

# Tips for Protecting Businesses from Imprecise Contractual Indemnity Provisions

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From the *Cashman* case to the *Builders FirstSource-Southeast Group* and beyond, courts have been busy forums in 2025 examining how imprecise or contradictory indemnification language jeopardizes a contract's enforcement. Real estate businesses and lawyers encounter indemnity provisions in virtually every type of commercial contract. Tenants indemnify landlords for liability relating to the tenant's use of their premises; buyers indemnify sellers for physical damage caused by the buyer's due diligence investigations; subcontractors indemnify prime contractors for the subcontractor's deficient work or materials; corporations indemnify their officers for the officers' good faith actions consistent with their authority in furtherance of the corporation's business; borrowers indemnify lenders for just about anything; and so on.

The essence of any indemnity provision is burden shifting for certain liability incurred by an indemnitee to the indemnitor. The concept is rooted in common law and in New York exists as common law where one party has incurred liability solely as the result of the negligence of another party. There are myriad reasonable justifications for expanding the common law indemnification by contract, and it is often the last thing business owners want to spend time negotiating.



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While indemnitees often insist on broad indemnity protection, business owners should be aware of, and try to avoid being bound by, generic indemnity provisions which can be contextually overbroad and result in unanticipated enforcement results.

This can be mitigated by considering certain basic elements of their contractual indemnity obligations in order to narrow the scope thereof and minimize the risk of becoming liable for the liabilities of a third party in unexpected circumstances.

## Identifying Indemnitees

Who is entitled to indemnification?

The first question to ask is: "Who is properly entitled to indemnification in this context?" A well-drafted indemnity provision specifically identifies

the indemnitees (i.e., the parties that are entitled to indemnification).

The appropriate breadth of potential indemnitees is context-dependent and can properly range from a single individual (e.g., where a corporation indemnifies one of its officers or other key employees) to a broad range of parties (e.g., where a borrower indemnifies a lender or a tenant indemnifies a landlord).

Based on the context in which the applicable indemnification provision is being negotiated, the indemnitor should evaluate the scope of potential indemnitees to confirm it comports with a reasonable allocation of their liability to the indemnitor.

### **Identifying the Indemnitor**

Are there any other indemnification obligations owed to this indemnitee for the same subject matter?

Particularly in the context of multi-tiered organizational structures where different entities may have a contractual indemnity obligation to the same indemnitee that could apply to the same underlying facts or circumstances (e.g., a holding company and its subsidiary portfolio company may have an indemnification obligation to a person that serves as an officer of both entities), it becomes relevant to include an express provision that identifies which indemnification obligation is primary and whether all other indemnity obligations should be non-contributory to such indemnified matter. In the absence of such a clearly drafted written agreement, courts could (and have) required that assets of multiple indemnitors be used to satisfy an indemnity obligation to a common indemnitee. This is a particularly troubling result for a business owner that believed it had properly limited its liabilities among its different business operations, so that the assets of one business are not available to satisfy the liabilities of another business.

### **Indemnification Triggers**

What facts and circumstances give rise to indemnification?

Another context-dependent aspect of a properly drafted indemnity provision is the type of facts or circumstances that give rise to a duty of indemnification. An indemnity provision should identify discrete triggering events that have a causal relationship to the matter for which the indemnitor owes its duty of indemnification to the indemnitee.

In some instances, it is customary and appropriate for there to be broad categories of indemnified matters because the indemnitee is not involved in making decisions related to the operation of the business and it would not be equitable for the indemnitee to be responsible for such liabilities arising out of the underlying business activities in most foreseeable scenarios (e.g., a tenant's indemnity of its landlord under a lease or a borrower's indemnification of its lender under a loan).

In other instances, an indemnification obligation should properly only arise out of some wrongful act or omission of the indemnitor because the indemnitee is responsible for performance of a specific portion of the underlying business activity (e.g., a subcontractor's indemnification of the prime contractor under a subcontract).

Business owners should be mindful of ensuring that their indemnity provisions are drafted such that there is an indemnification obligation only where the context dictates that it would be fair and reasonable to hold the indemnitor responsible for liability incurred by the indemnitee in connection with the performance of the applicable agreement.

### **Scope of Indemnification**

What is the indemnitor obligated to pay?

An indemnity provision should identify, with particularity, the liabilities of the indemnitee for

which the indemnitor has agreed to assume responsibility. Two common pitfalls in this portion of an indemnity provision are (a) for the benefit of the indemnitee, including responsibility for defending the indemnified matter so that the indemnitee can seek to avoid advancing the cost of litigating liability for the underlying indemnified matter before seeking indemnification from the indemnitor, and (b) for the benefit of the indemnitor, expressly excluding consequential or other indirect damages from the indemnification obligation to avoid becoming liable for lost profits or diminution in value of an asset in which the indemnitee has an interest. These types of consequential or other indirect damages can be theoretical and vastly exceed the amount of damages actually incurred by the indemnitee from the underlying indemnified matter.

### **Exclusions for Indemnitee's Bad Conduct**

When is the indemnitor's duty of indemnification fairly cut off by the indemnitee's own bad conduct?

In virtually any context, the indemnitee should not be entitled to indemnification where it has caused the underlying indemnified matter through its own bad conduct such as fraud, gross negligence or willful misconduct. These exclusions should be tailored to be commensurate with the scope of control the indemnitee has over reasonably foreseeable indemnified matters. A passive indemnitee (e.g., most lenders) may fairly have their right to indemnification cut off by its own bad conduct only upon the occurrence of event, like foreclosure of a mortgage, that puts the indemnitee in control of the underlying business activity. On the other hand, a subcontractor could fairly have its right to indemnification cut off by a wider category of bad conduct

(e.g., failure to adhere to contractor-supplied plans and/or specifications in the performance of the subcontractor's services) because such indemnitees have a certain degree of direct control over the underlying business activity. It is important for business owners to review their indemnification obligations and consider the scenarios in which they would not reasonably expect to be responsible for certain bad conduct of the indemnitee and ensure that those exclusions are expressly and clearly included in each indemnity provision.

### **Conclusion**

Business owners and legal practitioners should consider these core principles of indemnification and ensure that their contractual indemnity obligations are expressly consistent with their expectations.

There is never a guarantee that a court will interpret an indemnification provision in the same manner as a party intended at the time of drafting, but taking the time to consider expectations on these fundamental potential issues and ensure that the provisions expressly reflect those expectations will help to ensure that their indemnity obligations are not contextually imprecise, overbroad or unclear, and result in an unanticipated enforcement outcome.

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