
Indemnification and Insurance: Contractual Risk Transfer Provisions

41st Annual Corporate Counsel Institute

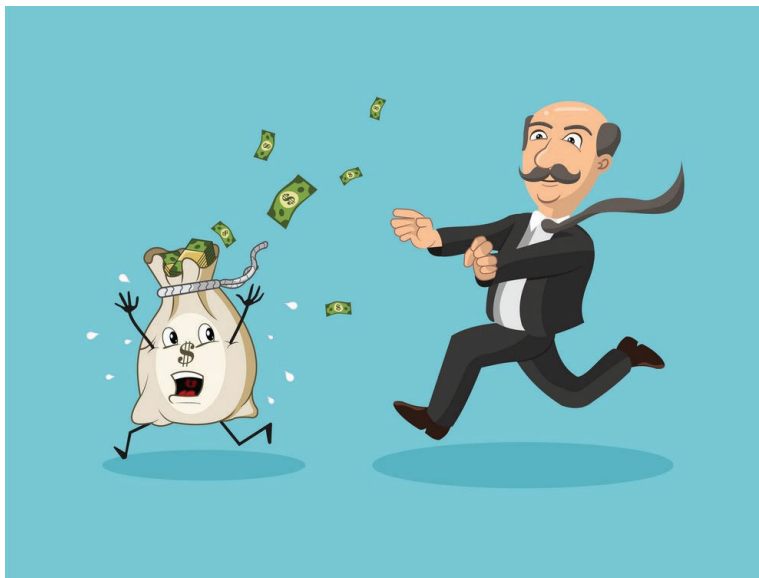
May 16-17, 2019

Houston, Texas

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Indemnity → Risk Transfer → Money



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Overview

Indemnity Agreements, Contractual Insurance Requirements + Insurance Policies



Indemnity Agreements

- Commonplace in corporate contracts—with vendors, suppliers, service providers, contractors, and others
- Risk-transfer mechanism
- Common law rules for enforceability + anti-indemnity statutes
- Routinely supported by contractual insurance requirements—but should not be confused with insurance!



Indemnity Agreements ≠ Insurance

Compare	Indemnity Agreement	Insurance Policy
Risk-Transfer Tool	✓	✓
Ability to pay (<i>i.e.</i> , solvency of payor)	No assurance the indemnitor will be able satisfy its indemnity obligations, other than by transfer of risk to an insurer required by the contract, letter of credit, or guaranty	Not guaranteed, but heavily regulated
Detailed agreement	Generally not	Yes, often on state-approved forms
Construction of the agreement	Tie goes to the indemnitor—agreements will be strictly construed <i>against</i> indemnity	Tie goes to the policyholder—if ambiguous, policyholder prevails (generally construed in favor of coverage if limitations on coverage are not clearly stated)
Applicable law	Common law and anti-indemnity statutes	Well-developed common law and state insurance statutes

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Contractual Insurance Requirements

- Indemnity agreements are often accompanied by insurance requirements, designed to shift the risk of the indemnity obligation to an insurance company
- An insurance clause provides a “financial backstop” for the indemnitor—insurance expected to respond if indemnity obligation is triggered
- Contract should specify types of insurance required + minimum limits
- Best protection → the contract requires the indemnitor to (1) name the indemnitee as an additional insured on the mandated policies and (2) provide a COI

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First appeared as part of the conference materials for the
41st Annual Corporate Counsel Institute session
"Indemnification and Insurance: Contractual Risk Transfer Provisions"