

Weird (and Bad) Contract Clauses

Health Law Webinar

April 8, 2026

Fredrikson



Should They Be Ex-perts?

- Compensation Group agrees to compensate Physician in accordance with Exhibit A, **which is attached hereto and incorporated herein by reference**. All compensation paid to Physician in connection with this Agreement is intended to be commercially reasonable and consistent with fair market value, and has not been determined in any manner that **impermissibly takes into account or otherwise reflects the volume or value of referrals or other business generated by Physician**. [...] Productivity Incentive Plan. The parties acknowledge that this methodology represents fair market value compensation and that the wRVU (or Work Relative Value Units) Multiplier **was determined based on market survey data**. The parties acknowledge that Physician's total compensation, including, without limitation, the Base Salary, Incentive Plan Payments, and any other amounts payable under this Section 2, **must be consistent with fair market value as defined by applicable law and regulations**. **The parties agree to review the compensation annually.** In the event that compensation under this Incentive Plan causes Physician's total compensation to exceed a fair market value level, **as determined by Group**, the parties agree to engage in good faith discussions to modify this Incentive Plan to meet regulatory requirements for fair market value compensation. If the parties are unable to reach a mutual agreement[...]"

Thou Protesteth Too Much?

- “The parties attest that no portion of the payment is intended to influence referrals...”
- What does this really get you?

Outdemnification

- Nearly every contract has an indemnification provision. What do they usually say?
- What would the law do in the absence of an indemnification agreement?
- Do people consider that accepting a liability they don't have under the law may void their insurance coverage?

Restatement of the Law

- Example:

- *“The Federal Tort Claims Act (FTCA) is the exclusive remedy for common law torts committed by employees of the U.S. Department of Veterans Affairs.”*

- Example:

- *“This responsibility shall be subject to the following limits under which [Service Provider] shall not be liable to pay a personal injury or property damage claim or judgment by any one person which exceeds the sum of \$200,000, or any claim or judgment or portions thereof, which, when totaled with all other claims or judgments paid by [Service Provider] arising out of the same incident or occurrence, exceed the sum of \$300,000.”*

Deferring Issues to the Future

- Can make sense in an ongoing relationship, such as a Master Service Agreement with SOWs for specific projects.
- Can introduce risk of disputes in M&A context.
- Asset Purchase Agreement Example:
 - ***“2.4 Missing Assigned Patents. From time to time, [Buyer] may become aware of the existence of a Missing Assigned Patent. For those Missing Assigned Patents that [Buyer] identifies to [Seller] and are confirmed by [Seller] to comply fully with the definition of a Missing Assigned Patent, [Seller] shall assign all of its right, title and interest in such Missing Assigned Patents to [Buyer] and shall execute a patent assignment . . . for such Missing Assigned Patents.”***
 - *Openwave Sys. Inc. v. Myriad France S.A.S., 2011 WL 1832999 (N.D. Cal. 2011)*

Earnouts

- Merger Agreement Examples:

- Buyer is prohibited from *“tak[ing] any action to divert or defer [revenue] with the intent of reducing or limiting the Earn-Out Payment.”*
 - *Lazard Tech. Partners, LLC v. Qinetiq N. Am. Ops. LLC*, 114 A.3d 193 (Del. S.Ct. 2015)
- *“Notwithstanding any other provision in the Agreement to the contrary, from and after the closing, [Buyer’s] obligation to provide funding for the Surviving Corporation, including without limitation funding to pursue achievement of any of the Milestones, shall be at [Buyer’s] sole discretion, to be exercised in good faith.”*
 - *ev3, Inc. v. Lesh*, 114 A.3d 527 (Del. S.Ct. 2014)

Eve of Destruction

- Example:

- *“Upon the expiration or termination of this Agreement, or at the Discloser's request at any time during the term of this Agreement, the Recipient shall promptly, at Discloser's discretion, either return to the Discloser all copies, whether in written, electronic or other form or media, of the Confidential Information, or destroy all such copies and certify in writing to the Discloser that such Confidential Information has been destroyed. In addition, the Recipient shall also destroy all copies of any materials containing Confidential Information created by the Recipient or its Representatives and certify in writing to the Discloser that such copies have been destroyed.”*

I Can Name That Term In..... The Jim Platt Rule

- “This contract shall be effective as of the Effective Date, and continue for a term of one year. Thereafter, the contract will automatically renew for additional one year terms unless terminated pursuant to this Agreement.”
- “This contract shall continue until terminated under this Agreement.”

The Terminator

- Example:
 - *“This Agreement shall commence as of the Effective Date and shall continue thereafter for a period of two (2) years (together with any Renewal Term, as defined below, the Term), unless sooner terminated pursuant to this Section 3. Either party may renew this Agreement for an additional two (2) year term by providing written notice of its intent to renew at least thirty (30) days prior to the end of the then-current term (a Renewal Term). If neither party provides timely notice of its intent to renew this Agreement, then this Agreement shall terminate upon the expiration of the then-current Term, unless sooner terminated pursuant to this Section 3.”*

No Termination or Expiration Provision

- Clients might sign a term sheet that does not contemplate an end to the relationship.
- Or a more formal agreement may simply not have either a termination or expiration provision.
- What happens then?

Better? Or Worse?

- A medical director contract requires the medical director to track their time and submit those reports to the hospital.
- Does Stark include this as a requirement? (Hint: No.)
- Does this term promote compliance or make it easier for the government to attack administrative snafus?

Does Anybody Really Know What Time It Is

- Most health care contracts have a provision requiring the parties to preserve documents and turn them over to the government.
- Why?

Is There A Draft In Here?

- Employment Agreement allows a clinic to terminate a physician if a hospital “terminates their medical staff privileges.”
- The hospital restricts a cardiologist from doing open heart surgery.
- Is the clause triggered?
- What if they require all procedures be monitored?

I Saw Him/Her Standing There....

- A contract includes a clause aimed at pollution emitted “thereupon, thereunder, therefrom, therewith, thereby, thereon, therein,

Incorporation By Reference and Hyperlinks

- Terms and Conditions Found in Hyperlinks.
 - Increasingly used in contracts.
 - Often allow for unilateral changes sometimes without notice.
 - Example: “You acknowledge and agree this Agreement is subject to our policies and procedures (collectively, “Policies”) and that we may revise, amend, or replace any of our Policies at any time in our discretion. Our Policies are available at [insert hyperlink]. Any changes to the Policies are effective upon posting at [insert hyperlink]. It is your sole responsibility to review the Policies for updates or changes. We have no obligation to notify you of any changes to the Policies.
- Solutions.
 - Strike if possible.
 - Limit ability to modify, e.g., notice and opportunity to cancel contract if changes are unacceptable.

Right to Use Trademarks

- Vendors sometimes include right to use trademarks, such as:

You hereby grants us a non-exclusive, royalty-free, worldwide, revocable license to use your name, logos, trademarks, service marks, and trade names for the purpose of identifying you as our customer, marketing and promoting our products and services, and fulfilling our obligations under this Agreement.

- Solutions: strike provision or at least require prior written consent before use.

Limitation of Liability

- Contractors may suggest unreasonable limits on liability, such as:

Vendor's total liability under this Agreement shall in no event exceed the fees paid by Customer in the three months preceding the claim, and Vendor shall not be liable for any indirect, consequential, or data-related damages.

- The limitation may be wholly inadequate compared to possible exposure.
- Remedy for contractor exposure is insurance, a typical business expense.
- If unable to delete, consider carve-outs such as: breach of confidentiality or data security obligations, including PHI breaches; negligence or willful misconduct; or infringement of copyright or other intellectual property.

Insurance Cost Shifting

- There can be seeming overreach such as:
 - You shall be solely responsible for, and shall indemnify, defend, and hold harmless us and our officers, employees, and agents from and against, any and all damages, losses, liabilities, costs, and expenses (including reasonable attorneys' fees) arising out of or resulting from any accident, injury, property damage, or other loss occurring at your premises or place of business, regardless of cause. You shall also be solely responsible for any increase in our insurance premiums, deductibles, self-insured retentions, coverage requirements, or other insurance-related costs that result, directly or indirectly, from any such accident or loss. You shall reimburse us for all such amounts within thirty (30) days after receipt of reasonably supporting documentation.
- Solution: delete cost shifting provision.

Data Ownership & Use Rights

- Sometimes, vendor tries to own or control data. For example:

All data entered into or generated by the System shall be the property of Vendor. Customer may access such data only as permitted by Vendor policies.
- For health system, own and control its own data:

Customer retains exclusive ownership of all data, including PHI and de-identified data. Vendor is granted a limited, non-exclusive license to use data solely to provide services under this Agreement. Vendor shall not use, disclose, aggregate, or commercialize Customer data for any other purpose without Customer's prior written consent.

“Clarifying” Phrases: Do They Help?

- Examples:
 - **For the avoidance of doubt**, nothing in this Agreement obligates the Company to renew this contract after the Initial Term.
 - **For clarity**, the license granted under this section does not permit Contractor to modify, distribute, or sublicense the Software.
 - **For clarity**, and notwithstanding anything to the contrary herein or in any Order Form or Statement of Work, whether express or implied, we are not responsible for any compliance functions related to your business, operations, claims, or revenue cycle, nor for any of your compliance or legal or regulatory obligations and responsibilities.

“Clarifying” Phrases

- Do they signal an ambiguity in the provision or the contract itself?
- Do they suggest that other provisions not using the qualifier are ambiguous?
- Isn't the purpose of a written contract to clarify and avoid doubt?

Oh, for HIPAA's Sake!

- When do you need a BAA?
 - How hard should you push back?
 - What about “to the extent the BA is acting as a BA” language?
- What should be in a BAA?
- What shouldn't be in a BAA?

Beware of Disguised Financing Arrangements

- Master Services Agreement references monthly service fees, but arrangement is actually a guaranteed 5-year contract fee, financed monthly.
- Red Flag References:
 - “Installment Payments”
 - “Financing”
 - Introduction of another party to the Agreement.

But Who Really Prevails?

- Prevailing party fee provisions.
- These are trickier than you think:
 - In the event a party prevails in an action to enforce its rights under this Agreement, the prevailing party shall be entitled to its attorneys' fees.

But Who Really Prevails?

- Prevailing party fee provisions.
- These are trickier than you think:
 - In the event a party prevails in an action to enforce its rights against under this Agreement, the prevailing party shall be entitled to its attorneys' fees.
 - In the event a party prevails in an action brought by either party to enforce rights under this Agreement, the prevailing party shall be entitled to its attorneys' fees.

Medicare As Secondary Payor

- If a provider contract says that payment from the insurer is “payment in full” you may extinguish your ability to bill Medicare!
- 42 CFR 411.32(b) Exception. Medicare does not make a secondary payment if the provider or supplier is either obligated to accept, or voluntarily accepts, as full payment, a primary payment that is less than its charges.
- A contract provision that says “Provider’s acceptance of the payment will extinguish Insurer’s obligations” is very different from “Provider’s acceptance of payment will constitute payment in full!”

Arbitrary Arbitration In The Arboretum?

- What is the ideal dispute resolution provision?

Don't You Forget About Me

- Careful when amending the agreement and consider the impact of the amendment on all other provisions (e.g., termination, severance).

Kiss This Thing Goodbye

- An employment agreement has a non-compete.
- The Agreement has a termination provision.
- If you use the termination provision, have you just terminated the non-compete?
- Often solved by “this provision shall survive the termination of the Agreement.”
- Also possible to separate “termination of employment” from “termination of the Agreement.”

Trying To Be Clear? Be Clear.

- Make sure the math maths.

(g) Pricing.

(i) Floor Pricing Conditions: This Service is based on contracted number of units times the unit rate. Actual number of units per month cannot drop below fifty (85) per cent of contracted number of units per month. Example: 8 Users @ \$25/User = \$200. Monthly usage extended pricing cannot drop below fifty (85) per cent of \$200 which is \$170. All other Service Components must be maintained at the contracted level

Presenters



Margy Ahmann
Attorney
612.492.7495
mahmann@fredlaw.com



David Glaser
Attorney
612.492.7143
dglaser@fredlaw.com



Andrew Holm
Attorney
612.492.7221
aholm@fredlaw.com



Ralph Topinka
Attorney
612.492.7400
rtopinka@fredlaw.com

Fredrikson



Where Law and Business Meet®