



**PLUNKETT & COONEY**  
A CENTURY OF DISTINCTIVE SERVICE

## Cutting Through the Fog

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Finding Clarity in Contractual Indemnity Liability

Presented by  
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## Today's Speakers

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## What is Indemnification?

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- An equitable doctrine that shifts the entire burden of judgments or settlements from one tortfeasor who has been compelled to pay a judgment or settlement to another whose active negligence is the primary cause of harm.
- Rationale behind indemnification is that liability should fall on party best suited to adopt preventative measures.

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## Types of Indemnification

- There are three types:
  - Common law indemnification
  - Implied contractual indemnification
  - Express contractual indemnification

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## Common Law Indemnification

- Equitable right to restitution for party held liable for another's wrongdoing
- Party may not seek indemnity under common law where primary complaint alleges active versus passive negligence.

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## Common Law Indemnification

- Active negligence is where a party breaches a direct duty owed to another and that breach is a proximate cause of other's injury.
- Passive negligence is attributed solely to another and liability arises by operation of law. Example: vicarious liability
- If there is any allegation against a party for active negligence, there can be no claim for common law indemnity.

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## Implied Contractual Indemnity

- Implied contractual indemnity only arises if there is a special relationship between the parties and a course of conduct whereby one party undertakes to perform certain services and impliedly assures indemnification.
- Same rules apply as far as an active fault as with common law indemnity

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## Express Contractual Indemnification

- Most common form of indemnity with which you will deal.
- Right to express contractual indemnification comes from the language of a contract between indemnitor and indemnitee.

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## Express Contractual Indemnification

- Indemnity contract is construed in same manner as any other contract.
- Indemnitee is not required to prove freedom from active fault.
- Except for construction contracts in Michigan, a contract can provide for indemnity even if indemnitee is solely at fault.

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## Where to Look for Right to Indemnification & Defense

- First step, look at allegations against you or your insured in the complaint.
  - Do allegations against you or your insured involve active negligence?
  - If so, then the only possible basis for tendering your defense and seeking indemnity would be based upon a contract with another party.

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## Where to Look for Right to Indemnification & Defense

- Assuming complaint alleges active negligence against you or your insured, next step is to determine whether there is any contractual right you may have to tender your defense and/or seek indemnification from another party.

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## Where to Look for Right to Indemnification & Defense

- Is there a written document in existence that may provide you or your insured with a basis to tender your defense to and seek indemnification from another party?
- If so, it is important to read the language very carefully to determine whether there is any basis for you to seek both defense from another party and to seek indemnification from another party.

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## Where to Look for Right to Indemnification & Defense

- Once you have determined that you may have a contractual right to have another party assume your defense and/or indemnify you against settlement or judgment, the next step is to determine what event would trigger this right.

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## Where to Look for Right to Indemnification & Defense

- Language that provides for defense and/or indemnification is critical to determining your rights.
- Clear and unambiguous language will be enforced according to the plain meaning of the words used in contact.
- Ambiguous language will be construed against drafter of agreement.

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## Triggers

- Is it a finding of negligence against you?
- Is it merely an allegation of negligence against you?
- Is it a finding that the indemnitor or the indemnitor's employee or product partially or completely caused the harm at issue in the lawsuit?

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## Triggers

- Is it a finding that there simply is a claim or allegation that the indemnitor or indemnitor's employee or product caused the harm at issue in the lawsuit?
- What does language say anything about your level of negligence, if anything?

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## Documents Which may Contain Indemnity Language

- Written contracts
- Purchase orders
- Bills of sale
- Invoices
- Receipts
- Any type of written document that may contain defense and indemnity language

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## When to Tender Your Defense, Seek Indemnification

- It is important to determine, as soon as possible, whether right to a defense and/or indemnification exists.
- The faster you tender your defense, the faster you stop paying attorney fees and costs related to defending the case.

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## When to Tender Your Defense, Seek Indemnification

- If you are going to settle the case, it is very important that the potential indemnitor be given notice of the lawsuit, an opportunity to defend it, and an opportunity to agree to indemnify you or your insured for proposed settlement.

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## When to Tender Your Defense, Seek Indemnification

- If indemnitor has notice of any action and declines the opportunity to defend it, the general rule is that indemnitor will be bound by any reasonable, good faith settlement indemnitee might thereafter make.

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## When to Tender Your Defense, Seek Indemnification

- If indemnitor had notice of claim and refused to defend it, then indemnitee need only demonstrate *potential* liability to claimant rather than *actual* liability.
  - Potential liability actually means nothing more than the indemnitee acted reasonably in settling the underlying suit.

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## When to Tender Your Defense, Seek Indemnification

- Right to indemnification technically does not exist until there is some basis for indemnitee to seek indemnification from indemnitor, such as a judgement or settlement.
- If party denies your tender of defense and/or request for indemnification, and there is a contract that provides those rights, then you have basis to file third-party lawsuit (or cross-claim if indemnitor is party to the lawsuit) for breach of contract.

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## Defending a Tender Defense, Request for Indemnification

- Defending tender of defense and/or request for indemnification is really no different than seeking to tender your defense and/or have another party agree to indemnify you.

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## Defending a Tender Defense, Request for Indemnification

- Key documents that must be carefully analyzed are the complaint in the underlying lawsuit and written documents that discuss what type of event would trigger a right to defense and/or indemnification.

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## Defending a Tender Defense, Request for Indemnification

- When you receive tender of defense and/or request for indemnification, it is important to complete your analysis thoroughly and quickly to avoid possible third-party lawsuits or cross-claims.

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## Defending a Tender Defense, Request for Indemnification

- Potential problem: If you are given notice of potential basis for a party tendering its defense to you and/or seeking indemnification and you refuse to honor that request, and party then settles underlying suit:
  - You may owe both costs of defense and amount of settlement in the end.

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## Questions & Answers



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## Questions



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## Post-webinar Survey

We want to hear from you!



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## Thank You!!



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