

## Indemnification Provisions: A Checklist of Key Considerations

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For transactional lawyers, indemnification provisions are reviewed, drafted and negotiated on a regular basis. Despite repetitive encounters with these provisions, “one size does not fit all”, and the scope and specifics of indemnification language must be viewed in the context of the entire transaction at issue and the associated risks presented.

Generally defined, indemnification is an obligation of a person to be responsible for damage, loss, expense, and injury to another. In most states, there are statutory and common law indemnification rights, as well as laws restricting the scope of contractual indemnifications.

Inclusion of a contractual indemnification can broaden or limit indemnification rights and obligations, including (i) rights of protected parties (such as those without privity of contract) and (ii) specific claims and damages recoverable. Further, it can address logistics such as notice, selection of counsel, and settlement and control of the case.

Consider the following:

- “Who” Indemnifies “Who.”
  - Contractual Parties only?
  - Other Entities or Persons included?
  - Mutuality of Obligations?
- Scope of Coverage
  - Inclusion of Duty to Defend
  - Comparative vs. Contributory Standard
  - Third Party Claims or All Claims
  - Negligence, Breach or Strict Liability Standards
  - Claims and Damages Types Covered
- Procedural and Logistics Considerations (E.g., Notice, Choice of Counsel, Settlement Rights)

The analysis must include a consideration of:

- Common Law and Statutory Rights (and Limitations) on Indemnification Provisions: Is the indemnity broader than the rights provided by law? Are there statutes that limit or restrict the right of indemnification (e.g., Anti-Indemnity Statutes)?
- Interplay with Limitation of Liability and Insurance Provisions: Does the Indemnitor have sufficient insurance to stand behind the indemnification obligations? Is the Indemnity capped or limited by provisions limiting a party’s liability or a consequential damage waiver? Or is it (or should it be) an exception to those provisions?

In the end, Indemnification provisions must be carefully and individually considered in context of the transaction at hand and the relevant risks presented, with the backdrop of other key contractual provisions and, of course, the law.