INDEMNITY AGREEMENTS

Benefits and Pitfalls

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What Is “Indemnity”?

- “Indemnity” is holding someone harmless for something.
- Two types of “indemnity”:
  - Implied
  - Express
Implied Indemnity

- Common law indemnity, or equitable indemnity
- Non-contractual
- Based on the concept that one who, without active fault, is compelled to pay damages properly attributable to the fault or negligence of another, should be compensated for such damages.
- Not within scope of this presentation!
An indemnity agreement is an express, contractual promise by one party, the “indemnitor”, to pay for the liability of another party, the “indemnitee”.

An indemnity agreement can also include a promise to defend the indemnified party in a claim or litigation.
An indemnity agreement determines who will bear the loss.

Indemnity agreements are generally governed by the law of contracts.

If indemnity is to be provided under a contract, the provision must be explicit. **Clarity is Imperative.**

Express contract provision ordinarily controls over equitable principles.
Key to an indemnity agreement is concept of holding indemnitee harmless and relieved of liability according to the agreement’s terms.

The indemnitor’s liability under an indemnity agreement is determined by the provisions of the agreement.
GETTING AN INDEMNITY
Why Get An Indemnity Agreement?

- Obviously, so that you -“indemnitee” – don’t have to pay a claim or judgment against you that is attributable to the indemnitor’s negligence on your property or otherwise.

- Most liability insurers ask that the airport have Such agreements each lessee.
An Example

- A Balanced Provision:

“Lessee shall keep and hold the Lessor and its officers, directors, agents, servants, and employees harmless from any and all liabilities, losses, suits, claims, judgments, fines, penalties, demands or expenses, including (but not limited to) all reasonable costs for defense and investigation thereof (including but not limited to attorneys’ fees, court costs and expert fees),
claimed by anyone by reason of injury or damage to persons or property sustained in or about the Airport, as a proximate result of the acts or omissions of the Lessee, its agents, servants or employees, (Consider adding invitees) or arising out of the operations of the Lessee upon and about the Airport, excepting such liability as may result from the sole negligence of the Lessor, its officers, directors, agents, servants, and employees;
provided, however, that upon the filing of any claim with the Lessor for damages arising out of incidents for which Lessee herein agrees to hold Lessor harmless, then and in that event the Lessor shall notify Lessee of such claim and Lessee shall have the right to settle, compromise, or defend the same.

Limited to claims, etc. against the Lessor for injury or damage to persons or property in or about the Airport, as “proximate result” of negligence of Lessee or arising out of Lessee’s operations at the Airport.

- No indemnity for “sole negligence” of the Lessor

- But you must also address the investigation of the claim by the Lessee, defense positions and strategies and require legal counsel reasonably acceptable to the Lessor. Be very specific as to investigation and defense. Again be very clear.
Why “Balanced”?  

- This provision is fair – it doesn’t place onerous terms and conditions on the Lessee, yet it protects the Lessor from paying for its Lessee’s negligence. Since the Lessees are your business partners and customers, you want to enter into a fair relationship.
GIVING AN INDEMNITY

When Your Lessee Wants To Negotiate
Giving an Indemnity

- Some tenants will ask for indemnification back from you, for claims or suits against them where the alleged injury or damage arises out of your negligence.

- Be aware of the contractual liability coverage, and of the exclusionary language for contractual liability, in your general liability policy.
The contracting parties decide the scope of the indemnity agreement: will it be limited to the negligence of the indemnifying party? Will it be an agreement to “defend, hold harmless and indemnify” against any claim brought against the indemnitee?

Usually, since indemnity agreements arise in the context of a larger contractual relationship between two parties of equal bargaining strength, they are limited to claims made against the indemnitee arising out of the negligence of the indemnitor.
Other Protections

- Your liability carriers generally also require that your tenants:
  - add you to their liability or other insurance policies as additional insureds;
  - carry certain minimum limits, per occurrence and aggregate; and
  - have their carriers endorse their policies to make such policies primary to any other valid and collectible insurance available to you.
COURTS AND INDEMNITY AGREEMENTS

Are They Always Enforced?
How Courts Interpret Indemnity Agreements

- Very narrowly. Courts use strict construction to construe indemnification provisions, because they can be broad and over-reaching. Again be clear in the wording.

- Some courts refuse to apply an indemnification provision that indemnifies a party against its own negligence; others refuse to enforce indemnification provisions that indemnify a party against its own intentional act.
Even an express agreement to indemnify may be void if liability is based upon a statutory violation or intentional or criminal conduct.

Courts faced with a provision seeking to indemnify a party for its own negligence will often look at the relative bargaining power and resources of the parties.
Anti-Indemnity Statutes

- Many state courts have stopped policing indemnity agreements by using public policy arguments, and have left them to the legislatures.

- Consequently, many states have enacted statutes limiting the scope of indemnity that can be obtained in construction and municipal contracts.
Excellent Web Site for a State by State discussion of these statutes for construction contracts


Remember the jurisdiction clause
HOW INDEMNITY AGREEMENTS WORK

Or, So Now You Have A Claim . . .
- Timely notice of the claim, suit, etc. by the indemnitee to the indemnitor.
- Timely notice to your insurance company
- Your indemnitor has a contractual obligation to defend and indemnify you in GOOD FAITH.
Final Comments on Wording - ECC

- Express the terms requiring broad form indemnity – must be stated in plain language.

- Conspicuous – the part of the contract containing the broad form indemnity should be bolded, highlighted and/or in large print/font/type

- Consideration – there must be some identifiable financial payment or “consideration: supporting the indemnitor’s assumption of indemnitee’s sole negligence.