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ACC NATIONAL CAPITAL REGION CORPORATE LAW FORUM PRESENTATION:

Defense and Indemnification Provisions: Lessons Learned from Litigation

Panelists



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General Principles of Indemnification and the Duty to Defend

- In general terms, indemnity is an obligation by one party to make another party whole for a loss, damage, or liability the other party has incurred.
 - The party obligated to pay is the indemnitor.
 - The party entitled to indemnification is the indemnitee.
- The obligation to indemnify another may arise by contract or by common law.
- The purpose of indemnity provisions “is to pre-determine how potential losses incurred during the course of a contractual relationship will be distributed between the potentially liable parties.” *Estes Express Lines, Inc. v. Chopper Express, Inc.*, 273 Va. 358, 366 (2007).
- Indemnification typically involves reimbursement for a third-party claim against the indemnitee.
 - Indemnification may, however, cover other kinds of losses.
 - First-party claims
 - Regulatory fines, etc.

General Principles (cont.)

- Duty to defend
 - The duty to defend is distinct from and broader than the duty to indemnify.
 - The duty to indemnify arises only once loss, damage, or liability has been incurred.
 - The duty to defend, by contrast, arises when a claim has been made that could potentially result in loss, damage, or liability.
- Exculpatory or limitation-of-liability provisions
 - An exculpatory provision governs liability as between the two parties to a contract. One party releases the other party from liability to the first party for specific conduct.
 - Although exculpatory provisions and indemnification provisions are different, courts sometimes apply similar principles in construing and/or determining the enforceability of both.

General Principles (cont.)

- Indemnification is distinct from guaranty and surety contracts.
 - In a guaranty contract, the guarantor promises to pay another if a third party fails to honor an obligation to the other party.
 - In a surety contract, the surety promises to pay the obligation of a third party to the other party to the surety contract.
- This presentation will not address two specific applications of contractual indemnification obligations:
 - Insurance contracts
 - Indemnification of directors and officers
- This presentation also will not address principles of equitable/implied indemnification.

General Principles (cont.)

- As a general matter, defense and indemnity provisions are subject to regular rules of contract interpretation.
- But courts have created certain clear-statement, or narrow-construction, rules with regard to certain aspects of indemnification agreements.
 - “[I]ndemnity agreements in which an innocent indemnitor agrees to indemnify an indemnitee are narrowly construed by the courts so as not to read into them any obligations [which] the parties never intended to assume.” *Am. Bldg. Maintenance Co. v. L’Enfant Plaza Props., Inc.*, 655 A.2d 858, 861 (D.C. 1995) (internal quotation marks omitted).

Indemnification for Indemnatee's Negligence

- Scenario:
 - Contractor hires subcontractor. The subcontractor agrees to a boilerplate indemnification clause. It agrees to indemnify and hold harmless the contractor “from any and all claims and liabilities for property damage and personal injury, including death, arising out of or resulting from or in connection with the execution of the work.”
 - As a result of the contractor’s own negligence, an employee of the subcontractor is injured and successfully sues the contractor.
 - Can the contractor enforce the indemnification provision against the subcontractor even though the contractor itself was the negligent party?

Negligence (cont.)

- DC: Yes.
- In DC, “unique rules” apply where a party claims to have the contractual right to indemnity for its own negligence. *Rivers & Bryan, Inc. v. HBE Corp.*, 628 A.2d 631, 635 (D.C. 1993).
 - “[T]here must be a clear intention” to provide such indemnity “that is apparent from the face of the contract.” *Id.*
 - “If the court determines that the contract is ambiguous on the issue of indemnifying the negligence of the indemnitee, then . . . there is no indemnification for the indemnitee’s own negligence.” *Id.*
- But DC courts have been generous in what they find to be a “clear statement” of intent to provide indemnification for the indemnitee’s negligence.
 - The DC Court of Appeals found the provision on the previous slide sufficiently broad to provide the required clear statement. *See N.P.P. Contractors, Inc. v. John Canning & Co.*, 715 A.2d 139 (D.C. 1998).

Negligence (cont.)

- Another example from DC:
- “The subcontractor shall promptly indemnify and save and hold harmless the General Contractor and the Owner from any and all claims, liabilities and expenses for property damage or personal injury; including death, arising out of or resulting from or in connection with the execution of the work provided for in this Agreement.” *W.M. Schlosser Co. v. Md. Drywall Co.*, 673 A.2d 647, 653 (D.C. 1996).
- The provision was held to be sufficiently broad to cover the indemnitee’s own negligence.

Negligence (cont.)

- To limit an indemnification clause so as not to cover the indemnitee's own negligence, the indemnification clause should include "a specific reference to one party's conduct." *Parker v. John Moriarty & Assocs.*, 189 F. Supp. 3d 38, 45 (D.D.C. 2016).
- Examples:
 - "[T]he Subcontractor shall indemnify and hold harmless the Owner, the Architect and the Contractor and all of their agents and employees from and against all claims, damages, losses and expenses, including but not limited to attorney's fees, caused by, arising out of, in connection with, or resulting from the performance of the Subcontractor's Work under this Subcontract, where any such claim, damage, loss or expense . . . is caused by and arises in whole or in part, from any negligent or non-negligent act or omission of the Subcontractor or any of its agents, employees, sub-subcontractors or others." *Parker*, 189 F. Supp. 3d at 41.
 - "Subcontractor agrees to observe and comply with all federal, state and local statutes and/or ordinances relating to the performance of this subcontract . . . and to indemnify and hold harmless Contractor from all penalties, damages or other loss resulting from subcontractor's failure to do so." *Rivers & Bryan, Inc.*, 628 A.2d at 634.

Negligence (cont.)

- Maryland: Perhaps.
- “The general rule is that contracts will not be construed to indemnify a person against his own negligence unless an intention so to do is expressed in those very words or in other unequivocal terms.” *Crockett v. Crothers*, 285 A.2d 612, 615 (Md. 1972).
- Maryland courts describe this principle as a “presumption against indemnity for negligence.” *E.g.*, *Bd. of Trs. of Cmty. Coll. of Balt. Cty. v. Patient First Corp.*, 120 A.3d 124,132 (Md. 2015).
- The provision “need not contain or use the word ‘negligence’ or any other ‘magic words.’” *Adloo v. H.T. Brown Real Estate, Inc.*, 686 A.2d 298, 304 (Md. 1996). But the provision must call “particular attention” to the notion of indemnifying the indemnitee for his own negligence. *Id.*
- When the presumption applies, the party resisting indemnification bears the burden to prove, as an affirmative defense, that the liability arose out of the indemnitee’s own negligence. *Patient First Corp.*, 120 A.3d at 136.

Negligence (cont.)

- Maryland courts also have been generous in finding language sufficient.
- Example #1: “Except to the extent prohibited by applicable law, neither the Owner nor Manager shall be liable for any damage, loss or injury to persons or property occurring in, on or about the apartment or the Premises. You, Occupant, or their [sic] respective guests, invitees or agents agree to save and hold Owner and Manager harmless and indemnify Owner and Manager from any liability or claim **to the fullest extent permitted by law.**” *Nerenhausen v. Washco Mgmt. Corp.*, 2017 WL 1398267, at *3 (D. Md. Apr. 18, 2017).
- Example #2: “The Council shall not be liable . . . for injury or damage to persons or property caused by the elements, or by the Unit Owner of any unit, **or any other person**” *Cornell v. Council of Unit Owners Haw. Vill. Condos., Inc.*, 983 F. Supp. 640, 643 (D. Md. 1997).
- Example #3: “The Maryland Mass Transit Administration agreed to indemnify and hold harmless a railroad company “from any and all casualty losses, claims, suits, damages or liability of every kind **arising out of the Contract Service under this Agreement.**” *MTA v. CSX Transp., Inc.*, 708 A.2d 298, 300 (Md. 1998).
 - The Court observed that the provision “reverses the direction of the indemnification from that more commonly encountered”—i.e., the hirer of the service agreed to indemnify the provider of the service. *Id.* at 303-04. The Court found that the provision thus operated as a sort of insurance for the service provider, and that it unequivocally was intended to cover the provider’s negligence. *Id.*

Negligence (cont.)

- What will suffice to avoid indemnification for the indemnitee's own conduct in Maryland?
 - Specific carve-out: “The obligations of the CONTRACTOR under this Article 32 shall not extend to the liability of the ENGINEER, his agents or employees arising out of (a) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, designs or specifications or (b) the giving of or the failure to give directions or instructions by the ENGINEER, his agents or employees provided such giving or failure to give is the primary cause of injury or damage.” *Crockett*, 285 A.2d at 615.
 - Reference conduct of specific parties: The indemnitor agreed to indemnify the indemnitee against “any and all losses, claims, liabilities, damages, costs and expenses . . . which arise out of the negligent acts or omissions of . . . Venipuncture Students” *Patient First Corp.*, 120 A.3d at 132.

Negligence (cont.)

- The Court of Special Appeals held that the presumption against indemnity for negligence applies only in the case of indemnity for future negligence. *Kreter v. HealthSTAR Commc'ns, Inc.*, 914 A.2d 168,177-79 (Md. Ct. Spec. App. 2007).
 - The court did not apply the presumption where the indemnity provision was part of an agreement terminating the parties' relationship and allocated risk with respect to liability for actions that had already taken place. *Id.*

Negligence (cont.)

- Virginia: Generally, yes.
- Virginia courts generally enforce indemnity provisions, “including those indemnifying a party against future liability for personal injury caused by its own negligence.” *Estes Express Lines, Inc. v. Chopper Express, Inc.*, 273 Va. 358, 366 (2007); *accord W.R. Hall, Inc. v. Hampton Roads Sanitation Dist.*, 273 Va. 350, 355 (2007).
- Exception: Indemnification provisions purporting to require indemnification for the sole negligence of a counterparty to a construction contract.
 - Va. Code § 11-4.1; *accord* Md. Code Ann., Cts. & Jud. Proc. § 5-401
 - In Virginia, if the provision violates the statutory exception on construction contracts, the entire provision will be invalidated. *Hensel Phelps Constr. Co. v. Thompson Masonry Contractor, Inc.*, 292 Va. 695, 705 (2016).
 - By contrast, in Maryland, the statute will not “void or excise an entire contract provision,” but merely invalidates the particular agreement or promise. *Bethlehem Steel Corp. v. G.C. Zarnas & Co.*, 498 A.2d 605, 611 (Md. 1985).

Exculpatory/Limitation of Liability Provisions

- An exculpatory clause purports to release one party from liability to the other for its own conduct.
- Example: “The Member hereby . . . fully and forever releases and discharges the Club and the Club affiliates, and each of them, from any and all claims, damages, demands, rights of action or causes of action, present or future, known or unknown, anticipated or unanticipated resulting from or arising out of the attendance at or use of the Club or their participation in any of the Club’s activities or programs by such Member, including those which arise out of the negligence of the Club and/or the Club and the Club affiliates from any and all liability for any loss, or theft of, or damage to personal property, including, without limitation, automobiles and the contents of lockers.”
- As a result of the Club’s negligence, the Member injures himself. Does this release bar a claim against the Club?
- The answer varies from jurisdiction to jurisdiction.

Exculpatory/Limitation of Liability Provisions (cont.)

- DC: Yes. See *Moore v. Waller*, 930 A.2d 176, 180 (D.C. 2007).
- Exculpatory clauses are generally valid in DC, except insofar as they cover intentional torts, recklessness, or gross negligence. *Id.*; see also *Carleton v. Winter*, 901 A.2d 174, 181-82 (D.C. 2006).
- Public policy may invalidate exculpatory clauses. See *Moore*, 930 A.2d at 182-83. DC courts have not elaborated on this public policy exception.
- Exculpatory clauses must be “clear and unambiguous,” but they need not use the word “negligence.” *Id.* at 181 & n.4.
- If an exculpatory clause can be construed to apply to grossly negligent, reckless, or intentional conduct, DC courts will not invalidate the entire provision; it may still cover negligence. See *id.* at 182.

Exculpatory/Limitation of Liability Provisions (cont.)

- Maryland: Yes.
- Maryland recognizes three exceptions to enforceability of exculpatory clauses.
 1. A party may not limit its liability for intentional, reckless, or wanton conduct or gross negligence.
 2. An exculpatory clause may be unenforceable “when the bargaining power of one party to the contract is so grossly unequal so as to put that party at the mercy of the other’s negligence.” *Seigneur v. Nat’l Fitness Inst., Inc.*, 752 A.2d 631, 638 (Md. Ct. Spec. App. 2000). “To possess a decisive bargaining advantage over a customer, the service offered must usually be deemed essential in nature.” *Id.*
 3. An exculpatory clause may be unenforceable “when the transaction involves the public interest.” Transactions involving the performance of a public service obligation, such as public utilities, common carriers, and innkeepers, will qualify, as will those “so important to the public good that an exculpatory clause would be patently offensive.” *Id.* at 640; see also *Wolf v. Ford*, 644 A.2d 522 (Md. 1994) (holding that a stockbroker-client relationship does not involve the public interest).

Exculpatory/Limitation of Liability Provisions (cont.)

- Virginia: No (for personal injury) and yes (for property damage)
 - For more than 100 years, Virginia courts have invalidated pre-injury releases of claims for personal injury. *Hiett v. Lake Barcroft Cmty. Ass'n, Inc.*, 244 Va. 191, 194 (1992).
 - Pre-injury releases for property damage generally are enforceable in Virginia. See, e.g., *Nido v. Ocean Owners' Council*, 237 Va. 664, 667 (1989); *Chesapeake & Ohio Ry. Co. v. Clifton Forge-Waynesboro Tel. Co.*, 216 Va. 858, 865-66 (1976).

Duty To Defend

- Contracts may also impose a duty to defend against third-party claims. That duty is distinct from and broader than a duty to indemnify.
 - It obligates the promisor to cover the promisee's costs and expenses in defending a third-party claim and may even obligate the promisor to take over the defense of the claim upon request of the promisee.
 - It is generally said that the duty to defend arises when a potential claim is asserted against the promisee.
 - Can (and probably should) cover allegations as well as actual liability.
- Concern: Without careful drafting, the indemnitee could lose control over their own case.

Duty To Defend (cont.)

- Pitfall: the duty to defend cannot be determined when the defense begins
 - “To the fullest extent permissible under Applicable Laws, Contractor shall reimburse, indemnify, hold harmless **and defend** Owner, its employees, agents, servants, landlords and representatives from and against any and all losses, damages, expenses, attorney’s fees, claims, suits and demands of whatever nature, including those resulting from damages to any property or injuries, including death, to any persons, **caused by or arising out of any action, omission, breach or operation** under the Contract or in connection with the Work **attributable to the Contractor**, any subcontractor, any material supplier, any of their respective employees, agents or servants, **except** to the extent caused solely and exclusively by the negligence of Owner, its employees, agents, servants and representatives.”
 - When the indemnitee sought a preliminary ruling on the duty to defend, the court found that it was “unclear” when the duty to defend accrued. *Brammer v. Radioshack Corp.*, 2006 WL 387979, at *1 (W.D. Va. Feb. 17, 2006).
- Concern 1: If the duty to defend is tied up with the ultimate indemnification question, the benefit to the indemnitee will be limited.
- Concern 2: The indemnitor’s defense could be conflicted and contrary to the indemnitee’s interests.

Attorneys' Fees

Two issues often arise in connection with indemnification for attorneys' fees.

1. Is the indemnitee entitled to recover attorneys' fees incurred to defend against the third-party claim?
2. Is the indemnitee entitled to recover attorneys' fees incurred in litigation with the indemnitor, including in litigation to establish the right to indemnification?

Attorneys' Fees (cont.)

- Question One: Does an indemnification provision entitle the indemnitee to attorneys' fees incurred in defending against the third-party claim?
- Example: Contract provides that a contractor “shall indemnify and hold harmless [the party that hired the contractor] from claims of injury . . . due to negligent acts or omissions of [the contractor].”
 - The two parties are held jointly liable to an injured third-party.
 - Is the hiring party entitled to indemnification from the contractor for the attorneys' fees paid in the underlying litigation?

Attorneys' Fees (cont.)

- DC: No. “[C]ourts have not readily inferred an obligation to indemnify a party for [attorneys’] fees in the absence of explicit and unambiguous contractual language so providing.” *Am. Bldg. Maintenance Co.*, 655 A.2d at 862.
 - “Where the contractual language is unclear on the question, an obligation to pay counsel fees is not to be inferred, except in cases in which the indemnitee is willing to step aside and turn over to the indemnitor complete control over the litigation.” *Id.*
- Maryland: Maybe yes.
 - Courts state that recovery of attorneys’ fees incurred in defending a third-party claim are recoverable as part of an indemnification agreement. *E.g., Nova Research, Inc. v. Penske Truck Leasing Co.*, 952 A.2d 275, 286 (Md. 2008).
 - It is not necessary that the indemnification provision specifically include the phrase “attorneys’ fees.” *Id.* at 285.
 - Note: One district court has said that *Nova Research* is limited to implied indemnity. See *C-Tech Corp. v. Aversion Techs.*, 2012 WL 3962508, at *5 (D. Md. Sept. 7, 2012).

Attorneys' Fees (cont.)

- Virginia: Yes.
 - The default rule for third-party claims under express contracts is that the indemnitee may recover attorneys' fees.
 - If “the right of the indemnitee is based upon an express contract, and no provision of the contract provides otherwise, . . . the indemnitee may recover reasonable attorneys' fees and expenses of litigation spent in defense of the claim indemnified against.” *Appalachian Power Co. v. Sanders*, 232 Va. 189, 196 (1986) (quoting *S. Ry. Co. v. Arlen Realty*, 220 Va. 291, 296-97 (1979)).
 - Example: “As part of the consideration aforesaid, Tenant agrees to save harmless the Landlord from any and all claims of whatever nature arising out of the use of said parcel for the purposes aforesaid, and will indemnify the Landlord from any loss, of whatever nature, that may occur through said use by Tenant.” *Appalachian Power Co.*, 232 Va. at 195-96.

Attorneys' Fees (cont.)

- Question Two: Is an indemnitee entitled to attorneys' fees in first-party claims, including to establish the right to indemnification?
 - Scenario: Contract provides: "CONSULTANT shall indemnify [Indemnitee] . . . and hold [it] harmless from any and all claims, suits, proceedings, costs, losses, expenses, damages and liabilities, including but not limited to attorney's fees and court costs, caused by or arising out of, or in connection with, CONSULTANT's performance or non-performance under this Agreement." *Coady v. Strategic Res., Inc.*, 258 Va. 12, 14 (1999).
 - Is the indemnitee entitled to attorneys' fees incurred to enforce the contract against the consultant?

Attorneys' Fees (cont.)

- Virginia: Yes. Broad indemnification provisions have been found to allow recovery of attorneys' fees for first party claims. See *Coady v. Strategic Res., Inc.*, 258 Va. 12, 14 (1999).
- Other examples:
 - “To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner and the Architect from and against all claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from the performance of the Work” *Chesapeake & Potomac Tel. Co. v. Sisson & Ryan, Inc.*, 234 Va. 492, 501 (1987).
 - “If an Indemnified Party becomes involved in any action or legal proceeding in connection with any services or matters which are the subject of this Agreement, *American Standard* agrees to indemnify and hold the Indemnified Party harmless from any liability or claims and reasonable attorneys' fees and other expenses incurred with respect to preparing for or defending against such action or legal proceeding” *Seale & Assocs., Inc. v. Ingersoll-Rand Co.*, 2016 WL 4435083, at *10 (E.D. Va. Aug. 16, 2016).

Attorneys' Fees (cont.)

- But if the parties reference recovery of attorneys' fees in one part of their agreement, but omit it from the relevant indemnification provision, the court is unlikely to permit recovery of fees under such indemnification provision. *Shee Atika Languages LLC v. Glob. Linguist Sols., LLC*, 2014 WL 11430922, at *2 (E.D. Va. Oct. 9, 2014).
 - First provision: Indemnification “from all claims, liabilities, losses, demands, causes of action, suits and expenses arising out of its negligence or willful misconduct in the course of performance of this agreement, or breach of its obligations under this agreement” but makes no mention of attorneys' fees.
 - Second provision: Indemnification “from all loss relative to acts by Subcontractor’s personnel, negligent or otherwise, including the failure to comply with any and all applicable laws, regulations, and statutes, to the extent such loss arises from the placement, management, or supervision of personnel in the United States and Iraq under the ITMA concept,” including making “the payment of all reasonable legal fees and costs.”

Attorneys' Fees (cont.)

- DC and Maryland: Probably not.
- Even where a contract obligates the indemnitor to cover attorneys' fees incurred in defending a third-party claim, that obligation does not extend to fees incurred in prosecuting a claim to establish the right to indemnification. *Spriggs v. Bode*, 691 A.2d 139, 143 (D.C. 1997).
- To recover attorneys' fees in first-party litigation, the contract must "provide expressly for [fee] recovery in first party enforcement actions." *Nova Research, Inc.*, 952 A.2d at 289.
- The Maryland Court of Appeals found the following language insufficient: "Customer shall . . . indemnify, and hold harmless Penske, its partners, and their respective agents, servants and employees, from and against all loss, liability and expense caused or arising out of Customer's failure to comply with the terms of this Agreement." *Nova Research, Inc.*, 952 A.2d at 289.

Attorneys' Fees (cont.)

- DC and Maryland (cont.)
- By contrast, reference to “attorneys’ fees” and “breach” of the agreement will likely suffice to require indemnification for first-party attorneys’ fees.
 - “Each Venturer shall indemnify and save harmless the other Venturer and its affiliates, directors, employees and officers from and against any and all claims, demands, losses, damages, liabilities, lawsuits and other proceedings, judgments and awards, and costs and expenses (including but not limited to **reasonable attorneys’ fees**) arising directly or indirectly, in whole or in part, out of any **breach** of the foregoing provisions by the Venturer or its affiliates, officers, agents or employees.” *James G. Davis Constr. Corp. v. HRGM Corp.*, 147 A.3d 332, 340-41 (D.C. 2016) (applying Maryland law).
 - Defendant “hereby indemnifies, and agrees to defend and hold harmless [plaintiff] . . . from any and all claims, demands, debts, actions, causes of action, suits, obligations, losses, costs, expenses, fees, and liabilities (including **reasonable attorneys’ fees**, disbursements, and litigation costs) arising from or in connection with [defendant’s] **breach** of any terms of this Agreement . . .” *Bainbridge St. Elmo Bethesda Apts., LLC v. White Flint Express Realty Grp. Ltd. P’ship, LLLP*, 164 A.3d 978, 981 (Md. 2017).

Exceptions and Special Cases

- There are certain, industry- and conduct-specific common law and statutory provisions that limit the ability to indemnify.
- Relevant industries include construction contracts, design professionals, motor vehicle carriers, and landlord-tenant contracts.
- Additional statutory citations:
 - Va. Code § 11-4.4 (design professionals)
 - Md. Code Ann., Cts. & Jud. Proc. § 5-401(a) (construction)
 - Va. Code § 11-4.5; Md. Code Ann., Cts. & Jud. Proc. § 5-401(b) (motor carrier transportation)
 - Va. Code § 55-248.9; Md. Code Ann., Real Prop. § 8-105 (landlord-tenant)
- Virginia common law limitation on common carriers and public service companies. See *Richardson-Wayland Elec. Co. v. Va. Elec. & Power. Co.*, 219 Va. 198, 202 (1978).

Indemnification by/of US and DC Governments

- The Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1), prohibits US and DC government employees from making or authorizing “an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation” and from involving the government “in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.”
- The Act has been construed to render “open-ended indemnity clauses” void. *Ins. Co. of N. Am. v. District of Columbia*, 948 A.2d 1181, 1186 (D.C. 2008).
- DC law contains an analogous provision applicable to the DC government. See D.C. Code § 47-355.02.
- Patent and copyright infringement cases involving government contracts. See *generally* 28 U.S.C. § 1498, FAR § 52.227-3, and DFARS § 227.70.

Lessons for Drafting Indemnification and Defense Provisions

- Do not treat as boilerplate.
- Research applicable jurisdiction's law, as rules vary from jurisdiction to jurisdiction.
- Consider what conduct of yours/your counter-party can validly be indemnified (negligence, gross misconduct, intentional misconduct).
 - Concurrent negligence and lesser conduct very likely to be enforced; sole negligence is in the middle; intentional conduct very unlikely to be enforced.
- Consider and explicitly address first party and third party claims.
- Availability of blue penciling/severability if the provision is invalidated in whole or in part
- Avoid circular indemnification obligations.
- Include a provision that the contract was jointly/mutually drafted to avoid application of *contra proferentem*.
- Notice requirements

Lessons for Drafting (cont.)

- Consider whether the counterparties will have the wherewithal to fulfill indemnification obligations—and what to do if they may not.
- Consider whether additional entities and individuals should be included in the indemnification provision—such as officers, directors, subsidiaries, parents, affiliates—and if so, whether any language limiting third-party beneficiaries should be adjusted.
- Address attorneys’ fees explicitly—for first-party claims, third-party claims, and fees-on-fees.
 - Consider “including all costs, attorneys’ fees, disbursements of counsel, and other professionals’ fees incurred in litigating [or arbitrating] the right to indemnification, as well as such fees and expenses incurred in litigating [or arbitrating] the amount or reasonableness of such fees and expenses.”
- Consider the choice-of-law and jurisdiction-specific exceptions on indemnification and the duty to defend.
- Do you want indemnification obligations to survive termination of the agreement? If so, include a reference in the survival/termination provision.
- Will the provision be viewed as commercially reasonable?

Lessons for Drafting (cont.)

- If you are carving out consequential or punitive damages in the contract for first party claims between the parties, address the prospect of such damages in a third party claim in the indemnification provision and harmonize or distinguish the treatment in the two provisions.
 - E.g., “Except for third-party claims addressed in Section [on Indemnification], to the extent permitted by law, the parties hereby waive and forever discharge one another for any special, consequential, or punitive damages”
- For government contracts, evaluate flowdowns and consider catch-all language
 - If you are flowing down specific statutes or regulations, do you want those to be “as of” the date of the contract, or as of the date of the dispute, or as of whichever date will provide the broadest indemnification?
 - E.g., “Any reference herein to any statute, rule, regulation or agreement, including this Agreement, shall be deemed to include such statute, rule, regulation or agreement as it may be modified, varied, amended or supplemented from time to time.”
 - “Or any other provision of the prime contract”?
 - Make sure you obtain/flow down right to indemnification from subcontractor if you are liable to the government.

Lessons for Drafting (cont.)

- Treatment of already-known claims:
 - If you want to omit, add “except Indemnifying Party shall have no obligation under this Section [x] to indemnify Indemnatee for any Claims about which Indemnatee already has actual knowledge[can insert specific claims as a carve-out if warranted].”
 - If you want to cover, either keep silent or add “including . . .” language.

Lessons for Drafting (cont.)

- Duty to defend:
 - Separate it from the ultimate indemnification obligation.
 - Right to participate/veto the indemnitor’s decisions, as a general proposition or in certain circumstances (e.g., challenges to indemnitee’s intellectual property or provisions/obligations that it deems of significant importance).
 - Right to choose and/or monitor counsel.
 - Right to approve settlements.
 - Address intertwined claims and alleged misconduct/breaches.
- Treatment of “alleged” breaches/negligence.
 - E.g., “any third party claim from any actual or alleged breach of this agreement or any duty of care associated with the work therein which, if proven, would constitute a breach of such agreement or duty”

Preparing To Litigate an Indemnification Provision

- Notice Requirements
- Statute of Limitations
 - As a general matter, a claim for indemnification does not accrue until the loss, damage, or liability is actually incurred, but the rules vary slightly from jurisdiction to jurisdiction.
- Virginia: The accrual of a claim for indemnity is governed by statute. A claim for indemnity does not accrue until “the contributee or the indemnitee has paid or discharged the obligation.” Va. Code § 8.01-249(5).
 - But if the contract indemnifies against *liability*, courts could hold that the claim may arise as soon as the liability is incurred, even if not paid. See, e.g., *Jackson v. Quantrex Integrated Tech. Grp., Inc.*, 71 Va. Cir. 368 (2002); *CSR, Inc. v. Foster-Bey*, 2017 U.S. Dist. LEXIS 71584 (E.D. Va. May 10, 2017).
- DC: The statute of limitations begins to run once a liability is paid. *A.I. Trade Fin., Inc. v. Petra Int’l Banking Corp.*, 62 F.3d 1454, 1466 (D.C. 1995). There is scant law in D.C. on point.

Preparing To Litigate (cont.)

- For purposes of the statute of limitations, Maryland courts distinguish between three types of contractual indemnification obligations.
 1. Indemnification against loss or damage: The claim accrues when the indemnitee pays the underlying claim or actually suffers a loss.
 2. Indemnification against liability: The claim accrues when the liability is legally imposed — i.e., the entry of judgment — even if the liability is not yet paid.
 3. Specific act indemnification: In cases where the indemnitor pledges to perform certain acts or make certain payments, the claim accrues when the indemnitor fails to perform the act.

Levin v. Friedman, 317 A.2d 831, 834-35 (Md. 1974).

Preparing To Litigate (cont.)

- Tolling and Common Interest Agreements
 - Ability to present a common front and forestall/minimize future disputes
 - Ability to deal with particulars, post-dispute that were not or could not be covered by the parties' contract
- Third-Party Claims Practice
 - Notwithstanding the rules on accrual of the statute of limitations, an indemnitee may assert a claim for indemnification as a third-party claim in the underlying litigation. See, e.g., Fed. R. Civ. P. 14(a)(1); D.C. Super. Ct. R. Civ. P. 14(a); Md. R. 2-332; Va. Code § 8.01-281(A).
 - Pros: minimize risk claim will be deemed untimely later, improve participation
 - Cons: exposes fault lines in the defense and potential sources of recovery, increases costs of litigation, antagonizes counter-party

Preparing To Litigate (cont.)

- Key Factual Investigation Points
 - Identify and gather the extrinsic evidence
 - Parol evidence rule
 - Most critical are exchanges between the parties about this subject matter
 - Fact investigation and discovery are broader than admissibility
 - Parol evidence can be used to generate admissible evidence
 - Identify and gather course of conduct and course of dealing evidence
- Key Strategic Investigation Points
 - Litigation experience of the adversary
 - Litigation experience of the contract or indemnity clause or similar provisions
 - Reasonableness of any settlement

Panelists

Jaye S. Campbell



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Jaye is Deputy General Counsel and Head of Litigation for CoStar Group, an international provider of commercial real estate information, marketplaces, and analytics. Her primary responsibility is protecting, through legal and technological means, CoStar’s content, which includes a comprehensive subscription database of property photos and information and the content on dozens of websites in the U.S., Canada and Europe, including LoopNet.com, Apartments.com, and LandsofAmerica.com. She also has primary responsibility for disputes – big or small – involving CoStar, and leads antitrust matters, including interfacing with the FTC in pre-merger review and other contexts.

Originally from Texas, Jaye came to Washington, DC to attend college and never left. Her first client-service job was at Clyde’s in Georgetown, where she was a bartender.

Prior to joining CoStar, Jaye was an associate in the intellectual property group of Drinker Biddle & Reath LLP focusing on trademark and information technology matters.

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Amy Mason Saharia focuses her practice on complex commercial litigation and appellate litigation. She has tried cases in federal and state courts and in arbitration proceedings. Her clients include global financial institutions, law firms, accounting firms, and other corporate and individual clients. Recent civil matters have involved claims of breach of fiduciary duty, breach of contract, theft of trade secrets, and professional malpractice, as well as claims under the securities laws. Amy also has represented clients in governmental and congressional investigations.

Amy frequently represents clients in high-stakes appeals in the U.S. Supreme Court and federal and state appellate courts around the country. She clerked for Justice Sonia Sotomayor on the U.S. Supreme Court from 2010 to 2011.

Amy grew up in Maine and graduated with honors from The John Hopkins University in 1999. Between college and law school, Amy was a Foreign Service Officer at the U.S. Department of State. Amy graduated *summa cum laude* from Duke University School of Law in 2005, where she was executive editor of the *Duke Law Journal*. Before joining Williams & Connolly in 2007, Amy clerked for Judge Jon O. Newman on the U.S. Court of Appeals for the Second Circuit and Judge Robert N. Chatigny on the U.S. District Court for the District of Connecticut. Amy rejoined Williams & Connolly in 2012 following her clerkship on the U.S. Supreme Court.

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Bryan Wilson litigates complex civil and criminal matters throughout the country. Recent civil matters, including several that went to trial or arbitral hearing, have involved allegations of breach of contract, deceptive trade practices, copyright infringement, breach of fiduciary duty, false advertising, fraud, legal malpractice, violations of federal procurement laws and the false claims act, and theft of trade secrets. He has first-chair trial experience, and also represents clients in bid protests as well as government investigations, including inquiries from the United States Congress, the Securities and Exchange Commission, and the Department of Justice.

Born and raised in Toledo, Ohio, Bryan graduated *magna cum laude* from Miami University, where he was a member of Phi Beta Kappa, and *magna cum laude* from Duke University School of Law, where he was a member of the Order of the Coif and served as an Article Editor of the *Duke Law Journal*. Before joining the firm, he clerked for the Honorable Edith H. Jones of the U.S. Court of Appeals for the Fifth Circuit and the Honorable Lee H. Rosenthal of the U.S. District Court for the Southern District of Texas.

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