
K-Notes: Indemnification Clause in Online Subscription Agreement **from Microsoft**

Use Simple Language

Bring an easy familiarity to the contract, using terms like “we” and “you”. This will help most business people understand the contract without having to engage their legal department.



Eric Drattell
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“My view, as a former litigator who actually tried a couple of indemnification cases to judgment, is that these are actually really super important clauses.”

KEY TAKEAWAYS

- **Defend and Indemnify**

Consider having both defense and indemnification, which would enable the company to retain control of when and how to protect their IP.

- **Cap liability, with exception**

You can cap liability, which makes sense for the company. But include an exception for indemnification and reimbursement of expenses, which helps the licensee.

- **Define what a claim is**

If a third party claims IP ownership and sends a cease and desist letter, include language in the agreement whether that constitutes a claim. Provide a trigger point when the claim has happened.

- **Consider when to defend costs**

Instead of waiting until the end to defend costs, consider the possible benefits of doing it as they are incurred.

“This is referred to as the repair, replace, or refund remedy...the repair piece is not objectionable. It’s the refund piece that creates a problem.”