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Indemnification – Case Examples, Practical Tips and Checklists

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Drafting and Negotiating an Indemnity Provision

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General Drafting tip: start from scratch

- Each contract is unique
- Tailor to the specific situation
- Avoid the “hand-me-down” indemnity provision

Defend/Control

- Control of defense provisions:
 - Identify the party responsible for controlling the defense and selecting counsel.
 - Set the other party's obligation to cooperate with the defense.
- Settlement of claims provisions:
 - Identify each party's role in settling third-party claims.
 - Does one party control settlement? If so, set out the other party's right to object or consent to the settlement.
 - Specify the terms that must be included in the settlement agreement.



Attorney's Fees

- Is the indemnitee entitled to recover attorneys' fees incurred to defend against the third-party claim?
- Limit to “reasonable” and exclude fees for experts, witnesses, etc.
- Is the indemnitee entitled to recover attorneys' fees incurred in litigation with the indemnitor to establish the right to indemnification?
- The right to indemnity includes the reasonable costs of defense incurred in good faith, payable as part of the indemnified amount. *Klock v. Grosodonia* (1998) 674 N.Y.S.2d 187; Cal Civ. Code § 2778(3); Cal. Code Civ. Pro. § 1021.6.



Who is indemnifying, defending and holding harmless?

- Is indemnification mutual?
 - If not, who is the indemnitor and who is the indemnitee?
- Reciprocal indemnification
- If the triggering events are different for each party, the better approach is to draft two separate clauses, one in which the first party is the indemnifying party and the other in which the second party is the indemnifying party.

What triggers indemnification?

The duty to indemnify often is triggered by losses arising from either:

- (i) breaches of representations and warranties made in the agreement; or
- (ii) some other defined source of potential losses, such as specific lines of business, assets, or claims.
- (iii) Lawsuit or pre-suit claim



What is covered and are there limitations?

- Defining “losses”
 - Covered losses may be defined to include direct damages, legal fees spent defending a third-party claim and potentially legal fees enforcing indemnification rights.
- But really – from what?
 - “Any and all” is too general.
 - Indemnification should be limited to particular, identifiable parties.

California Statutes

Civ. Code § 2772 - Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person.

Civ. Code § 2773 - However, an agreement to indemnify a person against an act thereafter to be done, is void, if the act be known by such person at the time of doing it to be unlawful.

Civ. Code § 2775 - Furthermore, an agreement to indemnify against the acts of a certain person, applies not only to his acts and their consequences, but also to those of his agents.

Dispute Resolution Process

- Should be defined in detail.
- Typical to include mediation followed by arbitration
- Detail the arbitrator selection process and rules.



Insurance

- Always try to make indemnification obligations insurable
 - Agreeing to indemnification obligations which are not insurable could result in additional out of pocket fees and costs.
- Bodily injury and property damage claims suffered by third parties are typically within the scope of coverage of standard commercial CGL policies.

Responding and Making Indemnification Claims

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Investigation Checklist

- Brush off that indemnification provision you drafted.
 - Is indemnification triggered?
 - Who owes the obligation and what are the prerequisites to getting a defense and indemnification?
- Indemnitees:
 - Is the entity and claim covered by the provision?
 - What are my notice obligations?
 - Put all insurance carriers on notice even if you believe the claim is indemnifiable.
 - Assemble your defense team
 - Develop a defense and settlement strategy
 - Provide comprehensive notice—**this might be Exhibit A someday**
- Indemnitors:
 - The reverse, but with a different perspective

Questions?
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