



# After the Thrill is Gone

## Tips From Litigators to Avoid Post-Deal Break-ups

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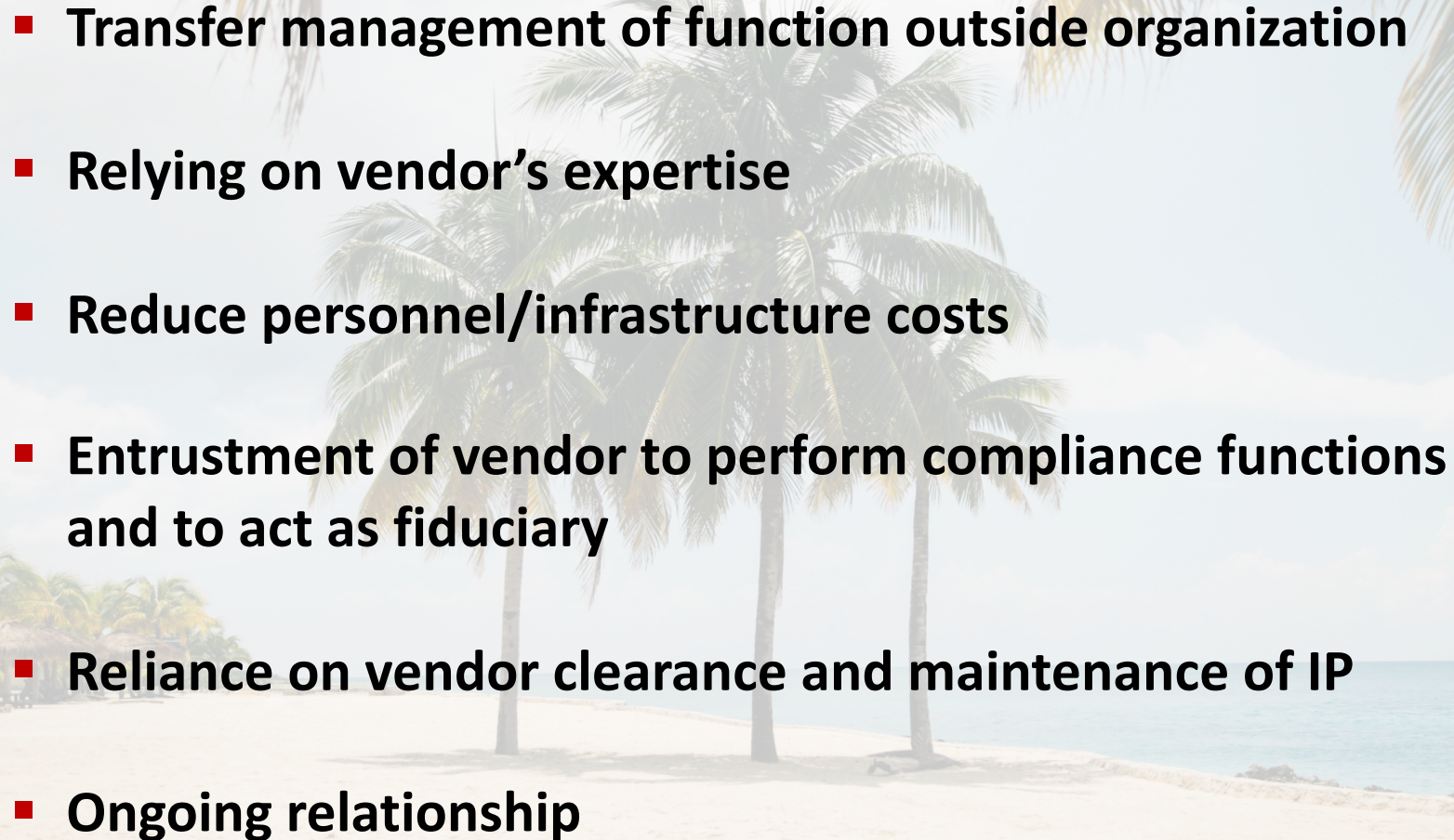
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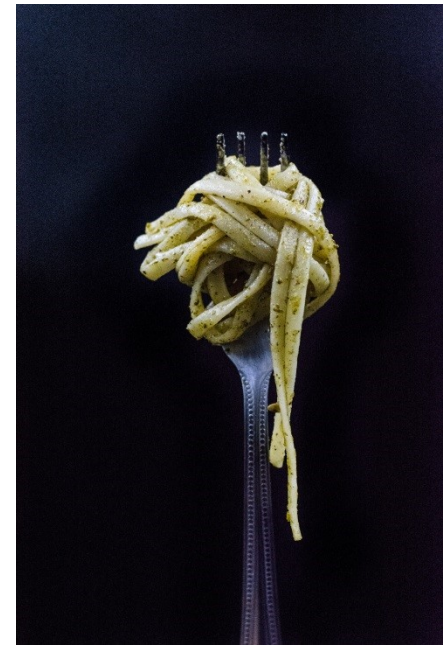
# Paradise by the Dashboard Light: Hallmarks of Outsourcing Deals

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- **Transfer management of function outside organization**
  - **Relying on vendor's expertise**
  - **Reduce personnel/infrastructure costs**
  - **Entrustment of vendor to perform compliance functions and to act as fiduciary**
  - **Reliance on vendor clearance and maintenance of IP**
  - **Ongoing relationship**



# Scenes from an Italian Restaurant: Agenda

- Setting expectations – Services descriptions and SLAs
- Trust but Verify – Audit provisions, reporting, inventory control
- Allocating exposure – reps/warranties/indemnity/limitation of liability
- Business continuity – financial oversight, step in, escrow





# Love and Marriage

Leading provider of home health care services in Southeast US

Managing and provisioning CBI employee lap tops and mobile devices

Enters into a contract with HT to outsource all IT support

Care Bears, Inc.

Hannibal Technologies

Providing help desk services to CBI employees

Reduces its internal info security staff and terminates lease on storage facility

Installing updates, bug fixes and patches for desktop and device software

Has access to all data and all devices of CBI



# Goodbye Yellow Brick Road

- Care Bears finds that HT's services are not meeting its needs and are creating problems
  - Help desk is only available Monday-Friday, 9-5, so Care Bear employees encountering issues cannot get support while working at night or on weekends
  - HT takes two weeks to provision and deliver lap tops for new Care Bear employees, causing gaps in Care Bears' services to customers
  - HT refuses to work with Care Bears' electronic medical records vendor to assure seamless communications and access to important health information.
  - HT claims that some of these issues are caused by Care Bears' failure to provide HT with adequate and timely information.



# What You Get When You Fall in Love: Consequences to Care Bears

- Care Bears receives complaints from its own customers regarding resulting performance issues
- Large prospective customer decides to contract with Care Bears competitor
- Care Bears pays EMR vendor an extra \$100,000 for professional services incurred to integrate with software managed by HT





# Peaceful Easy Feeling: Setting Expectations



## Clearly Define Scope of Services

- Vendor Responsibilities
- Customer Responsibilities
- Require Timely Communication Issues



Include provisions requiring cooperation with other service providers to the customer



Use Service Level Agreement to define “performance” and include consequences for failures

- Tailor metrics to services being provided
- Create service credit structure for failures
- Address consequences of “chronic failure”

# Lyin' Eyes

- Care Bears equipment costs double during second year of term while its employee count and turnover remain constant
- Care Bears audit reveals that HT warehouse manager, in collaboration with an HT subcontractor has been stealing lap tops and mobile devices that have been returned to the HT warehouse for refurbishing and reuse.
- FBI finds 50 Care Bears laptops with unencrypted PHI in the car of a known cyber-criminal



# Lawyers, Guns and Money: Consequences for Care Bear

- Government Involvement
  - Agency Investigation (HHS-OIG, OCR, ETC.)
  - Subpoenas
  - Internal Investigation
  - Collateral Consequences





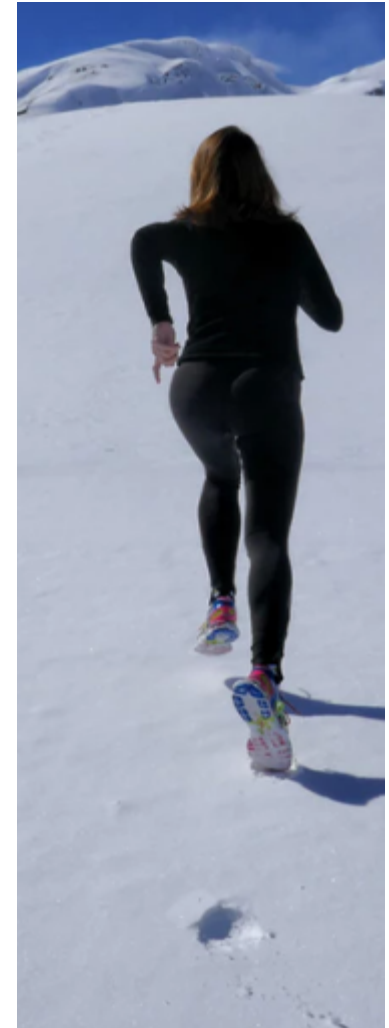
# Your Cheatin' Heart: Trust but Verify

- Include and enforce audit and reporting provisions tailored to services
- Provide specific remedies for theft, where appropriate
- Require vendor to take responsibility for acts/omissions of subcontractors
  - Direct right of action against subcontractors
  - Right to approve subcontractors
- Include background screening provisions for vendor employees



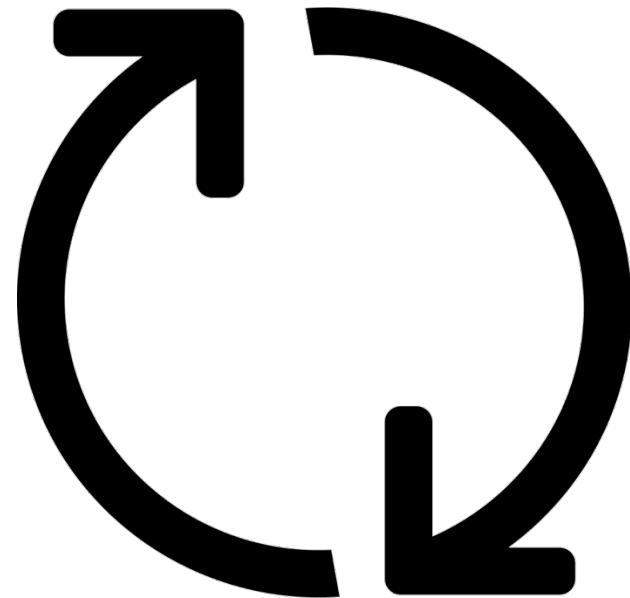
# Fifty Ways to Leave Your Lover

- HT begins to encounter financial difficulties, which impact level of staffing and quality of services.
- Care Bears begins search for alternative vendor, but before it can find a substitute, HT notifies it that HT will cease operations in two weeks.
- Care Bears termination rights are triggered only by an actual breach of the agreement by HT that is not cured within 30 days of notice of breach.
- Care Bears contacts HT's landlord to arrange for access to HT's warehouse to recover Care Bears equipment, but the landlord refuses without express permission from HT.



# Here I Go Again (On My Own): Consequences for Care Bears

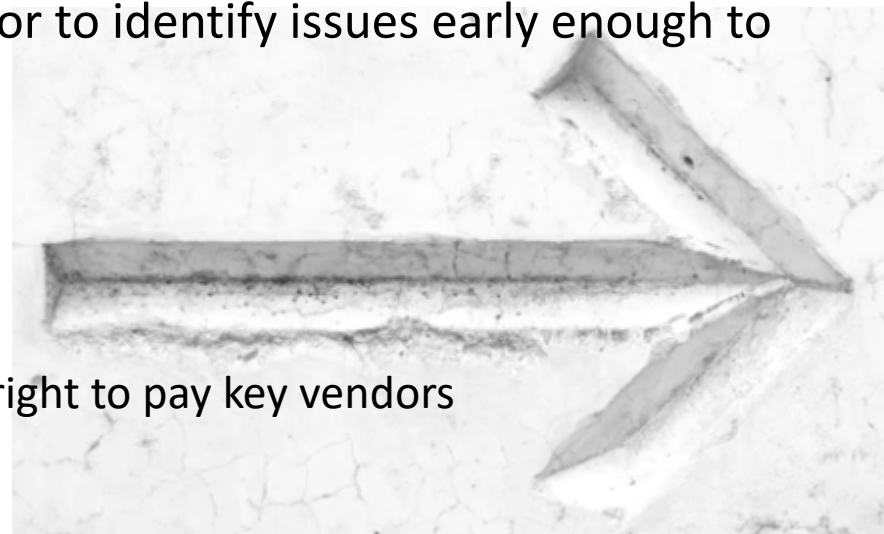
- Reality of bankruptcy proceedings
- Rejection of contract
- Inability to access key assets, services and data



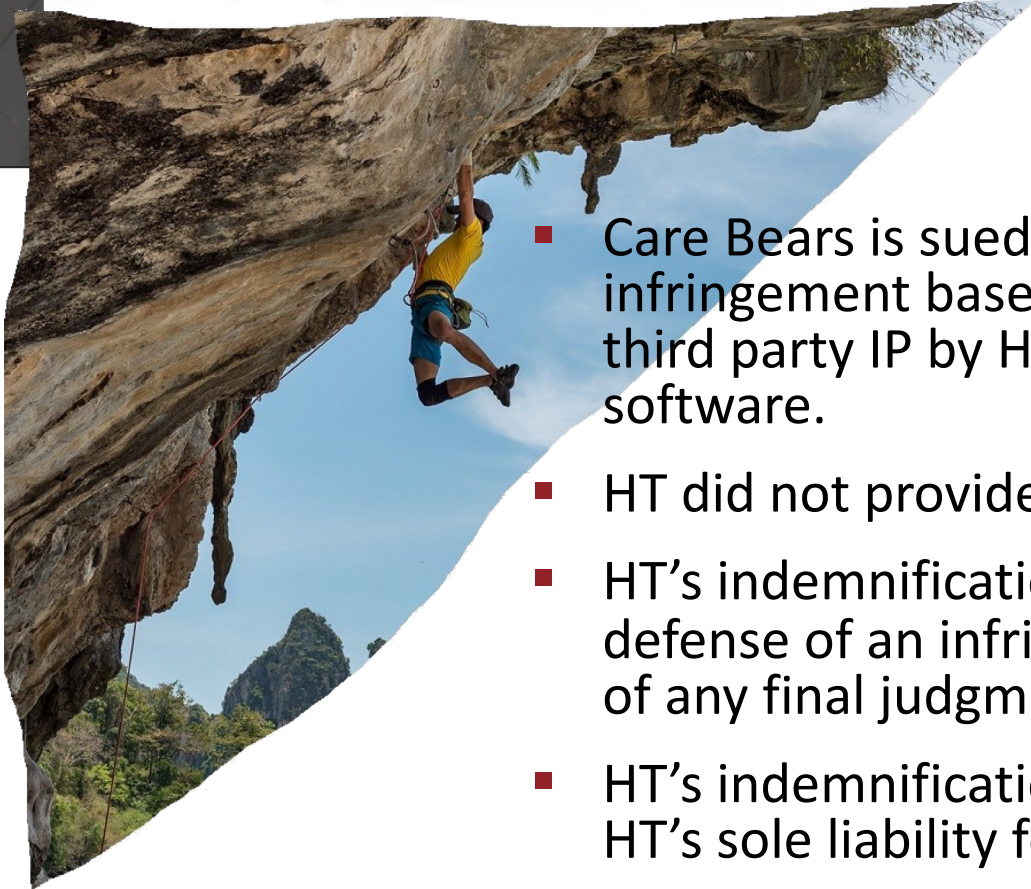


# Already Gone: Preparing for Smooth Transition

- Require financial reporting by vendor to identify issues early enough to act
- Provide for access to key assets
  - Source Code Escrow
  - “Step-in” Rights
  - Access to key vendor agreements/right to pay key vendors
- Provide for transition period
  - Maintenance of platform
  - Professional services at pre-agreed upon rates
  - Access to data (self-service if necessary)
- Termination rights based on early warning signs (e.g., loan defaults, other adverse financial events)
- Access to key personnel for a period of time



# Take It to the Limit



- Care Bears is sued for contributory patent infringement based on the alleged infringement of third party IP by HT's proprietary help desk software.
- HT did not provide a warranty of non-infringement
- HT's indemnification obligations provide only for the defense of an infringement action and the payment of any final judgment or settlement.
- HT's indemnification is Care Bears' sole remedy and HT's sole liability for any infringement.
- The limitation of liability is capped at an aggregate of \$3 million, with no carve-out for indemnity.

# Poor Poor Pitiful Me: Implications for Care Bears

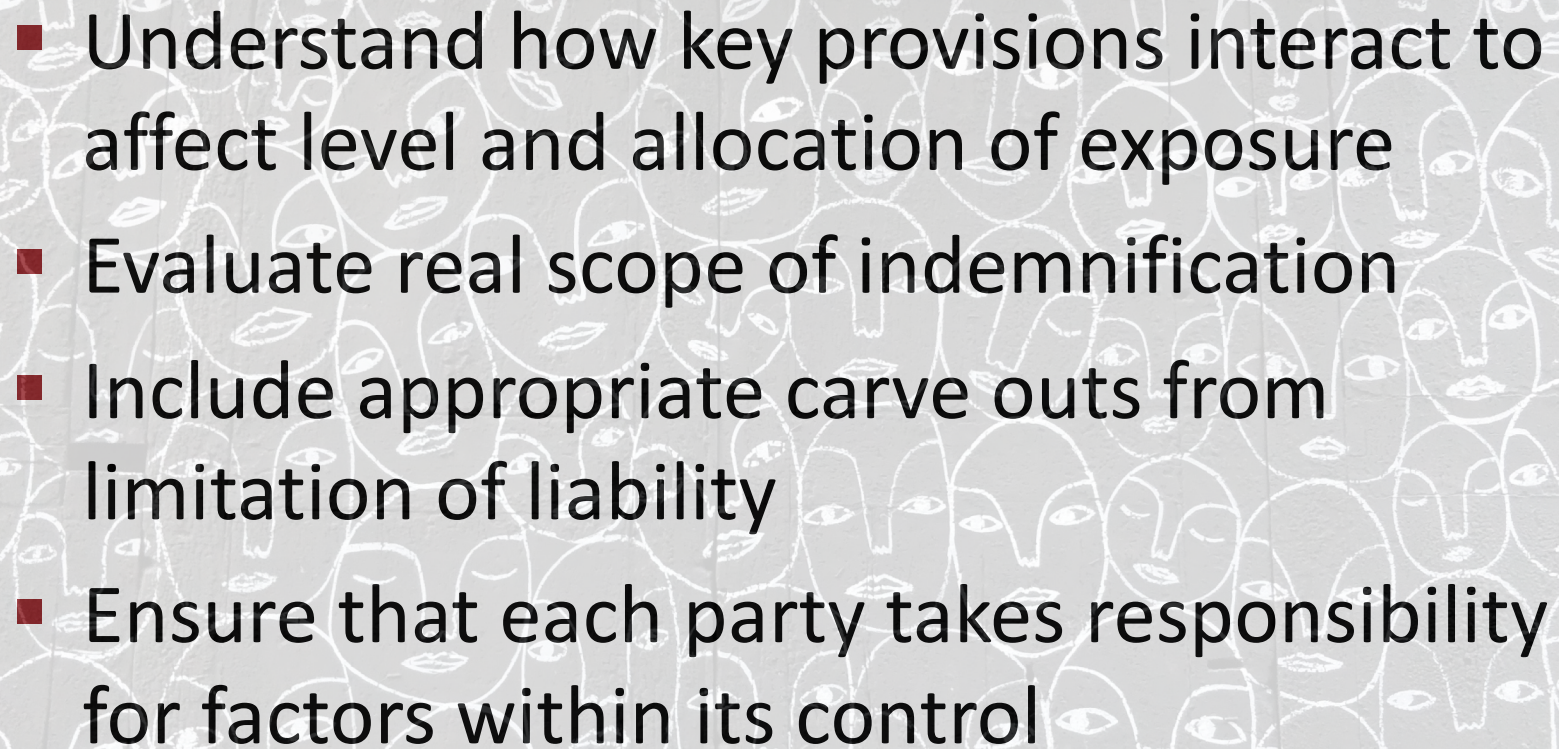
- Defense costs for the IP infringement suit hit the \$3 million level during the discovery process
- Care Bears wants to find another vendor to provide help desk services due to threat of unavailability of HT solution
- A year after the IP infringement suit exhausts the limitation of liability, HT experiences a security incident that exposes Care Bears patient data







# Ready to Take a Chance Again: Allocating Exposure

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- Understand how key provisions interact to affect level and allocation of exposure
  - Evaluate real scope of indemnification
  - Include appropriate carve outs from limitation of liability
  - Ensure that each party takes responsibility for factors within its control

# Questions for the Panel?



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