



Successfully Defending Software Audits

Presented by Robert J. Scott
Managing Partner Scott & Scott, LLP

www.ScottandScottllp.com

Types of Software Audits

- Independent & Third-Party Audits
 - Software Publisher Conducted Audits
 - Publisher-Initiated Audits Conducted by Big Four Firms
- Self-Audits
 - Audits Initiated by the Business Software Alliance (BSA)
 - Audits Initiated by the Software & Industry Information Association (SIIA)

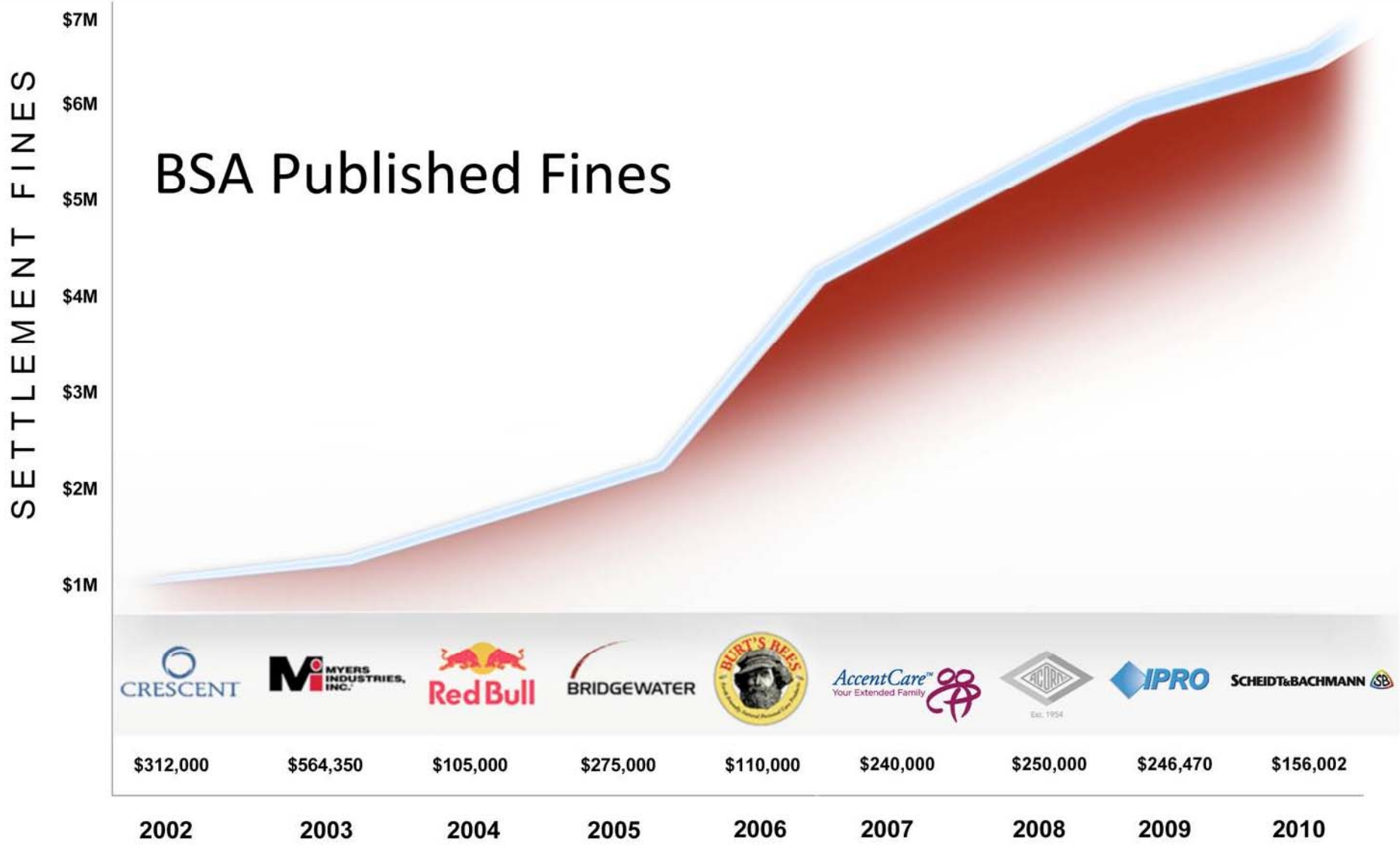
Publisher & Third-Party Audits

- Publisher initiates audit by exercising its contractual right to enter and audit
- The most active third parties are KPMG (BEA) and Deloitte (IBM, Adobe)
- Third parties allegedly operate independently
- Third parties usually have publisher-developed discovery tools and scripts
- Audits may be narrow in scope but are still invasive and disruptive

Initiation of BSA Audits

- Aggressive marketing and PR campaigns drive reports from disgruntled employees
- Tipsters stand to recover up to \$1,000,000 in reward money
- Audit letters are generated by both internal enforcement agents and an international network of law firms

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SIIA Audits

- Audits are initiated by tips from both disgruntled employees and tips from member firms
- Tipsters stand to gain up to \$1,000,000 in reward money
- Lawyers are often compensated on a contingency fee basis
- SIIA is in competition with BSA due to overlap in members

Legal Issues Arising in Software Audits

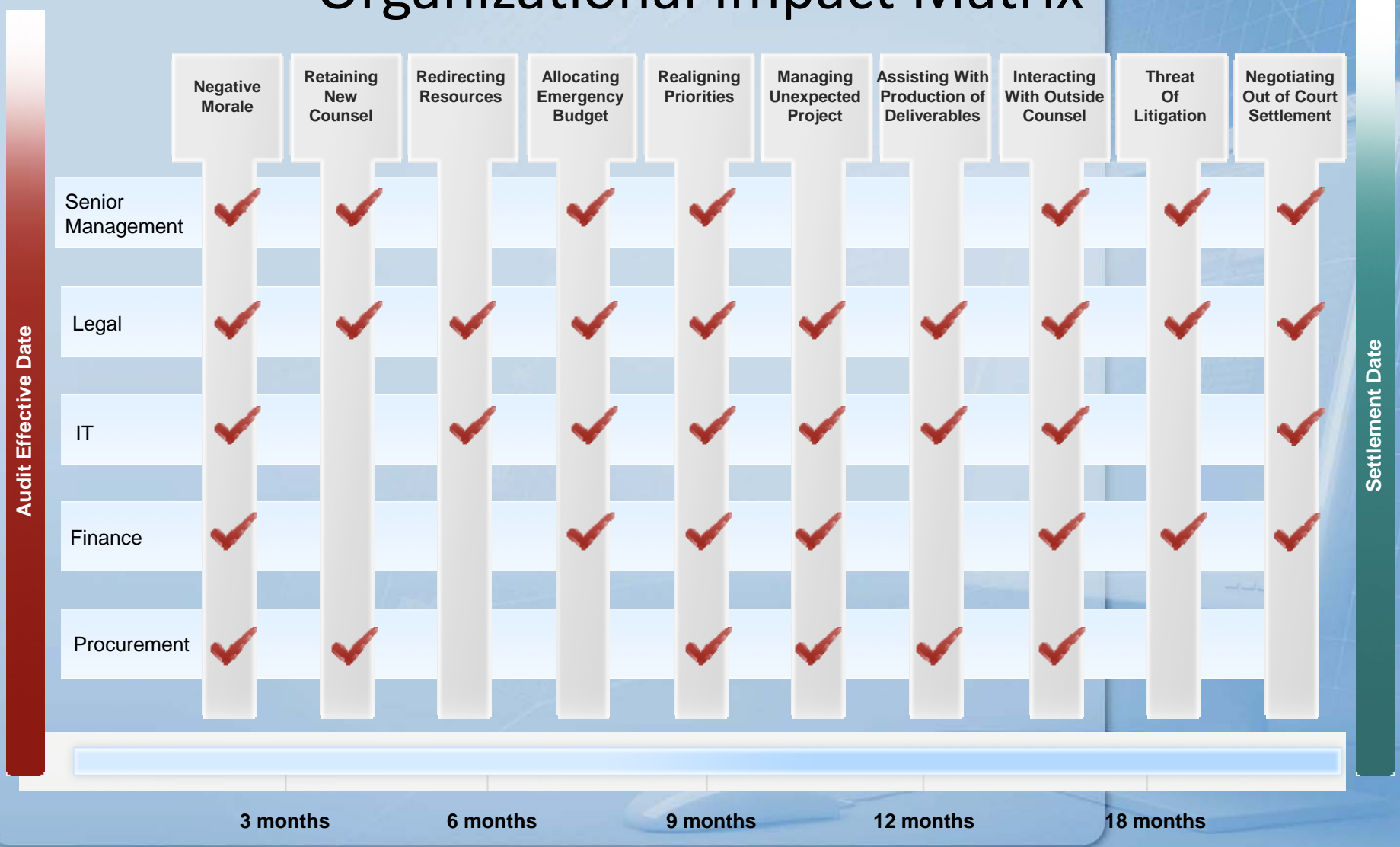
- Breach of Contract Liability
- Copyright Infringement Liability
- Successor Liability Resulting from Mergers or Acquisitions
- Individual Liability for Officers and Directors

Common Mistakes Made in Software Audits

- Failure to Negotiate Audit Procedures
- Reliance on IT Staff to Deploy Discovery Tools
- Failure to Understand and Gather Proper Proof of Purchase Documentation
- Failure to Produce Audit Results as of the Effective Date
- Scrambling to Buy Software Products in Response to an Audit Letter

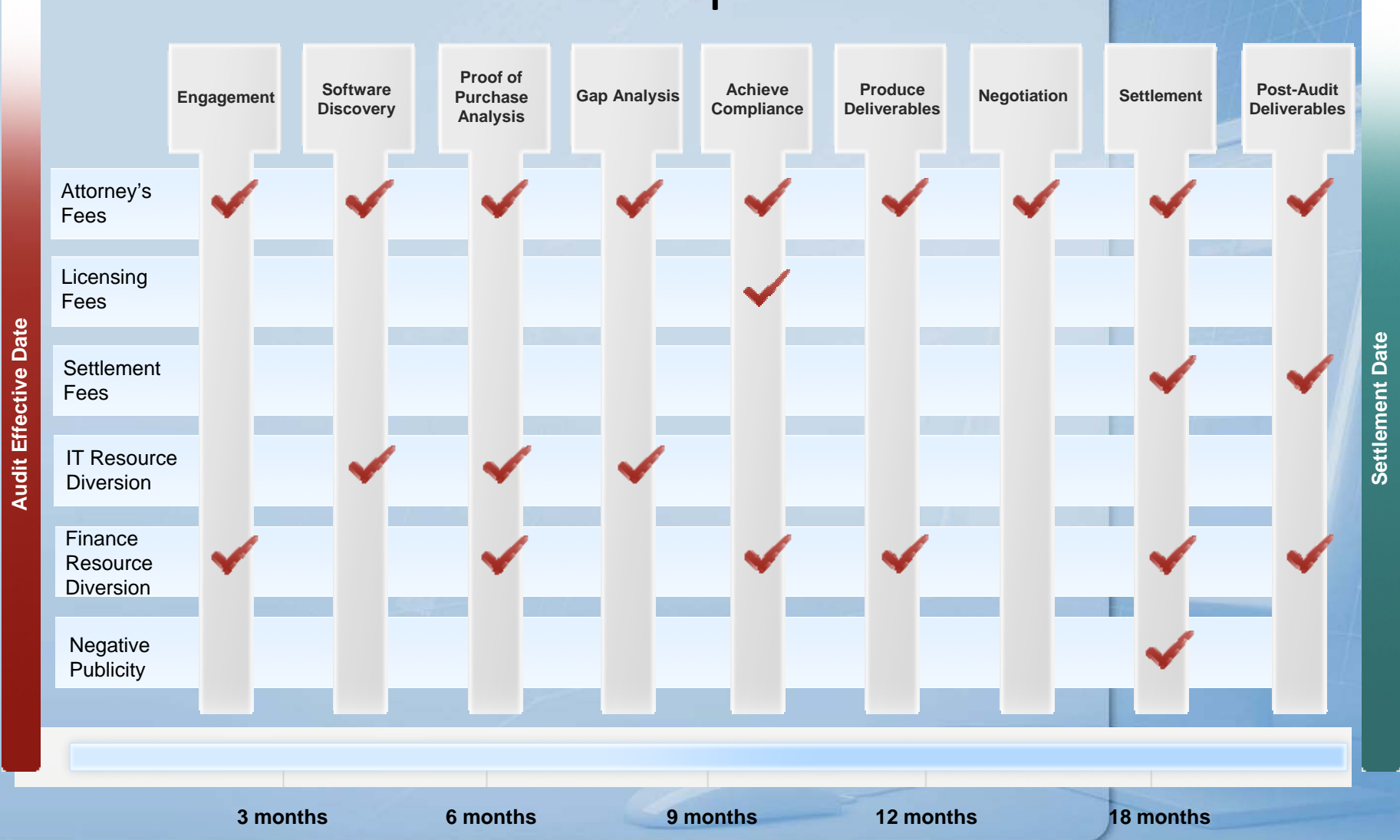
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Organizational Impact Matrix

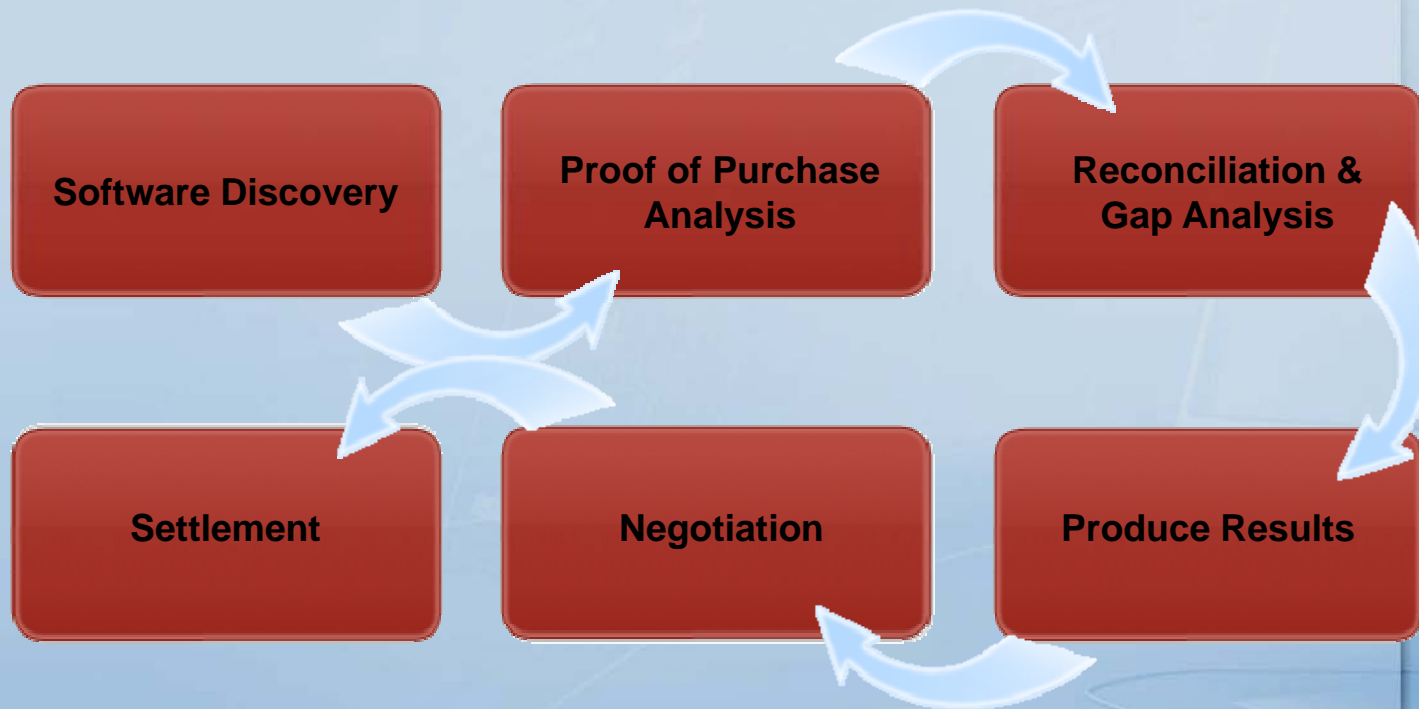


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Financial Impact Matrix



The Audit Defense Process



Software Discovery

- Automated Process Designed to Identify all Software Products Installed on Corporate Computers
- Discovery Tool Selection is Critical to Success
- Discovery of All Assets is Challenging
- Reporting is Unreliable
- Validation is Difficult
- Make Sure all Data is Protected by Attorney Work-Product Privilege
- Attorneys Experienced With Software Licensing Should Analyze the Data

Proof of Purchase Analysis

- Process of Gathering and Documenting Proof of Ownership of Software Licenses
- License Agreements, Manuals, Media, Purchase Orders, and Checks are Not Sufficient Proof
- Dated Proofs of Purchase are Required
- Valid Proof Must Show Product Name and Version
- The Entity Listed in the Invoice or Other Proof of Purchase Must Match the Entity Being Audited
- Clients Should Leverage Vendors to Help Compile Entitlement Data

Gap Analysis

- Process of Analyzing Gross Installation Information against Gross Invoices for each Specific Product
- License Types, Use Characterizations, and Downgrade Rights must be Considered
- Must Include Products not Included in Software Discovery Reports Such as Client Access Licenses, and Remote User Licenses Including Terminal Server, VPN and Citrix Users
- Calculate the Potential Fine Exposure for the Client Prior to Producing the Audit Results

Producing Audit Materials

- Schedules and Supporting Documentation Representing all Relevant Software Products Installed on the Client's Network as of the Effective Date
- Secure a Federal Rule of Evidence 408 Agreement
- A Summary with Columns for Product Name, Number of Installations, Number of Proofs of Purchase, and Excess/Deficiency is Required
- Organize the Supporting Material by Product with Supporting Proof of Purchase for Each Product
- Obtain Management Approval before Producing Final Results

Negotiating Resolution

- Discussions Occurring after Production and Continuing through Settlement
- Carefully Scrutinize the Auditor's Analysis
- Explain the Basis for Any Challenges to the Proposed Deficiency Counts Prior to Engaging in a Monetary Negotiation
- Understand Both Monetary and Non-monetary Considerations Before Negotiating
- Challenge the Legal Basis for Arguments Advanced in Settlement Correspondence

Settlement Agreements

- Make sure that executive management understands that Audit Results are Being Certified as Accurate as of the Effective Date
- Understand that the Release is Predicated on the Accuracy of Certifications and in Many Instances Future Performance
- Never Allow an Agency to Conduct Future Inspections
- Non-monetary Provisions Have “Costs” as Well
- Confidentiality is Sometimes Negotiable

Contact Information

Robert J. Scott, Esq.

Managing Partner

Scott & Scott, LLP.

1256 Main Street, Suite 200

Southlake, TX 76092

Phone: (800) 596-6176

Fax: (800) 529-3292

E-Mail: rjscott@scottandscottllp.com