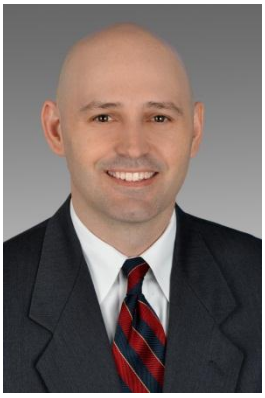
Software Escrow Provisions in Agreements

By Brian Von Hatten

Most technology-related contracts have provisions that seek to protect the seller or licensor's intellectual property rights. These provisions usually contain clauses prohibiting reverse engineering, derivative works, or copying software. It is generally true that most software is not sold; it is simply licensed to the licensee to use for some certain amount of time. What happens if the licensee relies on the software to run its business and the licensor breaches the agreement (due to, for example, insolvency, willfulness, or some other reason beyond its control)? In theory, the agreement will likely terminate, and thus the license to use the software terminates as well. This could create a serious burden for the licensee.

One contract component that may help protect the licensee is a software escrow provision. In general, these provisions require the licensor to place a copy of the source code with an escrow and list the licensee as a third party beneficiary to the code. These provisions can vary in breadth and flexibility, but the contract language may provide that the licensee is entitled to the source code in the event the licensor becomes insolvent, files bankruptcy, or some other triggering event. This provision may also provide that in the event of a triggering event that the licensee is granted a license to use the software for some period of time. The nuances of these provisions often depend on the comparative bargaining position between the parties.



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Brian represents many large and mid-market organizations on matters related to transactions, software licensing, and disputes. Brian's focus includes substantial attention to complex information technology issues for companies of all sizes.

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