



Mesmer & Deleault, PLLC
41 Brook Street, Manchester, NH 03104
Seacoast Office: One New Hampshire Ave., Suite 125
Portsmouth, NH 03801



“Tip of the Month”

Contract Terms: Warranties and Indemnification

Sometimes contract terms can seem confusing as they represent the promises of the contracting parties following the general theory of contract: risk allocation. This is to review a few of the common terms.

Warranties are usually considered promises about the reliability of things that are already in place, such as the accuracy of books and records, or the absence of pending litigation. Here, they are sometimes called Representations and Warranties. These are not to be confused with product warranties, such as a 90-day warranty on your new coffee maker, which is like a product guarantee.

Guaranty, or personal guaranty, should also not be confused with product guarantee. In the world of lending or any extension of credit, a guaranty is offered as extra security or support for a promise to pay made by somebody else. For example, the bank might lend money to your corporation only if you give your personal guaranty to pay the debt even if your company goes bankrupt.

Covenants are usually promises about things happening in the future, such as a covenant not to compete, or a covenant of continuing cooperation after closing on the deal. Like warranties, covenants can often be enforced even after the end of the contract term. If the promise turns out to be false, or the party violates the promise, the other party can claim breach of the contract.

Indemnification is usually applied to the idea of paying back the party who suffers a loss because of a broken promise. For example, one party might warranty that its work does not violate any copyrights. If later a copyright claim crops up, the other party can seek indemnification to recover any money paid in damages to the copyright claimant, or even to cover losses in the effort to fight the copyright claim.

Hold harmless is a term that often accompanies indemnification. In fact, the term is often called hold harmless, defend and indemnify. That is, the party making the promise will back it up to the point of stepping in to help fight the outside claim, and will pay the claim in the event of loss. The security offered by this term can support warranties and covenants. Because it is so broad, parties need to be careful.

Generally, the allocation of contract risk needs to be balanced. Neither party wants to take on too much of the risk. When negotiating contract terms, therefore, parties need to look into the crystal ball with an eye on Murphy’s Law to anticipate what could possibly go wrong. They also want to allocate properly the responsibility for fault or liability in the event the deal goes sour or even a little off track.

If you need help with contracting or negotiations, please call the attorneys at Mesmer & Deleault, PLLC (Tel. 603-668-1971) or contact us by sending an email to mailbox @ biz-patlaw.com. We are happy to help.

Frank B. Mesmer, Jr.
Robert R. Deleault
Ross K. Krutsinger
Joshua N. Mesmer
Steven H. Slovenski – *of Counsel*
0915



(603) 668-1971

Fax (603) 622-1445

E-mail: mailbox@biz-patlaw.com

Website: www.biz-patlaw.com