution, delivery and performance of this Agreement by such party does not conflict with any other agreement to which it is a party or by which it is bound; (iii) any products, materials, or information provided by it will not infringe or otherwise violate the **Rights** of any other person or organization; and (iv) it will substantially comply with all material laws and regulations applicable to its activities in connection with this Agreement.

SECTION 14 – INDEMNIFICATION

*Indemnification
from Vendor
to DR*

The Vendor and its successors and assigns shall indemnify, defend, and hold harmless DR and its successors and assigns, and any **Resellers** (including their successors and assigns) from and against and in respect of any and all third party claims, demands, losses, costs, expenses (including, but not limited to, the cost of obtaining an opinion of counsel in response to a notice of potential infringement of the **Rights** of any other person or organization), obligations, liabilities, damages, recoveries and deficiencies, including interest, penalties, reasonable attorneys' fees and costs, that DR may incur or suffer, which arise, result from, or relate to:

- (i) The breach by the Vendor of any of its representations and warranties set forth in this Agreement; or
 - (ii) The failure of the Vendor to perform any of its obligations under this Agreement; or
 - (iii) The assertion of any infringement or other claims alleging that the **Products, Software, Documentation, Vendor Trademarks**, or other materials provided by the Vendor violate the **Rights** of any other person or organization; or
 - (iv) Claims relating to the violation of the Vendor's privacy policies; or
 - (v) Damages to property or personal injury caused by the negligence or willful acts of the Vendor or any of its employees or agents; or
 - (vi) In the event the Vendor is obligated to make sales, use, or other **Transaction** related tax payments pursuant to the provisions of **Exhibit C**, any obligation or liability of DR to make any such tax payments in any state or jurisdiction indicated in **Exhibit C** or otherwise.
-

Indemnification from DR to Vendor DR and its successors and assigns shall indemnify, defend, and hold harmless the Vendor and its successors and assigns from and against and in respect of any and all third party claims, demands, losses, costs, expenses (including, but not limited to, the cost of obtaining an opinion of counsel in response to a notice of potential infringement of the **Rights** of any other person or organization), obligations, liabilities, damages, recoveries and deficiencies, including interest, penalties, reasonable attorneys' fees and costs, that the Vendor may incur or suffer, which arise, result from, or relate to:

- (i) The breach by DR of any of its representations and warranties set forth in this Agreement; or
- (ii) The failure of DR to perform any of its obligations under this Agreement; or
- (iii) The assertion of any infringement or other claims alleging that the **DR Materials**, DR's **Trademarks**, or other materials provided by DR, (including, but not limited to, **Software Passport**) violate the **Rights** of any other person or organization; or
- (iv) Damages to property or personal injury caused by the negligence or willful acts of DR or any of its employees or agents.

Notice and Response Procedure for Indemnification Claims In the event DR or the Vendor receive notice of a claim that gives rise to an indemnification obligation on the part of the other party, the party seeking indemnification (the "**Indemnified Party**") shall provide prompt written notice of such claim to the other party (the "**Indemnifying Party**"), and tender the defense of such claim to the **Indemnifying Party**. Upon receipt of such notice, the **Indemnifying Party** shall respond in writing to the tender of defense within ten (10) business days of receipt of the tender of defense. The **Indemnifying Party's** response shall either:

- (i) Accept the tender of defense, as well as acknowledge its obligation to indemnify and hold harmless under this provision; or
- (ii) Accept the tender of defense with a reservation of rights with regard to any subsequent obligation to indemnify or hold harmless; or
- (iii) Reject the tender of defense, setting forth in detail its reasons for disclaiming its obligation to defend under this provision.

A failure by the **Indemnifying Party** to respond in writing to the tender of defense within the time specified in this subsection, shall be deemed a waiver of any objection to its obligation to defend the **Indemnified Party**, but a reservation of the **Indemnifying Party's** rights to object to any subsequent obligation to indemnify or to hold harmless the **Indemnified Party**.

When the Indemnifying Party May Control the Defense In the event the **Indemnifying Party** accepts the tender under romanette (i) of the above "Notice and Response Procedure for Indemnification Claims" provision, the **Indemnifying Party** shall thereafter have control of the defense of such claim, including the ability to select which firm defends the claim, and it shall be responsible for the fees and expenses associated with such claim. The **Indemnifying Party** will have the right to settle the claim, provided, however, that **Indemnifying Party** shall not agree to any settlement that (i) imposes restrictions on the **Indemnified Party**, (ii) makes an admission or liability or wrongdoing on behalf of the **Indemnified Party**, or (iii) requires any action by the **Indemnified Party**, including

without limitation, the payment of any amounts, without the **Indemnified Party's** prior written consent, which consent shall not be unreasonably withheld, subject to appropriate modifications to the terms and conditions of this Agreement based on such restrictions and/or actions.

*When the
Indemnifying
Party Shall
Not Control
the Defense*

In the event the **Indemnifying Party** accepts the tender under romanette (ii) of the above "Notice and Response Procedure for Indemnification Claims" provision, or if the **Indemnifying Party** remains silent in the face of a written notice and tender of defense, the **Indemnified Party** shall thereafter have the right to control of the defense of such claim, including the right to select which firm defends the claim. If the **Indemnified Party** is controlling its own defense at the **Indemnifying Party's** expense under this subsection, the **Indemnifying Party** shall contract directly with the law firm selected by the **Indemnified Party** to pay all defense expenses on a monthly basis within 30 days of the tender of each month's expenses from the **Indemnified Party**.

*Liability for
Improper
Refusal to
Defend Claim*

In the event the **Indemnifying Party** rejects the tender under above "Notice and Response Procedure for Indemnification Claims" provision, the **Indemnified Party** shall thereafter have control of the defense of such claim, including the ability to select which firm defends the claim.

The **Indemnifying Party** further agrees that, in the event that the **Indemnified Party** files a declaratory judgment action (or pursues any other legal process) to compel the **Indemnifying Party** to honor its obligations under this Section, and should the **Indemnified Party** prevail in that action, the **Indemnifying Party** shall be liable for the legal fees and expenses incurred by the **Indemnified Party** to compel the **Indemnifying Party** to honor its obligations under this Section. Moreover, the **Indemnifying Party** expressly waives any right it may have under statutory or common law which might operate to make the recovery of fees under this provision a mutual right.

SECTION 15 – LIMITATION OF LIABILITY

Under no circumstances shall DR's total liability under this Agreement for any cause exceed the net amount realized by DR under this Agreement. **Even though both have been advised of the possibility of such damages, and notwithstanding the failure of essential purpose of any limited remedy provided herein, and save for their respective obligations under the indemnification section, NEITHER DR NOR THE PUBLISHER SHALL HAVE ANY LIABILITY TO EACH OTHER OR TO ANY OTHER PERSON OR ORGANIZATION FOR ANY DAMAGES RELATING TO ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL OR SPECIAL DAMAGES OF ANY DESCRIPTION, WHETHER ARISING OUT OF WARRANTY OR OTHER CONTRACT, NEGLIGENCE OR OTHER TORT, OR OTHERWISE.**

Calling All Addresses!

If you received a hard copy of this issue instead of a copy via the Internet, it means that the MSBA does not have your e-mail address. Less than 3% of our members still receive this newsletter via the quaint "snail mail" method. Don't be left behind! Newsletters sent via e-mail arrive one to two weeks earlier than those sent via surface mail.

We value your inbox privacy. We promise that we will not provide your e-mail address to any third party.

Please submit your e-mail address to 612.333.4927 or mkempton@statebar.gen.mn.us.

COMPUTER LAW SECTION MEETING MINUTES

by Thomas R. Sheran, Secretary
• Moss & Barnett, PA

Minutes from November 9, 2004

- Attendees:** Katheryn Andresen (Chair); Kari Wangensteen (Treasurer); Carla Condiff Schaumann (by phone); Carolyn Sandberg; Chip Brink; Jim Blomquist; Steven Lieske; Miguel Azar; Michael Luzum; Allen Oh; Damien Riehl; Steve Buckingham; Dan Tysver; Chris Hilberg.
- Call to Order.** The Chair called the meeting to order at 11:45 a.m.
- Minutes.** Minutes from the 12 October 2004 meeting were reviewed. Two corrections were noted: (1) Chris Schulte is leading the Website committee; and (2) Kari Wangensteen is on the Membership Committee. The prior minutes were approved with these two corrections.
- Treasurer's Report.** Financial report for period ending 31 October 2004. Kari Wangensteen reviewed charges of \$500 anticipated for the Membership committee's activities and \$19 spent for a meeting with students at William Mitchell. The current balance is approximately \$8100.

Committee Reports:

- Newsletter.** Damien Riehl reported that his ideas for the newsletter include: (1) potentially using color since the majority of the newsletters are sent electronically and therefore color does not add to the cost of the newsletter; and (2) reprinting articles from national sources in addition to new articles from local authors.
- The group discussed the costs associated with producing and distributing the newsletter. To see how effective it is, Damien will create a PDF version of the next newsletter himself, which will decrease the time and formatting costs charged by the MSBA.
- Damien requested committee reports by 15 November 2004 so that the newsletter can be sent out mid-December. Damien will check to see if

the MSBA has digital photos from the Computer Law Institute.

Noontime CLE. A volunteer is still needed to present at the January monthly meeting. Chris Hilberg presented his case law summary after the meeting.

Contracts. The Chair requested a volunteer to chair this committee.

Case Law. Chris Hilberg presented his case law summary after the meeting.

Membership. Three council members represented the section at William Mitchell on November third and approximately 40 students attended the event. The U of MN law school is hosting a Career Options night on November 18th. Steven Lieske asked for volunteers to attend with him.

A student from Hamline and a student from William Mitchell have contacted the section. Steven will follow-up with them and invite them to the January meeting.

The member survey is in progress through the Wednesday before Thanksgiving. So far, 23 people have responded. Steven will present his findings from the survey at the January meeting.

Discussion about the preliminary survey results included whether or not members should be given a discount to the CLI or CLEs. Lisa Wilde will research rules regarding such discounts for the January meeting. It was also discussed that the monthly meeting notices should be sent to all section members rather than just to the council members.

Website. No report.

Computer Law Institute. No report.

Legislation. No report.

Technology Round Table. No report.

Nominations. No report.

Old Business. No old business.

New Business. Steven Lieske will assist the Chair in a promotional paragraph to be included in an upcoming issue of the Bench & Bar.

Dan Tysver brought up the idea that one new member benefit could be an on-line tool to build agreements based on a library of pre-designed paragraphs. A first agreement to be implemented could be a software licensing agreement. Dan Tysver asked for examples of good software licenses from the council. Jim Blomquist and Carla Condiff Schaumann agreed to assist in this effort. Ray Bonnebeau may also assist. The Chair will check with Chris Schulte of the **Website** committee to see if this on-line tool could be password protected so that only members of the section could access it.

Motion to Adjourn. The meeting was adjourned at approximately 12:30 p.m.

Steven Lieske, on behalf of Tom Sheran

Minutes from January 11, 2005

- Attendees:** Katheryn A. Andresen (Chair); Tom Sheran (Secretary); Miguel Azar; Veness Beardsley; James A. Blomquist; Charles P. Brink; Carla Condiff Schaumann (by phone); John Conway; Charles A. Johnson; Steven Lieske; Allen Oh; Kendra Richgels, Damien Riehl; Jennifer Rogers; Jenny C. Salyers; Carolyn M. Sandberg; Kristin Speltz; Daniel A. Tysver; Gary S. Weinstein; Michael Luzom.
- Call to Order.** The Chair called the meeting to order at 11:35 a.m.
- Minutes.** Prior minutes approved.
- Treasurer's Report.** Financial report for period ending November 30, 2004 was presented by Kate Andresen.

Committee Reports:

- Newsletter.** Damien Riehl announced the deadline of April 1, 2005 for submission of material that will appear in the spring newsletter.
- Noontime CLE.** Jenny Salyers reported that she is looking for speaker for February and other dates. She requests that council members submit suggestions. The plan is to have a speaker at each meeting.
- Contracts.** Dan Tysver will report at February meeting regarding committee's plan for activity during the year.
- Case Law.** No report
- Membership and**
- Law Student Outreach.** Steve Lieske reported that the membership survey generated a 10% response. A summary of findings was distributed and discussed.
- Website Committee.** No Report
- Computer Law Institute.** No Report. Kate Andresen requested suggestions re. dates for the Institute. The MIPLA program will be in September and the MSBA's CLE staff will try to keep the MIPLA program and the Computer Law Institute 30 days apart. Kate suggested a Tuesday in mid-October with the 13th as a first choice and the 6th as an alternate date. Kate will contact MSBA.
- Legislation.** No report.
- Elections Committee.** No report.
- Annual Meeting.** No report. Kate Andresen invited emails to Christine Brick regarding possible assistance with the Computer law Institute and annual meeting.
- Old Business.** No old business.
- New Business.** **Joint Section activity:** Kate Andresen reported that the MSBA staff met with section chairs and a consensus was reached that the individual sections were interested in engaging in joint section activities. Joint programs have the advantage of getting notice out to a larger membership pool. A discussion was had regarding possible

collaborations with the MSBA Business Law section and with MIPLA. No action was taken.

MSBA Annual Meeting: Kate Andresen reported that the MSBA has invited Computer Law Section participation in the MSBA annual meeting.

Dave Graven Award: Kate Andresen reported that the deadline for submission of nominees for the MSBA's Dave Graven public service award is February 25, 2005.

Annual Section Dues: A discussion was had regarding the level of dues charged for section membership. Kate Andresen reported that annual sections dues have remained at \$25 since 1995. Gary Weinstein suggested lowering the dues to raise membership and perhaps total revenue. A motion to maintain the present level of dues was made, seconded and passed.

Motion to Adjourn.

The meeting was adjourned at ____ p.m.

Thomas R. Sheran, Secretary

Minutes from February 8, 2005

Attendees: Katheryn A. Andresen (Chair); Christine M. Brick (Vice Chair); Tom Sheran (Secretary); Kari Wangenstein (Treasurer); Miguel Azar; Veness Beardsley; James A. Blomquist; Andrea Bond; Charles P. Brink; Steve Buckingham; Carla Condiff Schaumann (by phone); John Carney; Sarah Graven; Chris Hilberg; Steven Lieske; Kendra Richgels, Damien Riehl; Jennifer Rogers; Colleen Schmidt; Chris Schulte; Jenny C. Salyers; Daniel A. Tysver; Dana Van de Vort; Gary S. Weinstein. .

Call to Order. The Chair called the meeting to order at 11:35 a.m.

Minutes. Prior minutes approved.

Treasurer's Report. Financial report for period ending December 31, 2004 was presented by Kari Wagensteen. The section balance as of 12/31 was \$7,351.63.

Committee Reports:

Newsletter. Damien Riehl requested input for newsletter by April 1, 2005 deadline. Kate Andresen mentioned article about indemnity liability limits.

Noontime CLE. Jenny Salyers asked about charges for noontime CLEs. There was a discussion about charges for lunch but not for the CLE credits per se.

Contracts. Dan Tysver presented a concept piece for the section website featuring an index to contents

Case Law. No report

Membership and Law Student Outreach. Steve Lieske reported that a representative is needed for a 2/17 program and Kate Andresen volunteered. Kate noted that in the past the section has gone out to the schools – currently plan to go to Hamline and UofM.

Technology Round Table.

Gary Weinstein asked about section members' reaction to prior programs and preferences re. frequency and regularity. Kate Andresen stated vies that roundtable is beneficial for generating participation and suggested three per year to be scheduled after council meetings. A discussion followed about preferred location, but survey results showed little support for other locations. Gary Weinstein suggested that programs be scheduled to follow the March or April meeting.

Website Committee.

No report

Computer Law Institute.

Christine Brick noted that conflict with scheduling of the MIPLA IP Institute on 27th and 28th raised issue of whether to defer to MIPLA. Kate Andresen suggested that the section either cancel or select a new date. Christine Brick will look into conflicts with other programs in the spring. Jim Bloomquist suggested that a committee be formed to address the issue of scheduling conflicts. Christine Brick agreed to report back after meeting with the committee.

Legislation.

No report.

Elections Committee.

Jim Bloomquist reported that the slate for election to the council is due. Chip Brink will send notices to members with an inquiry of interest in the Council. Kate Andresen noted that information received before March first could be attached to the notice for the March council meeting.

Annual Meeting.

A discussion was had regarding members' preference for a short annual meeting followed by a speaker. There were no suggestions regarding topic. It was suggested that the meeting be scheduled mid-week (Tuesday, Wednesday or Thursday) in the week before Memorial Day or the week of May 8, 2005. A discussion followed regarding preferred location.

Old Business.

No old business.

New Business.

New Council Member: A motion was made to have Allen Oh replace Shelly Gilbertson who has resigned from the council. Motion passed.

MSBA Annual Meeting: Eileen Burnside, temporary MSBA section liaison reported that the MSBA wants at least one representative from each section as a representative to the Assembly. The annual convention is scheduled for June 15-17, 2005. The names of section representatives must be submitted by March 3, 2005. The section is also required to submit any proposed modification of bylaws by March 3. The council must first pass the amendment and then go to the section membership before submitting the amendment to the MSBA Assembly. If the March cutoff is missed, changes to bylaws will not be approved until the MSBA board approves at a full meeting.

Motion to Adjourn.

The meeting was adjourned at 12:35 p.m.

Thomas R. Sheran, Secretary

PUBLICATION SUBMISSION GUIDELINES

The Computer Law Section welcomes submissions for publication in this newsletter. If you submit an article, please adhere to the following guidelines:

Subject Matter – Submit any articles of interest to the members of the Computer Law Section, including recent issues on technology licensing, patents, copyright, trademark, or Internet technology. Articles previously published in other publications are acceptable, if current. Preference is given to local authors.

Article Length – Submitted articles should be less than 3,500 words and should not exceed 5,000 words.

Article Format – A journalistic style is preferred over the style of law reviews, CLE materials, or legal briefs. The structure of the article should consist of a “catchy” lead, a “thesis paragraph” tersely stating the general theme of the article, an exposition of the topic, and a summary conclusion.

Footnotes – Keep law-review-style footnotes to a minimum, as this is a journalistic publication. All footnotes should be in the form prescribed by the Uniform System of Citations (“Bluebook”). Footnotes should be limited to citing specific authorities; “string” citations and discursive notes are discouraged. The author is responsible for ensuring the completeness and accuracy of all references and citations, as article information and footnotes are not checked for accuracy.

Copyright Notice – A copyright notice is unnecessary. If the author wishes to include

one, it should be placed at the end of the article, not on each page.

Title and By-Line – The article should include both a title and a by-line. The by-line should include both the author’s name and firm affiliation. It is not necessary to include any additional author biographical information. Keep the author’s practice areas, experience, etc., to a minimum.

Photographs – Photographs of article authors and Section events are encouraged. Digital photographs are preferred, although prints are also acceptable.

Submission Deadline – The *Computer Law News* is published twice a year: in December and in May. Submission deadlines are approximately 4 weeks prior to publication and are listed in the Calendar of Events for the prior issue. Microsoft Word files sent via e-mail are preferred, though other formats are permissible.

Distribution – The newsletter is distributed via e-mail and is also posted on the Computer Law Section’s website. Any section members who has not submitted an e-mail address is sent a hard copy via U.S. mail.

Questions – Contact Editor Damien A. Riehl at Damien_Riehl@mnd.uscourts.gov

**COMPUTER LAW SECTION
NEW MEMBER/COMMITTEE/OFFICER INTEREST FORM**

- Enclosed is my check in the amount of \$35 payable to the MSBA.
(Mail to Section Services, c/o MSBA, 600 Nicollet Mall, Suite 380, Minneapolis, MN 55402.)
- I am a current Computer Law Section member. The following information is address change information only. Address information can be faxed to 612-333-4927; or e-mailed to mkempton@statebar.gen.mn.us.

Name _____
 Employer _____
 Street _____
 City/State/Zip _____
 Phone _____ Fax _____
 E-mail _____

If you are interested in joining one of the following committees for 2003-2004, or are willing to be considered for an officer or committee chair, please check below and send to Computer Law Section Chair.

	Chair	Join
Annual Meeting	_____	_____
Computer Law Institute	_____	_____
Case Law Reports	_____	_____
Contracts	_____	_____
Law School Outreach	_____	_____
Newsletter Editor	_____	_____
Noontime CLE Programs	_____	_____
Legislative Liaison	_____	_____

I would like to participate in the Section in the following ways:

___ Speak at a CLE ___ Contribute an article to the Newsletter
 ___ Other: _____

Check any of the following officer positions you would consider in the future:

___ Chair ___ Vice Chair ___ Secretary ___ Treasurer ___ Council member

I would like to see the Computer Law Section undertake the following:

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