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webinar
Narrative

Indemnification Provisions: How They Work and Don't

I. General Principles of Indemnification and the Duty to Defend

Understanding Indemnity

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."

Indemnification typically involves reimbursement for a third-party claim against the indemnitee. Indemnification may, however, cover other kinds of losses, including first-party claims or regulatory fines, etc.

Understanding 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.

II. Contractual obligations versus Additional Insured

Duties arising from contractual defense and indemnity versus additional insured endorsements

Contractual insurance provisions and additional insured language in insurance policies are often viewed as intertwined with indemnification provisions in a contract. Many parties may intend that the additional insured's right to coverage apply to the other party's indemnification obligations, but not to cover any liability of the additional insured that is beyond the scope of

any contractual indemnification provision. While the contract language and additional insured language should we assessed separately, they are often interrelated.

One significant area of conflict is when contractual defense and indemnity triggers obligations of the insured business but missing additional insured endorsements on a policy limit or lead to denial of coverage for the potential indemnitee.

III. Examples of hold harmless and indemnity provisions

It is important to review the contract to assess for broad, sweeping language. The broader the provision the more likely the intended obligations are triggered. For example:

> "Contractor agrees to indemnify, defend and hold harmless property owner/tenant/property manager from and against any and all claims and liabilities incurred by owner based upon, arising out of or **in any way related** to the services contemplated by this contract. "
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> Or
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> "Contractor hereby agrees to indemnify and hold harmless property owner/tenant/property manager from and against any and all liability, claims, **whether actual, threatened or alleged**, arising out of either direct or indirect activity of the contractor."

Also look out for language that attempts to hold the indemnitor responsible for indemnitees own negligent acts or omissions. We would note that some jurisdictions prohibit indemnification for the indemnitee's sole negligence.

IV. Timing and apportionment of Defense Costs

The triggering of the duty varies from state to state, however, the duty to defend almost universally begins no later than the potential indemnitor being put on notice of the obligation.

There are several theories of recovery as to apportionment of defense costs. The pick and choose method have been identified in several jurisdictions. "Where an insured makes such a designation, the duty to defend falls solely on the selected insurer. That insurer may not in turn seek equitable contribution from the other insurers who were not designated by the insured. This rule is intended to protect the insured's right to knowingly forgo an insurer's involvement." *Westfield Ins. Co. v. Indem. Ins. Co. of N. Am.*, 423 F. Supp. 3d 534, 551-52 (C.D. Ill. 2019)

Another is Equitable contribution (or subrogation). "The costs of defense must be apportioned on the basis of equitable considerations <u>not found in the insurers' own contracts</u>, since the insurance companies who must share the burden do not have any agreements among themselves. … The varying equitable considerations … depend upon the particular policies of

insurance, the nature of the claim made, and the relation of the insured to the insurers." *Scottsdale Ins. Co. v. Century Sur. Co.*, 182 Cal. App. 4th 1023, 1032-33 (2010).

There are also other equitable cost-sharing considerations. These include: (a) Time on the risk; analysis of the policy periods triggered by the claim; (b) Pro rata of policy limits that are exposed to total limits; (c) Tower of coverage to an additional insured
(vertical exhaustion); and (d) Exhaustion of all primary layers before proceeding to excess (horizontal exhaustion).