

Indemnity Clauses

Just boilerplate, right?

Indemnity

“The obligation resting on one person to make good any loss or damage another has incurred or may incur by acting at his request or for his benefit, or a right which inures to a person who has discharged a duty which is owed to him but which, as between himself and another, should have been discharged by the other.” 42 C.J.S. *Indemnity* § 2 (1991).

Contractual Indemnity

Contractual indemnity is different from common law indemnity. Indemnity provisions in a contract allocate the risk of a business transaction between the two parties by obligating one party to pay the expenses incurred by the other party under certain circumstances.

Drafting an Indemnity Provision

- Consider the following when drafting, negotiating or entering into a contract with an indemnity provision:
 - Who is indemnifying whom?
 - What risks of doing business under the contract are being indemnified, i.e., personal injury, property damage, economic loss, infringement of intellectual property rights, and attorneys' fees and costs of defense?
 - Do the terms of the contract determine whether the indemnitor is obligated to reimburse the indemnitee for a particular claim, and if so, when?

Drafting an Indemnity Provision

- Should there be a monetary limitation on the extent of the indemnity? If so, the limitation should bear a reasonable commercial relationship to the contract.
- Does the contract include a provision requiring coverage of certain risks by insurance such that the indemnity is limited to the amount of the insurance coverage (i.e. contractual liability insurance)?
- Does the contract clearly express an intent to indemnify a party against its own negligence, and if so does it make sense under the circumstances?

Drafting an Indemnity Provision

- Both the identity of the other contracting party and your negotiating power will affect your ability to negotiate a fair and reasonable indemnity provision.
 - Government Agencies often are limited or prohibited from agreeing to contractual indemnity provisions due to “tort claims” acts or similar statutory or constitutional limitations.
 - If you have little or no negotiating power, you may be stuck with the indemnity provision offered. Options for managing the risk imposed by an unreasonable indemnity include ensuring that policies of insurance cover contractual indemnity claims.

Drafting an Indemnity Provision

- The indemnity provision should be integrated with the other risk allocation provisions in the contract.
 - Include a clear dispute resolution mechanism. If the parties disagree over an indemnity claim, the dispute resolution mechanism will come into play. Issues such as governing law and where disputes will be resolved become important.
 - Limits on liability are important. Issues such as including or excluding obligations under an indemnity provision from a limit on liability is important. Consideration of whether to exclude indemnity obligations from a disclaimer of consequential damages should be considered.

Drafting an Indemnity Provision

- Insurance requirement provisions should be evaluated. For indemnitee, being co-insured on target company insurance policies provides an additional “pocket” to which to look to satisfy indemnification claims. Indemnitors may want to negotiate placing a “no double-dipping” provision in the indemnification provision so the indemnitee cannot obtain double recovery: i.e., from indemnitor and indemnitor’s insurance company.

Drafting an Indemnity Provision

- Duty to defend should be separate from duty to indemnify.
 - Is it important for to defend each and every claim in every small town across the United States to avoid setting negative precedent, to maintain client relationships or for other business reasons?
 - The non-defending party should have the right to defend a claim if the other party fails or chooses not to do so.
 - The non-defending party should have the right, at its sole option and expense, to be represented by counsel of its choice, if the counsel is reasonably acceptable to the defending party.

Drafting an Indemnity Provision

- Consider whether limits on the size of claim are appropriate, i.e. a threshold amount that the claim must exceed before the indemnification obligation is triggered.
- Consider how long the indemnity obligation should survive the termination of the contract.
- If the contract is assigned, should the indemnity and/or defense obligations go with the contract?

Drafting an Indemnity Provision

- ❑ Consider whether the funding of the indemnity obligation is necessary.
 - Should some funds be escrowed?
 - Should you have the express right to set off amounts owed to cover expenses incurred that are the subject of the indemnity?

Examples of Overreaching Provisions

Names have been changed to protect the
innocent (and the guilty)

Supplier shall defend, indemnify, release and hold harmless the Indemnitees from and against any and all loss, damage, injury, liability, demands and claims for injury to or death of any person (including an employee of Supplier or an Indemnitee) or for loss of or damage to property (including Supplier or Indemnitee property), in each case whether directly or indirectly resulting from or arising out of Supplier's (or its subcontractors') performance of this Agreement. This indemnity shall apply whether or not an Indemnitee was or is claimed to be passively, concurrently, or actively negligent, and regardless of whether liability without fault is imposed or sought to be imposed on one or more of the Indemnitees. Such indemnity shall not apply to the extent that it is void or otherwise unenforceable under applicable law in effect on or validly retroactive to the date of this Agreement and, shall not apply where such loss, damage, injury, liability, death or claim is the result of the sole negligence or willful misconduct of an Indemnitee.

Supplier shall defend, indemnify, release and hold harmless the Indemnitees from and against any loss, damage, injury, liability, demands and claims, and pay any settlements and judgments against the Indemnitees, arising out of alleged or actual infringement (whether or not the alleged infringement is joint or indirect) of patent rights, trademark, copyrights or alleged misuse of trade secret information, by the whole or any portion of the Services or Products. The foregoing indemnity shall be limited to the extent, but only to the extent, Supplier demonstrates that claim of infringement has resulted from Purchaser's non-permitted modification of the Products or work product.

Examples of provisions that reasonably allocate the risk between the parties

- Third-Party Infringement Claims. Supplier will defend at its expense or settle any third-party claim against Customer or its Affiliates alleging that Products, Services, or Deliverables provided under this Agreement infringe intellectual property rights in the country where they were sold. Supplier will pay infringement claim defense costs, Supplier–negotiated settlement amounts, and damages finally awarded by a court. Supplier has no obligation for any claim of infringement arising from, and Customer will indemnify Supplier against any third-party claim arising from: (i) Supplier’s compliance with Customer or third party designs, specifications, instructions, or technical information; (ii) modifications made by any party other than Supplier; (iii) Customer’s non-compliance with applicable Documentation; (iv) use of Products, Services or Deliverables for purposes not contemplated by this Agreement or applicable Documentation (including distribution to third parties); (v) Customer use or combination of Products, Services, or Deliverables with products, software, or services that are not provided by Supplier; or (vi) a Product, Service, or Deliverable that is not at the most current release level if the most current release level is non-infringing.

- ❑ Bodily Injury Cross-Indemnity. Customer and Supplier will each defend and indemnify the other and the other's employees, officers, directors and agents against all damages for bodily injury, including death, or damage to real or tangible personal property to the extent proximately caused by the indemnifying party in the course of performing this Agreement.
- ❑ Conditions. Each party's indemnification obligations under this section are conditioned upon the indemnified party: (i) promptly notifying the indemnifying party of any claim in writing; (ii) cooperating with the indemnifying party in the defense of the claim; and (iii) granting the indemnifying party sole control of the defense or settlement of the claim.