

CTRL + F + INDEM

Searching for Meaning in Indemnification Clauses
A Panel Discussion

1

GENERAL DEFINITION OF INDEMNIFICATION CLAUSE

- **Indemnity** is an obligation by one party to make another party whole for a loss, damage, or liability the other party has incurred.
- The purpose of an **Indemnification Clause** is to decide in advance how any losses arising out of a contract will be distributed between the parties.
- Usually, but not always, it is to make the indemnitee whole from 3rd party claims, including government agency fines and actions.
 - Could include claims between the parties (2nd bite at apple)

2

5 PARTS TO INDEMNIFICATION CLAUSE

- 1- **Indemnify, Defend, Hold Harmless.**
- 2- **ID of the Indemnitor and Indemnitee** (could be mutual).
- 3- **Covered Losses** (i.e. costs, expenses, liabilities, fines, judgments, settlements, court costs, attorney fees, claims, lawsuits, demands, personal injury, property damage).
- 4- **Nexus language** "Arising out of," "Related to," "In connection with" "to the extent arising out of" "directly caused by"
- 5- **Covered Events** (i.e. "the performance of contract", "any breach of contract, negligence or other wrongful act of indemnitor")

3

INDEMNIFY, DEFEND AND HOLD HARMLESS

- **Do we need all three?**
 - **MAYBE! Do your research in the controlling jurisdiction.**
- **Indemnify:** pay or reimburse losses incurred by indemnitee
- **Hold Harmless:** essentially the same as indemnify, some say it covers liability, while "indemnify" just covers losses.
- **Defend:** engage counsel to defend the indemnitee.
 - Some courts see it as included in "indemnify" but is usually added separately
 - Broader than indemnify: Must have loss to indemnify, duty to defend happens when there is a potential loss.



4

ID OF THE INDEMNITOR AND INDEMNITEE

- Can be one-sided "Supplier indemnifies Company"
- Can be mutual: Each party ("Indemnitor") indemnifies the other ("Indemnitee")



5

COVERED LOSSES

- Types of damages, typically include:
 - **Losses:** (often a defined term including liabilities and causes of action, by itself would include fines, judgments and penalties)
 - **Liabilities:** debts, but also legal liability.
 - **Claims, causes of action, court costs, attorney fees:**
 - includes litigation but also pre-litigation claims
 - Usually just third party, but also could include first party.
- Sometimes also includes things that are more like "Covered Events" like "bodily injury, property damage, claims for IP infringement"



6

NEXUS LANGUAGE

- Connects the Covered Damages to the Covered Events
- Broad: “arising out of”, “related to” “in connection with”
- Narrow: “directly caused by”, “to the extent caused by” (could also used “except to the extent caused by”)
- Indemnitee wants to avoid having to prove a nexus to trigger, Indemnitor wants the opposite.



7

COVERED EVENTS

- Does not have to be tied to fault.
- Broad: “...the performance of the contract, including any Losses resulting in whole, or in part, from Indemnitee’s own fault.”
- Narrow: “...any proven material breach of the contract or gross negligence on the part of Supplier.”



8
