

Indemnity Clause Prevails over Limited Remedy Clause in Software License

A software manufacturer is not excused from indemnifying its licensee by a clause limiting the manufacturer's duty, in case of breach of warranty, to remedying the breach.

Myriad France's predecessor licensed browser software for mobile phones to Motorola Mobility's predecessor. According to Motorola Mobility's complaint, alleged defects in the software led to (1) a class action by users for excessive browser session charges, (2) cancellation of a sale of phones and (3) a costly delay in release of a product.

Myriad France moved to dismiss the claims based on a warranty clause that arguably limited Motorola Mobility's remedies to correction of the defects in the software within 90 days of delivery:

[Myriad France] warrants to **Motorola**, and solely for the benefit of **Motorola**, that for a period of ninety (90) days after delivery of each commercially released version of the ... Software to **Motorola**, such version ... will perform in accordance with the applicable ... Software Specification During the above noted warranty period, [Myriad France's] obligation for any breach of the warranty shall be to remedy the breach without additional charge to **Motorola**.

Motorola Mobility responded that the contract required Myriad France to indemnify Motorola Mobility both for costs due to third-party claims and Motorola Mobility's own losses caused by Myriad France's gross negligence:

[Myriad France] agrees to defend, indemnify, and hold harmless **Motorola** from and against any claim, suit, or proceeding and any damages, liability, or other expenses (including, but not limited to, reasonable attorneys' fees and court costs) which arise out of or result from: (i) gross negligence or wrongful acts of employees of [Myriad France] while performing [Myriad France's] obligations hereunder....

Motorola Mobility asserted that its losses were due to negligence and that the limited remedy in the warranty clause did not limit Myriad France's indemnity obligation.

On a motion to dismiss the complaint, the federal district court in Chicago agreed with Motorola Mobility. The court said that allowing the warranty remedy limitation clause to negate any remedy under the indemnity clause would make the indemnity clause meaningless, a result that courts avoid. The court also held that the indemnity clause covered not just damages from third-party claims but direct damages suffered by Motorola Mobility, because the indemnity covered "any



David Rabinowitz
Litigation

Intellectual Property
drabinowitz@mosessinger.com
212.554.7815

claim, suit, or proceeding and any damages, liability, or other expenses.” The court applied both Delaware law and California law because the choice of law provision in the agreement had changed in the middle of the relevant events from California to Delaware.

The court in substance left to a later date the issue of whether yet another clause, excluding liability for consequential damages, would affect the damages available to Motorola Mobility, saying that the damages had been pleaded as direct damages and the court would accept that characterization for purposes of a motion to dismiss.

Motorola Mobility might not have the right to recover damages under the indemnity clause, other than for indemnity against third-party claims, under New York law, which was not involved in the case. New York strictly construes indemnity clauses, at least where a party seeks indemnity for legal fees incurred in pursuing its breach of contract claims against the indemnitor. Whether New York would look differently upon a non-third-party claim under an indemnity clause for something other than such counsel fees is not clear.

Because the court dismissed without prejudice the negligence claims for failure to make timely service of the complaint, the court’s discussion of the indemnity and limitation of warranty clause was technically dicta, but the court gave its views in anticipation of re-service of the complaint and another motion to dismiss.

Motorola Mobility, Inc. v. Myriad France SAS, 850 F. Supp. 2d 878 (N.D. Ill. 2012)

Please click [here](#) to view the case document. For more information about this alert, please contact David Rabinowitz at drabinowitz@mosessinger.com.

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Moses & Singer LLP
The Chrysler Building
405 Lexington Avenue
New York, NY 10174-1299
Tel: 212.554.7800, Fax: 212.554.7700

2200 Fletcher Avenue
Fort Lee, NJ 07024
Tel: 201.363.1210, Fax: 201.363.9210
Abraham Y. Skoff, Esq.
Managing Attorney for New Jersey

10 Cuttermill Road – Suite 201
Great Neck, NY 11021
Tel: 516.498.8828, Fax: 516.498.8810
James Alterbaum, Esq.
Managing Attorney for Long Island

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