“Indemnification Agreements”: I Don’t Think That Means What You Think It Means

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Indemnification provisions appear in nearly every commercial contract. They are often treated as boilerplate, copied from prior agreements with minimal scrutiny. Yet when a claim arises and the tender letter goes out, those few paragraphs become the most heavily litigated language in the contract. What the parties *thought* indemnification meant frequently diverges sharply from how courts enforce it.

This article examines the most common contexts in which indemnification disputes arise, the recurring pitfalls that derail tenders for defense and indemnity, and practical solutions for minimizing disruption to business relationships while protecting clients’ interests. It also highlights jurisdiction-specific considerations in the Pacific Northwest, where statutory and judicial limits on indemnification are particularly pronounced.

I. Where Indemnification Disputes Most Commonly Arise

A. Products Liability

A familiar scenario: a retailer or reseller is sued following an alleged product defect. The retailer tenders the claim to the manufacturer under a vendor agreement that requires the manufacturer to “defend, indemnify, and hold harmless” the seller from product-related claims.

Disputes quickly arise over scope. Does the indemnity apply only to manufacturing defects, or also to warnings, packaging, or retailer-level marketing decisions? Is there a duty to defend, or only to indemnify after liability is established? Does the presence of retailer negligence defeat the tender entirely? These questions frequently find their way into motion practice, often while the underlying case proceeds.

Courts generally enforce indemnity provisions as written, provided they are clear and unambiguous. For example, in , Lafayette City-Par. Consol. Gov't v. Morbark, LLC, 2024 U.S. Dist. LEXIS 4039 (2024), the court upheld an indemnity provision that broadly applied to "any and all claims resulting from any product defects or design defects related to manufacture or production" . Lafayette City-Par. Consol. Gov't v. Morbark, LLC, 2024 U.S. Dist. LEXIS 4039 (2024). Similarly, in , Kruzits v. Okuma Mach. Tool, 40 F.3d 52 (1994). the indemnity clause explicitly covered claims arising out of strict liability in tort, including those related to the use, operation, or condition of the product . Kruzits v. Okuma Mach. Tool, 40 F.3d 52 (1994). These cases demonstrate that indemnity provisions can extend beyond manufacturing defects if the language explicitly includes other types of claims, such as those related to warnings or marketing.

Retailers generally have a more limited duty compared to manufacturers. For example, under New York law, a retailer is only required to inspect for defects that a reasonable physical inspection would disclose and is not liable for defects in sealed products unless they fail to conduct such an inspection . Brodie v. Green Spot Foods, LLC, 503 F. Supp. 3d 1 (2020).

However, indemnity provisions could potentially extend to retailer-level marketing decisions if the language of the agreement explicitly includes such claims. In , Tiny Totland, Inc. v. Spalding & Evenflo Cos., 242 F.3d 830 (2001). the court noted that indemnity claims between commercial parties are often governed by contract, and absent a specific provision, indemnity may not apply to retailer-level decisions . Tiny Totland, Inc. v. Spalding & Evenflo Cos., 242 F.3d 830 (2001).

B. Premises and Personal Injury Claims

Service agreements between municipalities or property owners and contractors commonly include indemnification provisions requiring the contractor to defend and indemnify the owner from personal injury claims "arising out of" the contractor's work.

When an invitee is injured and sues both parties, the property owner tenders its defense. The contractor may respond that the claim arises from the owner's premises liability, not the contractor's work, or that the complaint alleges concurrent negligence outside the scope of the indemnity. The result is often a parallel dispute over who must pay defense costs while the plaintiff's case moves forward.

C. Construction Projects

Construction contracts generate some of the most contentious indemnification litigation. Owners and general contractors often expect subcontractors to shoulder broad risk through indemnity clauses, while subcontractors rely on statutory protections that limit indemnification for another party's negligence.

These disputes are particularly fraught because defense costs escalate quickly in construction defect and injury cases, and because many jurisdictions impose strict statutory limits on indemnification provisions in construction agreements.

Many states have enacted anti-indemnity statutes that limit or void indemnity provisions in construction contracts when they attempt to shift liability for the indemnitee's own negligence or intentional misconduct. For example:

- **Louisiana**: The Louisiana Anti-Indemnity Act (LAIA) invalidates provisions in construction contracts that require an indemnitor to indemnify or defend an indemnitee for liability arising from the indemnitee's own negligence or intentional acts. However, an exception exists if the contract requires the indemnitor to obtain insurance to cover the indemnity obligation, and the indemnitor recovers the cost of the insurance in the contract price. In such cases, the indemnitor's liability is limited to the insurance proceeds . La. R.S. § 9:2780.1, Atl. Specialty Ins. Co. v. Phillips 66 Co., 365 F. Supp. 3d 706 (2019).

- **Texas**: The Texas Anti-Indemnity Act (TAIA) similarly voids indemnity provisions in construction contracts to the extent they require an indemnitor to indemnify or defend an indemnitee for claims caused by the indemnitee's negligence or fault. However, an exception exists for claims involving bodily injury or death of the indemnitor's employees, agents, or subcontractors . Tex. Ins. Code § 151.102, Maxim Crane Works, L.P. v. Zurich Am. Ins. Co., 392 F. Supp. 3d 731 (2019), Maxim Crane Works, L.P. v. Zurich Am. Ins. Co., 11 F.4th 345 (2021).
- **Montana**: Montana law prohibits indemnity provisions that require one party to indemnify another for liability caused by the indemnitee's negligence, recklessness, or intentional misconduct. However, indemnity is allowed for liabilities caused by the indemnitor's own negligence or misconduct . 28-2-2111, MCA.

While owners and contractors can use indemnity and defense provisions to protect themselves from liability in construction contracts, these provisions are subject to significant legal restrictions. Anti-indemnity statutes in many states prohibit shifting liability for the indemnitee's own negligence or misconduct, and courts require clear and unambiguous language to enforce such clauses. Parties should carefully draft indemnity provisions to comply with applicable laws and ensure that the obligations are limited to liabilities arising from the indemnitor's own actions or negligence.

D. Sale of a Business

Indemnification plays a central role in mergers and acquisitions, allocating risk between buyer and seller for pre- and post-closing liabilities. Yet post-closing litigation often reveals mismatched expectations.

Common disputes include:

- Sellers being sued for the buyer’s post-closing operations;
- Buyers being sued for pre-closing conduct; or
- Claims falling into gray areas excluded from the indemnity scheme or subject to caps, baskets, or survival provisions.

These cases frequently involve high stakes and complex indemnity mechanics, including escrow arrangements and representation and warranty insurance.

E. Intellectual Property Claims

IP-related indemnification disputes are increasingly common. Manufacturers may face trademark, trade dress, copyright, or false advertising claims stemming from how a retailer markets a product. Retailers, in turn, may be sued for patent infringement or copyright violations embedded in a manufacturer's packaging or advertising materials.

Service providers also present exposure. For example, a business sued for a web designer's unauthorized use of copyrighted images may find its indemnity provision far less protective than anticipated.

II. Recurring Issues That Complicate Indemnification

A. Cross-Claims and Strategic Tension

An indemnitee understandably seeks to preserve its rights. Filing a cross-claim against the indemnitor may feel necessary to avoid waiver or statute of limitations issues. Yet cross-claims often inflame tensions and fracture defense strategies.

As a practical matter, the only party that reliably benefits from internecine fighting is the plaintiff. Separate counsel, duplicative discovery, and inconsistent liability positions increase costs and litigation risk across the board.

B. Damage to Business Relationships

Indemnification disputes frequently arise between ongoing business partners—supplier and customer, contractor and owner, franchisor and franchisee. Aggressive pursuit of indemnity rights may jeopardize a commercially valuable relationship.

Clients are often torn between protecting contractual rights and preserving future business. Counsel must help navigate that tension with an appreciation for both legal exposure and commercial realities.

C. Statutory Prohibitions and Limits on Indemnification

Forty-five (45) states have enacted anti-indemnity statutes that limit or prohibit enforcing indemnification agreements in construction contracts. Anti-indemnity legislation seeks to prevent the party with superior bargaining power from taking advantage of the party with inferior power. Also, some states with anti-indemnity legislation protect only the government by limiting the application of these rules to public projects.

Several states prohibit indemnifying a party against its own negligence, and a few even bar indemnifying a party where there is concurrent negligence. Others will allow indemnification to a negligent party, but only where the agreement is clear and unequivocal.

D. Intellectual Property and Business Continuity Concerns

In IP disputes, the parties' goals may diverge dramatically. A manufacturer may insist on protecting its right to continue selling a product, even if doing so escalates litigation risk. A reseller, facing downstream exposure, may prefer to discontinue sales immediately. Indemnification provisions rarely address who controls these decisions, leaving the conflict unresolved.

E. The Elusive "Duty to Defend"

Unlike insurance policies, indemnification agreements often lack clear standards governing a duty to defend. Depending on the language of the agreement, courts are frequently reluctant to impose a defense obligation where the underlying complaint alleges both covered and uncovered conduct.

The timing and scope of the duty to defend in an indemnity agreement differ significantly when the agreement is not an insurance contract, particularly regarding whether the duty to defend attaches before a fact finder determines fault. These differences arise from the distinct nature of indemnity agreements compared to insurance contracts.

1. **Timing of the Duty to Defend in Non-Insurance Indemnity Agreements**

In non-insurance indemnity agreements, a determination of the duty to defend turns on the specific language in the agreement. In some agreements, the duty to defend often does not attach until there is a determination of fault or liability. For example, in , Dorian Amsterdam LPG Transp. LLC v. Tradewinds Towing Co., 2025 U.S. Dist. LEXIS 153923 (2025), the court held that the duty to defend was co-extensive with the duty to indemnify, meaning it was conditioned upon a finding of fault against the indemnitor. The indemnity provisions in that case explicitly required a judicial determination of fault before the duty to defend could be triggered . Dorian Amsterdam LPG Transp. LLC v. Tradewinds Towing Co., 2025 U.S. Dist. LEXIS 153923 (2025). Similarly, in , In re Oil Spill by the Oil Rig, 841 F. Supp. 2d 988 (2012). the court emphasized that the duty to defend and indemnify were treated identically under the contract, requiring a judicial determination on the merits before the duty to defend arose . In re Oil Spill by the Oil Rig, 841 F. Supp. 2d 988 (2012). These cases illustrate that, unlike insurance contracts, non-insurance indemnity agreements often tie the duty to defend to a finding of fault or liability. Other indemnity agreements more closely follow the language of insurance agreements, where the duty to defend is far broader than the duty to indemnify, as discussed more fully below.

2. **Scope of the Duty to Defend in Non-Insurance Indemnity Agreements**

The scope of the duty to defend in non-insurance indemnity agreements is defined strictly by the terms of the contract. Courts have consistently held that such agreements are construed narrowly and against coverage, as they are collateral to the primary purpose of the contract, which is not risk-shifting. For instance, in , Catlin Ins. Co. v. Champ Constr. Co., 2025 U.S. Dist. LEXIS 169226 (2025), the court noted that the breadth of a non-insurer's contractual defense obligations is defined solely by the contract's terms, which are strictly construed . Catlin Ins. Co. v. Champ Constr. Co., 2025 U.S. Dist. LEXIS 169226 (2025). This contrasts with insurance contracts, where ambiguities are construed in favor of the insured, and the duty to defend is broader, often triggered by the mere potential for coverage based on the allegations in the complaint . Metro-North Commuter R.R. Co. v. United Illuminating Co., 777 Fed. Appx. 544 (2019), Seven Signatures Gen. P'ship v. Irongate Azrep BW LLC, 871 F. Supp. 2d 1040 (2012).

3. **Comparison to Insurance Contracts**

In insurance contracts, the duty to defend is broader and attaches whenever the allegations in the complaint potentially fall within the policy's coverage, regardless of the ultimate determination of fault. This principle is well-established in cases such as , Metro-North Commuter R.R. Co. v. United Illuminating Co., 777 Fed. Appx. 544 (2019), where the court explained that the duty to defend is triggered by the potential for coverage, while the duty to indemnify arises only after a determination of actual coverage . Metro-North Commuter R.R. Co. v. United Illuminating Co., 777 Fed. Appx. 544 (2019). However, in non-insurance indemnity agreements, courts often require a judicial determination of fault or liability before the duty to defend arises, as seen in *Dorian Amsterdam* and . Dorian Amsterdam LPG Transp. LLC v. Tradewinds Towing Co., 2025 U.S. Dist. LEXIS 153923 (2025), In re Oil Spill by the Oil Rig, 841 F. Supp. 2d 988 (2012).

4. **Exceptions and Variations**

While the general rule in non-insurance indemnity agreements ties the duty to defend to a finding of fault, some jurisdictions and contracts may adopt a broader approach. For example, in , Seven Signatures Gen. P'ship v. Irongate Azrep BW LLC, 871 F. Supp. 2d 1040 (2012), the court applied insurance-law principles to a non-insurance indemnity agreement, holding that the duty to defend could be triggered by allegations in the complaint that potentially fell within the indemnity provision . Seven Signatures Gen. P'ship v. Irongate Azrep BW LLC, 871 F. Supp. 2d 1040 (2012). This approach, however, is not universally applied and depends on the specific language of the indemnity agreement and the governing jurisdiction.

The timing and scope of the duty to defend in non-insurance indemnity agreements are often written and interpreted more narrowly than in insurance contracts. The duty to defend in such agreements may require a judicial determination of fault or liability before it attaches, and its scope is strictly defined by the contract's terms. This contrasts with the broader and more flexible duty to defend in insurance contracts, which can be triggered by the mere potential for coverage based on the allegations in the complaint . Dorian Amsterdam LPG Transp. LLC v. Tradewinds Towing Co., 2025 U.S. Dist. LEXIS 153923 (2025), In re Oil Spill by the Oil Rig, 841 F. Supp. 2d 988 (2012), Catlin Ins. Co. v. Champ Constr. Co., 2025 U.S. Dist. LEXIS

[169226 (2025)](), [Metro-North Commuter R.R. Co. v. United Illuminating Co., 777 Fed. Appx. 544 (2019)]().

The result is unpredictability. Some courts analogize to insurance principles; others insist on strict contractual interpretation. Clients expecting an insurer-like defense often discover they bargained for something far less certain. The well-crafted section on duty to defend can save the client a significant amount of heartache.

F. The Tripartite Relationship and Conflicts of Interest

When an indemnitor agrees to defend an indemnitee, a tripartite relationship emerges—similar, but not identical, to the insurer-insured-defense counsel model. Conflicts can arise when:

- The indemnitor and indemnitee disagree on liability strategy;
- Coverage or scope disputes lurk beneath the surface; or
- Settlement positions diverge.

Independent counsel may be required, raising questions about who pays for that representation and under what authority.

III. Structural and Ethical Considerations for Counsel

Before wading into an indemnification dispute, counsel should address several threshold issues:

- **Who is the client?** Are you representing the indemnitor, the indemnitee, or attempting some form of joint representation?
- **Who is paying your fees?** If the indemnitor is funding the defense but is not your client, informed consent and clear engagement terms are essential.
- **Are conflicts present or foreseeable?** Some conflicts may be waivable; others are not.
- **Who controls litigation and settlement decisions?** Contracts often answer this poorly, if at all.
- **What happens if interests diverge mid-litigation?**

Failure to address these questions early can lead to ethical issues, disqualification motions, and disputes over unpaid fees.

IV. Practical Solutions and Risk-Management Strategies

A. Draft Better Indemnification Provisions

Many disputes can be avoided with clearer drafting. Effective provisions:

- Define the scope of covered claims with precision;

- Separate the duty to defend from the duty to indemnify;
- Address concurrent negligence explicitly;
- Allocate control of defense and settlement decisions; and
- Specify procedures for tender, acceptance, and dispute resolution.

B. Address Defense Obligations Through ADR

One practical approach is to include a provision requiring the indemnitor to provide a defense if tendered, coupled with binding arbitration to resolve defense-duty disputes after the underlying matter concludes. This avoids prejudicing the defense while preserving each party's contractual arguments.

C. Use Diplomacy Strategically

In many cases, formal litigation over indemnity is unnecessary and counterproductive. Early, candid discussions—often at a business-to-business level—can lead to shared defense arrangements or cost-sharing agreements that protect relationships and reduce litigation spend.

D. Shift the Fight to Insurance

Requiring the indemnitee to be named as an additional insured on the indemnitor's policy can dramatically change the dynamic. Coverage disputes between insurers are often more predictable—and less personal—than indemnity fights between commercial partners.

E. Consider Representation and Warranty Insurance

In transactional contexts, representation and warranty insurance can serve as a backstop, reducing post-closing indemnity disputes and allowing buyers and sellers to move forward without lingering exposure.

Conclusion

Indemnification agreements are deceptively simple and endlessly misunderstood. When treated as boilerplate, they sow the seeds of expensive and relationship-damaging disputes. When drafted thoughtfully and enforced strategically, they can provide meaningful risk transfer and predictability.

For counsel, the challenge is twofold: understanding how courts actually interpret these agreements, and guiding clients through disputes in a way that balances legal rights with business realities. In the indemnification arena, precision, foresight, and diplomacy are often as important as advocacy.