

Covering your back in the credit crunch

Unbelievably, the chances are that most readers have contractually agreed not to develop, design, manufacture or produce missiles, or nuclear, chemical or biological weapons. If you have not done so yourself, you may have children who have entered into this agreement. The provision is in the iTunes software agreement used by iPod owners and others, and although the opportunities to misuse the software in this way seem remote, no doubt there will be some sound reason why it is there. Users probably had no idea they had agreed to this.

Is it any more likely that clients have read our terms of business? Pages and pages directed at many improbable occurrences, each firm's terms addressing their own personal adverse experience in times gone by, probably long forgotten. In some cases, the firm's attempts to comply with the Law Society's *Your clients – your business* guidance will be superimposed, although in many cases not the latest October 2007 edition. Some clients may read them, but the majority probably will not.

More useful would be a focus on key issues that the firm needs for its protection and that of partner assets.

Two key issues among many are the limitation of liability and scoping the retainer. Traditionally, lawyers were reluctant to limit liability, but all top-100 firms responding to Legal Risk's *Professional Indemnity and Risk Management Survey 2008* limited liability at least some of the time. Forty five per cent usually did so, and 55 per cent sometimes (64 firms replied representing a broad spread across the top 100).

Limitation of liability can come in many shapes and sizes. The writer has been involved in reviewing and advising on at least ten of the top-100 firms' terms limiting liability, and they have become increasingly comprehensive over the years.

Liability caps are the first type that comes to mind, but there are other important issues too: net contribution clauses (in particular) aimed at ensuring the firm does not have to pay the share of a liability for which another party is liable but unable to pay – particularly appropriate in a credit crunch when doubts may arise about the solvency of another party, adequacy of its insurance, and even the solvency of their insurers. Many solicitors believe that reliance on counsel means solicitors are more or less immune from liability, but this is rarely so, and counsel generally have nothing like the levels of insurance cover carried by even medium-sized law firms.

Perhaps more important in practice even than limiting liability, is limiting the scope of the retainer – defining what

work is included and what work is excluded: this may also help manage conflict issues. Excluding advice on tax is common, or in international matters advice on the law of other jurisdictions. Yet the best efforts at limiting the scope of the retainer in this way will be frustrated if there is 'engagement creep' as the matter progresses, and the lawyer starts advising on matters previously excluded. Or perhaps an associate is drafted in midway through the project and does not read the retainer letter – a common occurrence – so does not know what has been excluded.

But none of this is of any use if partners do work without engagement letters in place, or if key provisions are not clearly agreed by the client. Rule 2.07 of the Solicitors' Code of Conduct 2007 requires solicitors to bring any limitation of liability to the client's attention – there are other compliance requirements too. What is required to achieve this adequately and to ensure that it passes muster with all other requirements, such as the Unfair Contract Terms Act 1977, will vary from client to client. It would be a mistake to assume that a limitation of liability is bound to fail: the writer has advised firms on the implementation of processes to maximise the prospects of exclusions being held to be enforceable. In the *Marplace* [2006] case, a judge found for the defendant on liability, but nonetheless held that a limitation of liability would have been effective.

This all brings us back to where we started with the iTunes terms, of which most users are probably unaware despite having agreed to them in order to be able to use the software. Are your clients aware of the terms on which the firm is acting? The best terms limiting liability will not help if they have not been sent out on every file (and they are frequently missing from files where claims ensue), drawn to the client's attention and agreed by the client. In some cases, rather more will be required, perhaps including specific discussion and possibly separate advice. A comprehensive review of both terms and how they are implemented in practice is an important safeguard, particularly in the credit crunch era, which will doubtless result in more liability claims for law firms. *FDLegal*



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