

## **CONTRACT TERMS YOU SHOULD KNOW**

By Paul A. Rianda, Esq.

One of the most daunting and time consuming tasks for any sales organization is negotiating the terms of the contract with your credit card processor. Most contracts between credit card processors and sales organizations are extremely dense documents, full of legalese that makes them very hard to understand. In this article, from the perspective of a “feet on the street” sales organization, I will highlight the important provisions in these contracts. I will also provide information about the types of issues that arise in each of the various contract provisions.

**Exclusivity:** Many credit card processors will ask you to enter into an exclusive arrangement as part of the transaction. This can be detrimental to your sales organization if there are changes in the bankcard industry that change the competitive balance between you and the credit card processor, especially from a financial perspective. An exclusive arrangement could leave you unable to move to a new processor to gain more favorable processing rates. The landscape is changing very quickly in the bankcard industry so unless you are given substantial financial incentives, it is generally not a good idea to enter into any type of exclusive relationship.

**Payment Terms:** One of the most important things to insure is that you are entitled to your residual payments for the term of the contract and after the contract ends. You need to make sure that the contract provisions provide that in the event of any cancellation, expiration or termination of the agreement that you are still going to be paid your residual as long as the merchants are generating a residual stream to credit card processor.

**Termination Provisions:** The other item that goes hand-in-hand with the payment terms is the conditions under which the credit card processor will be able to terminate your residual. Of course, your first objective is to try and insure that your residual stream will never be terminated regardless of any conduct on your part. However, most credit card processors will not allow such a provision and, at a minimum, will request a provision that provides for the termination of your residual payments if you are actively engaged in fraud that causes the credit card processor a monetary loss. During contract negotiations, remember to view the contract as a whole to make sure that there are no provisions that would allow the credit card processor to terminate your residual income. Often, one contract provision will make reference to other sections in the agreement that allow for the termination of the residual. You need to make sure you read each of the referenced sections to determine their impact on the potential for termination of your residual payments.

**Indemnity:** Indemnity is the provision that, if certain events occur, allows the credit card processor to obtain defense and indemnity from you. What this means is that as a first matter, if a merchant for instance files a lawsuit because of something that you did or did not do, then you must pay for the cost of hiring an attorney to defend the credit card processor in the lawsuit. If indeed the credit card processor is found liable in the lawsuit, potentially you will have to pay for any judgment entered against the credit card processor. Indemnity and defense obligations can be extremely expensive, so it is important that you try to limit your exposure in this area as much as possible. To the extent possible, you should try and limit your exposure to any intentional or fraudulent conduct that causes a loss to the credit card processing organization. Broader indemnity provisions that allow for recovery for negligence could serve to allow the credit card processor to obtain defense and indemnity under almost any circumstances.

**Chargebacks:** One of the largest issues in the contract is the liability for chargebacks. In my experience, this provision is the one most often relied upon for terminating your residual. The contract should not be silent on this issue, but should affirmatively state that you are not liable in any fashion for any merchant chargebacks or other losses incurred by the credit card processor. Larger sales organizations can, as a way to make more money, assume some liability for chargebacks. However, for the smaller sales agents it makes no sense to take any chargeback liability as the losses from one merchant could easily wipe out your residual stream for an indefinite period of time.

**Attorneys Fees:** An attorney’s fees provision allows the prevailing party in any lawsuit to recover its attorney’s fees. This can serve as a leverage device in the event that a credit card processor wrongfully fails to pay you

your residual. In addition to having to pay your residual, they are also going to have to pay for the attorney's fees you pay to recover the residual.

**Venue:** Often times credit card processors will place a venue provision in the agreement that forces you to sue them in a court where the credit card processor is located. If you are dealing with a local organization, this may not be as great an issue as if you are dealing with a company that is across the United States. Unless the credit card processor is located near you, I would recommend trying to delete any such venue provision in the agreement.

**Personal Guarantees:** Personal guarantees only become relevant in regard to the indemnity provisions and the risk for chargebacks. If you guarantee the agreement, conceivably you can be held personally liable to defend and indemnify the credit card processor. The same is true if you enter into the agreement personally instead of utilizing a corporate entity or limited liability company that you own. For this reason, it is often more advantageous to you to have a company properly formed and existing in your home state that you use for all your business dealing. All business operations of your sales organization would be run through this entity and also the entity should be the party that enters into the contract with the credit card processor. This will serve to protect your personal assets from the risk of having to pay for losses from merchants, indemnity obligations and any other obligations of your business.

**Non-Solicitation Provisions:** Most credit card processors will ask that you do not solicit the merchants you submit to them for a period of 3-5 years after the merchants are placed with the credit card processor. These provisions can become an issue to the extent that if they quit paying you your residual, you should generally have a right to move the merchants to retain your residual stream. Consequently, in most contracts, I insert a provision that states unequivocally that if the credit card processor wrongfully fails to pay your residuals that you can move your merchants to another processor.

These are just a few of the more important provisions that you need to be aware of in a contract. Most contracts are written as traps for the unwary and unless you are very familiar with such contracts, it is critically important that you receive competent legal advice to protect yourself.

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