




LOCUM TENENS CONTRACTS

Be Aware of Risk Shifting

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Current Environment for LT Contracts

Many healthcare facilities/institutions are intentionally drafting contracts to "shift the risk" of loss/payment to their vendors whenever possible.

- Many facilities are using their own contracts which have "indemnity" provisions

What is an appropriate response?

- Your first response should be to completely remove all indemnity obligations on the premise that the physicians are independent contractors and not your employees.
- If the facility won't remove the indemnity provisions altogether, your second discussion should be to compromise by offering to indemnify the facility solely with respect to your credentialing services because that is the only service you are providing, in other words, limit your contractual indemnity liability to cover the actual work you DO BUT NOT the healthcare services provided by the independent contractor physician. Again, look at how "Services" is defined in the contract and make sure it doesn't include the provision of healthcare services.
- If that doesn't work, your last option is to indemnify the facility for both your credentialing services and to provide a limited indemnity for damages resulting directly from the negligent acts of the physician.
- **The key is to make sure the indemnity is LIMITED as much as possible.**




Indemnity Provisions

- Found in most service agreements and may also be called "hold harmless" agreements
- Typically difficult to negotiate because the provision is intended to allocate the risk of loss associated with events that may happen in the future
- Hospital facilities want indemnity provisions to be as broad (or ambiguous) as possible and LT staffing firms want them drafted as narrowly as possible




WHY DO YOU CARE?

- Generally underwriters only insure risk that they underwrite. If you agree to a broad indemnification provision, you create contractual liability and a situation where gaps in coverage exist. In other words, you may have agreed to something you don't have insurance coverage for.
- The pretext of "Let your Insurance pay for what you do and my insurance will pay for what I do" is typically embodied in mutual hold harmless or mutual indemnification provisions. Unfortunately, the language is typically broader than that and **such contractual liability is not likely covered by your insurance policy**. Said another way, your insurance policy will typically cover the negligence of your company, your agents and employees, but it will specifically exclude coverage where you indemnify a hospital, its employees and/or agents for their negligence in broadly crafted indemnity provisions.
- The form of the general contract exclusion found in most professional liability policies may look like this:
"This insurance does not apply to any medical incident, claim or suit arising out of contractual liability or any liability you assume under any contract or agreement. This exclusion does not apply to liability that you would have in the absence of a contract or agreement."
 OR
"This policy does not respond and there is no coverage for liability for the acts of another assumed by an Insured under any contract or agreement, except as otherwise noted in this policy."



Definitions

- **Indemnitor**
 - The party bound to reimburse/indemnify or protect the other party
- **Indemnitee**
 - The party who is to be reimbursed/indemnified or protected by the other party
- **Hold harmless**
 - Agreement in which one party agrees to hold the other party without responsibility for damage or other liability arising out of the transaction involved
 - Courts often interpret a "hold harmless" obligation to be broader than an indemnity obligation




Definitions Continued ...

Contractual Indemnity

- Reimbursement by one party to the other party upon the occurrence of a loss based on terms expressly agreed upon in the written service agreement

Common Law Indemnity


- Reimbursement based on the equitable principle that where the wrongful act of one results in another being held liable, the latter party is entitled to restitution from the wrongdoer
- The Indemnitee must prove to the court that it is entitled to be indemnified based as a matter of equity, as opposed to contractual indemnity where the duty to indemnify is expressly agreed upon in writing by the parties



Definitions Continued ...


Services

- The provision of staffing services – **NOT** the provision of healthcare services



Basic Indemnity Language


- There is no "standard" indemnification/hold harmless provision
- BEWARE of the inclusion of certain words used in indemnity provisions and where those words are placed (e.g. what other words they modify):
 - "directly or indirectly"
 - "arising out of or relating to"
 - "agents"
 - "any and all liabilities"
- These words are typically inserted to change the scope and dollar amount of the contractual indemnity clause (i.e. to shift additional risk to the Indemnitor)
- BEWARE of the absence of certain words limiting the scope of the indemnity:
 - "directly"
 - "solely arising out of the negligence of"



General Example of Indemnity Provision and Its Interpretation

A school bus company ("Bus Company") enters into a Transportation Agreement with a school to transport the school's students pursuant to which the Bus Company agrees to the following language:

The Bus Company agrees it will carry any and all insurance to protect it, the Board, the school and its employees from any and all claims and demands, actions and causes of action, damages, costs, loss of service, expenses and compensation, including but not limited to any and all claims for personal injury and/or death and property damages which may, in any way arise from or out of the operations of the school pursuant to the terms of the Transportation Agreement whether such operations are performed by the Bus Company itself, anyone directly or indirectly employed by it or any other person or company retained in any way to carry on all or a portion of the operations necessary to abide by the terms of this Agreement. The Bus Company further agrees that the school, and its employees shall be named insured in any and all such insurance policies required by virtue of this Agreement. The Bus Company also agrees to defend, indemnify and save the school and its employees harmless from all claims and demands, actions and causes of action, damages, costs, loss of service, expenses and compensation on account of or in any way growing out of any claim referred to above.




Non-LT Example Cont.....

A school child was struck by one of the Bus Company's buses. The child's family sued both the school and the Bus Company arguing both (1) that the school was negligent in its failure to supervise the students when they were dismissed from school and the school failed to enforce bus safety rules; and (2) the Bus Company's bus was responsible for hitting the child.

The lawsuit settled and the school sought indemnification from the Bus Company under the indemnity provision in the Transportation Agreement for the amount the school contributed to the settlement and for the school's attorneys' fees incurred in defending the suit. The Bus Company argued it didn't agree to indemnify the school for the school's own negligence.


The New Hampshire Supreme Court ruled that the language was not ambiguous and the Bus Company was required to reimburse the school for the portion the school paid for the school's negligence (e.g. not supervising the students and not enforcing their own bus safety rules), plus the school's attorneys' fees.



Non-LT Example Cont....

How did the court reach that conclusion?


1. Indemnity agreements are strictly construed, particularly when they purport to shift responsibility from one party to another, however, an indemnity provision does not need to state explicitly the parties' intent to provide indemnity for the other party's negligence.
2. In strictly construing such an indemnity provision, the court will look at the "ordinary" meaning of the words in the agreement. When the parties use expansive, unrestricted language, the court gives those phrases the normal, broad reading.
The Bus Company agreed to indemnify the school for"any and all" causes of action "arising out of" the defendants performance of the contract.
3. The court gave the phrase "**arising out of**" a very broad, general and comprehensive meaning. The school's negligence related to its failure to supervise the students and its failure to enforce bus safety rules (e.g. standing so many feet away from the driveway, etc.). The claims against the school "**arose out of**" the defendants operations to the extent that one of the Bus Company's buses was the actual cause of the injury to the child.



Non-LT Example Cont....

3. The Bus Company argued the phrase "arise from or out of the operations of the Bus Company" was limited to the operations performed by the Bus Company itself and anyone employed by the Bus Company (directly or indirectly) and that this language was not meant to indemnify the school for the school's own acts of negligence.
4. The Court disagreed and found that the language on its face made the Bus Company responsible not only for its negligence and for the negligence of its employees, but also for the negligence of anyone it hired or who was "associated with" it in order to fulfill the Transportation Agreement. Based on this expansive language, the court found the parties intended to enter into a "risk shifting" arrangement. Again, the Bus Company's language covered.....**any and all claims for personal injury and/or death and property damages which may, in any way, arise from or out of the operations of the school...**
6. The Court also awarded attorneys fees to the school because the Bus Company agreed to "**defend, indemnify and save the school and its employees harmless** from all claims and demands, actions and causes of action, damages, costs, loss of service, expenses and compensation on account of or in any way growing out of **any claim referred to above.** Since the Bus Company agreed to "defend" the school, the Bus Company had to reimburse the school for legal fees the Bus Company would have paid if it had defended the school as required."

Merrimack School District v. National School Bus Service, Inc. No. 94-120




LT EXAMPLE #1

Staffing Firm agrees to indemnify Client from and against liabilities, claims, suits, actions, causes of action and damages incurred by Client, its agents and employees as a result of ~~any~~ **any** act or omission ~~Services furnished hereunder by Providers, Staffing Firm, its agents and employees.~~

Client agrees to indemnify Staffing Firm from and against liabilities, claims, suits, actions, causes of action and damages incurred ~~thereof~~ as a result of any act or omission of medical malpractice arising out of medical services provided by and under the direction and control of Client, its agents and employees, excluding Providers.


The indemnification provisions described herein are contingent upon the indemnitee fully complying with the following requirements: (a) cooperating in the investigation, settlement or defense of any suit, action, cause of action or claim and permitting indemnitor and indemnitor's attorneys and insurers to control and direct the defense of the same; (b) immediately notifying the indemnitor of any demand, notice, suit, summons, complaint or legal paper in connection with any suit, action, cause of action or claim; (c) promptly notifying any other insurers whose coverage is available to the indemnitee; (d) cooperating with indemnitor and indemnitor's attorneys and insurers with respect to coordinating other applicable insurance available to indemnitee and (e) providing written authorization to obtain records and other information related to the suit, action, cause of action or claim.



Issues – LT Example #1


- Indemnity by Staffing Firm for the benefit of Client
 - Language **"to the extent arising out of"** is very broad
Suggested change: "directly arising out of"
 - Staffing Firm agrees to indemnify Client for **any damages** arising out of ~~services~~ furnished hereunder by Providers, Staffing Firm, its agents and employees
Note: This requires the Staffing Firm to indemnify the Client for ANY damages (e.g. sexual harassment, medical malpractice, intentional acts of the physician, etc.), not just negligent acts or medical malpractice claims. Also, how is "services" defined?
- Indemnity by Client for the benefit of Staffing Firm
 - Client's indemnity is limited
 - Client's indemnity is limited to damages incurred by Staffing Firm (not Provider).
Suggested change: Modify language to extend indemnity to damages incurred by Provider in addition to those incurred by Staffing Firm
 - Client's indemnity is limited to damages incurred by Staffing Firm **thereof** as a result of any act or omission of medical malpractice arising out of medical services provided by and under the direction and control of Client, its agents and employees, excluding Providers.
Suggested change: Either limit Staffing Firm's indemnity to damages "directly" arising out of... or change Client's indemnity to reflect the broad language in Client's indemnity provision.

Note how the slight variations in language broaden Staffing Firm's indemnity and limit Client's indemnity.




Issues – LT Example #1 Cont...

- 3. The indemnification provision described herein are contingent upon the indemnitee fully complying with the following requirements: (a) cooperating in the investigation, settlement or defense of any suit, action, cause of action or claim **and permitting indemnitor and indemnitor's attorneys and insurers to control and direct the defense of the same...**
 - Does this mean that the indemnitee gives up its right to select counsel?
 - Indemnitor "controls" and "directs" the defense of a claim per this language, so the Indemnitee is being required to give up its right to select counsel, approve settlement, etc. Yes, the insurance company has parallel interests and would want good counsel, but what if the indemnitee disagrees with the strategy? It is the indemnitee's reputation at risk.
- 4. The indemnitee will be in breach of contract if it does not (b) **immediately** notifying the indemnitor of any demand, notice, suit, summons, complaint or legal paper in connection with any suit, action, cause of action or claim.
 - "Immediately" is up for interpretation and may give the indemnitor an argument that it does not have to indemnify the indemnitee for damages of a claim if indemnitor wasn't notified "immediately."
Suggested change: use the word "promptly" instead of "immediately"




LT EXAMPLE #2

Staffing Firm will indemnify and save harmless the State and all of its officers, agents and employees from all suits, actions, or claims of any character brought for or on account of any injuries or damages received by any persons or property resulting from the operations of the contractor, or of any of its contractors, in prosecuting work under this Agreement.




ISSUES – LT EXAMPLE # 2

1. There is no reciprocal indemnity from the State and, more importantly, the State probably enjoys some level of sovereign immunity (cap on what it can be sued for). In this case, it is even more important to have the limiting language.
2. Staffing Firm agrees to "indemnify and **save harmless**" the State, its officers, **agents** and employees (e.g. other staff employees, other LT physicians, etc.)
3. "of any character" ...resulting from the "operations of the contractor, or any of its contractors"....
4. This language is quite broad and not limited to medical malpractice claims. It could include harassment claims and other types of claims. The only defense would be that the claims were outside the scope of practice, however, this limitation is not in the indemnity provision. A court would read this broadly.




LT - EXAMPLE # 3

Staffing Firm will indemnify and **hold harmless** the Department of Corrections and all of its officials, officers, **agents**, and employees from and against **any and all** liability **of any character** including, without limitation, suits, actions, claims, demands, losses, judgments, **costs**, damages, and expenses, **including attorneys' fees, arising from or incidental to** the act or omission of Contractor, or any of its officers, agents, employee, or contractors in performing work under this Contract **regardless of whether or not said liability arises or results in part from the act or omission of a party indemnified hereunder.**




ISSUES – EXAMPLE # 3

1. There is no reciprocal indemnity from the Department of Corrections, so the risk is greatly shifted to the Staffing Firm.
2. Staffing Firm agrees to "indemnify and **hold harmless**" the Department of Corrections, its officials, **agents** and employees (e.g. other staff employees, other LT physicians, etc.)
3. Broad languageliability of "**any character**"
4. Broad language... arising from or "**incidental to**" ...
5. Very broad language ... "**whether or not said liability arises or results in part from the act or omission of a party indemnified hereunder.**"
 *** This language would be interpreted in many states to mean that indemnitor (Staffing Firm) has even agreed to indemnify the Department of Corrections if one of the Department of Corrections own officers committed medical malpractice that resulted in damages to the Department of Corrections. This language is simply not acceptable and would never be covered in an insurance policy.




LT -- EXAMPLE # 4

Staffing Firm shall **defend**, indemnify and **hold harmless** the County, its officers and employees from all claims, demands, damages, **costs**, expenses, judgments, attorney fees, or other losses that may be asserted **by any person or entity, including Contractor/Consultant**, and that **arise out of or are made in connection with** the acts or omissions, relating to the performance of any duty, obligation, or work hereunder. The obligation to indemnify shall be effective and shall extend to all such claims or losses in their entirety. However, this indemnity will not extend to any claims or losses arising out of the **sole negligence or willful misconduct** of the County, its officers and employees.



ISSUES – LT EXAMPLE #4

1. Staffing Firm is agreeing to "defend" the County, which means an **advancement** of costs for attorneys to represent the County. If there is a conflict of interest, Staffing Firm will also have to pay for its own attorneys. This is very costly to the Staffing Firm.
2. "**arise out of or are made in connection with the acts or omissions**"....
 Very broad language and not limited to medical malpractice or negligent acts of Staffing Firm and its Providers. **Should read... "solely arise out of the negligent acts or omissions of Staffing Firm, its employees and/or agents."**




OTHER MEANS OF RISK SHIFTING

Joint and Several Jurisdiction or a Proportional Jurisdiction?

Know the type of jurisdiction you are providing service in.

Joint and Several - The doctrine of joint and several liability is a fairness rule, developed to protect injured parties. A legal doctrine applying in some states that allows an injured person to sue and recover from any one or more of several wrongdoers at his option, regardless of that wrongdoer's degree of negligence. The injured party cannot receive double compensation but can choose to recover 100 percent of a damages award from any defendant who is found liable to any extent. For example, if the jury returns a verdict of \$1,000,000 in a medical malpractice claim, plaintiff's counsel may collect the full amount from any defendant who was assessed liability, even if that defendant was only allocated 10% of the total liability. That defendant must then collect the other 90% from the other defendants found to be liable. This means jury instructions in a joint and several jurisdiction MUST be drafted to include allocations of fault to each defendant.

Proportional Liability - The assignment of liability in which each defendant is held responsible solely in proportion to the liability allocated to it.



Type of Jurisdiction?


Why do you care what type of jurisdiction it is?

A. If your company has an LAD claim in a joint and several jurisdiction and the hospital, its employees or agents have any liability, you could be required to pay all of the jury award (\$10,000,000) and then bring an indemnity or contribution claim against the hospital, et al. to recover \$6,000,000 from them.

- Does your contract have reciprocal indemnification from the hospital whereby the hospital agrees to indemnify your company for the negligence of the hospital, its employees and agents? If not, you would have to try to rely on common law indemnity, which may or may not be available in that jurisdiction.
- By having reciprocal indemnification, you have some leverage in mediation negotiations because the hospital knows you can ultimately recover from the hospital if any portion of the fault is attributed to the hospital. If you don't have this, they know you have to try to argue common law indemnity which is sometimes very difficult.

B. If your company has an LAD claim in a proportional jurisdiction and the jury awards \$10,000,000 to plaintiff and allocating 40% to your physician and 60% to the hospital, you would only be liable to pay the portion of the liability allocated to your company or \$4,000,000.

- Make sure you don't agree to contractually indemnify the Client for more than what you would be limited to by law in a proportional jurisdiction
- It isn't as necessary to get reciprocal indemnification from the hospital since you both only pay your portion of the liability.



Additional Insured Endorsements


Additional Insured Endorsements

When a hospital asks to have the hospital, its directors, agents and employees added as an "additional insured" to your policy, what are they really asking for?

Given a broad interpretation, the hospital may be asking to be named as an additional insured as though the hospital had been provided his own separate policy. A more restrictive interpretation is that they are asking to be covered only for the vicarious liability for the acts and omissions of the named insured (the staffing firm, its agents and employees), but not for the hospital's own negligence.


You should NEVER add a hospital as an additional insured unless it is limited to liability "solely" arising out of or relating "solely" to the negligence of your staffing firm, its agents or employees. For example.....

- **Who Is An Insured (Section II)** is amended to include the hospital, its employees, officers, agents and directors, but only with respect to liability solely arising out of your ongoing operations performed by [NAME OF STAFFING FIRM, ITS EMPLOYEES OR AGENTS] for the hospital.



Additional Insured - Example

- Oracle Corporation hired Pro Con to manage the construction of Oracle's new facility.
- Pro Con hired several subcontractors to get the work done, including Decorative Concepts (an interior painting company) ("DC").
- One of DC's employees walked from the work area to a coffee truck for a break. He slipped and fell on an icy sidewalk on the facility site, but away from his work area.
- The employee sued Pro Con saying they failed to keep the sidewalk clear of snow and ice.
- ProCon requested indemnification from DC under its CGL policy issued by Acadia Insurance Company. Again, the insured was DC under this policy.
- While Acadia had issued an "additional insured" endorsement naming ProCon, Acadia argued that the incident didn't trigger coverage.
- The parties did not dispute the facts, so ProCon filed an action for declaratory judgment to enforce the additional insured endorsement and make Acadia pay for the claim.



Additional Insured – Example Cont....

The additional insured endorsement read:

" WHO IS AN INSURED is amended to include as an insured any person or organization for whom you are performing operations if you and such person or organization have agreed in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability arising out of your ongoing operations performed for that insured."


The Supreme Court of New Hampshire looked at the language and looked at the plain and ordinary meaning of the words in the context of the policy.

Looking specifically at the following language, the Court found that Pro Con's ability to recover was limited to damages or injuries arising out of DC's ongoing painting operations performed by DC for ProCon per the language. The Court found there had to be a "causal nexus" linking DC's ongoing painting connections and the injuries in order for the additional insured endorsement to apply. While it doesn't have to be the "proximate" cause, the only relationship between the injury and DC was that the guy was employed by DC.

Pro Con was denied the additional insured coverage.....based entirely on the limiting language in the additional insured endorsement.

TAKE AWAY: LIMIT YOUR LIABILITY USING SIMILAR LANGUAGE....."Such person or organization is an additional insured only with respect to liability arising out of your ongoing operations performed for that insured."

Pro Con Construction, Inc. v. Acadia Insurance Company No. 2000-422



OTHER MEANS CONTINUED ...

- **Waiver of Subrogation**

A waiver of subrogation endorsement means your staffing firm (and therefore your insurance company) agrees to waive (forfeit) its right to sue or make claim against the hospital, even if the hospital is 100% responsible for an accident or loss. In other words, your insurance company cannot pay you out and then step into your shoes to proceed to recover against the hospital.

Waivers of subrogation are typical in landlord/tenant contracts and property/casualty transactions.


Agreeing to a "waiver of subrogation" clause may void your policy. Check your policy for language similar to the following:

I. Transfer of Rights of Recovery Against Others To Us
 If any person or organization to or from whom we make payment under this Coverage Part has rights to recover damages from another, those rights are transferred to us to the extent of our payment. That person or organization must do everything necessary to secure our rights and must do nothing after loss to impair them.



BUSINESS RISK AND INSURANCE COVERAGE

- The indemnification agreement is completely independent of insurance coverage
- The indemnitor will be required to respond whether the obligation is insured or not
- You may have insurance coverage for some provisions of an indemnity agreement and not for others, which is not uncommon




BUSINESS DECISIONS AND INSURANCE COVERAGE

Accepting an indemnification obligation that goes beyond the scope of your insurance coverage is a business decision/risk that your executive team needs to understand **BEFORE** taking that risk.

- Do you typically staff OB/GYN, PEDS or ER physicians at this facility where potential risks could be greater or is it a lower risk (e.g. Med Surg)?
- Is there enough business at the facility to justify the risk?
- Do you have ability to pay out a catastrophic claim if your insurance doesn't cover it?

Parties are assumed to be in a position to insure their own negligent acts and to be able to provide their own defense for their vicarious liability for acts of others



BE PROACTIVE..... NOT REACTIVE

1. Create an approval process so your company knows the risks it is taking.
 - Create a checklist and require someone with higher authority to sign off on taking certain risks outside of your insurance policy Train others within the organization regarding what is or is not acceptable contract language
 - Understand what risks your executives are willing to take
2. Know what your insurance policy covers.....and what it doesn't.
3. Don't be afraid to negotiate with your Clients. If you don't ask, you won't get it.

Don't just sign contracts, put them in a folder and hope that nothing happens.

Do your best to limit your company's liability now and in the future!!!!
