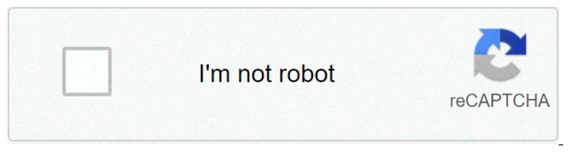

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Hold harmless and indemnity agreement

[Update: For my more recent take on this issue, see this 2012 post.]At a seminar I gave last week, I suggested that hold harmless and indemnify are essentially synonyms. Some participants were skeptical, so I thought I'd better research the issue.Black's Law Dictionary supports my view. It defines hold harmless as follows: "To absolve (another party) from any responsibility for damage or other liability arising from the transaction; INDEMNIFY." (It defines indemnify as follows: "To reimburse (another) for a loss suffered because of a third party's or one's own act or default. 2. To promise to reimburse (another) for such a loss. 3. To give (another) security against such a loss.")But in Mellinkoff's Dictionary of American Legal Usage, David Mellinkoff says that "hold harmless is understood to protect another against the risk of loss as well as actual loss." He goes on to say that indemnify is sometimes used as a synonym of hold harmless, but that indemnify can also mean "reimburse for any damage," a narrower meaning than that of hold harmless.So it appears that the skeptical seminar participants and I were both right. But when looked at in a broader context, you should always be able to dispense with hold harmless. All it takes to ensure that indemnify is given its broader meaning is to have Acme agree to indemnify Widgetco against losses and liabilities. Black's defines loss as "the disappearance or diminution of value, usu. in an unexpected or relatively unpredictable way," and it defines liability as "A financial or pecuniary obligation." If you use both these words, Acme would be indemnifying Widgetco against both the risk of loss as well as actual loss, to use Mellinkoff's words. It would be redundant to have Acme also hold Widgetco harmless.One of the pleasures of giving seminars is that issues crop up that I would otherwise never have thought to investigate. So my thanks go to last week's skeptical participants. The presence of a hold harmless agreement between parties in a contract can have a significant effect on the parties liability insurance and indeed the premium they pay for that insurance but what is a hold harmless agreement? What is an indemnity agreement or hold harmless agreement? The purpose of a hold harmless agreement in a contract between two parties is to release one or both parties from liabilities that may arise under and during the contract that would otherwise fall upon them but for the absence of that agreement. The hold harmless agreement can apply to only one of the contracting parties or it can apply to both, this is known as a mutual hold harmless agreement. What does a hold harmless or indemnity agreement say? The exact nature and wording of an agreement may differ from contract to contract and certain standard forms of agreement are present in the UK oil and rail industry but an example of a limited form of hold harmless agreement may look like this; The [Main Contractor] shall (in addition to, and without affecting, any other rights or remedies the other party may have whether under statute, common law or otherwise) indemnify and keep indemnified the other and hold the other harmless from and against all actions, claims, demands, liabilities, damages, costs, losses or expenses (including without limitation, consequential losses, loss of profit, loss of reputation and all interest, penalties, legal and other professional costs and expenses) resulting from any breach or non-performance by [the sub contractor] of any of the provisions under this agreement. When are hold harmless agreements used? A hold harmless agreement can appear in contracts in any industry although they are not commonplace in most contractual arrangements. However, there is a tendency within certain industries for the inclusion of the hold harmless or indemnity agreement in order to make the use of specialist sub-contractors much easier for the main contractor. Good examples of this are in the gas, oil and rail industries where the perceived risks are high as are the requirements for limits of indemnity for third party liability insurance. The level of cover that might be required for a specialist contractor to work on an oil platform would be so expensive for the specialist contractor that it would either preclude them from undertaking the work or make the cost of the work to the main contractor extremely expensive. In cases such as these the actual risks that are being undertaken by the sub-contractor are already present and presumably insured by the main contractor. It makes good business sense for a hold harmless agreement to be in force between the parties in respect of the work being undertaken. What effect does a hold harmless agreement or indemnity agreement have on insurance? If you are involved in contracts that include hold harmless agreements you should make your insurance company aware of this. This applies to contracts with mutual hold harmless as well as agreements that are in effect in your favour or otherwise. If you have an agreement with a sub contractor or other party that extends your liability by assuming risks that you would otherwise not be responsible for you must inform your insurance company so that they can accommodate this aspect of cover. This will increase your premium and may in some circumstances affect the availability of cover. If you have agreements that relieve you of legal liabilities arising from work that you undertake you should also inform your insurance company as this can have a very positive effect on the premium you pay for your liability insurance. Do hold harmless agreements reduce the liabilities of the parties to the contract? Not necessarily, almost by definition if one party is relieved of liabilities that would otherwise arise then it would seem that automatically the other party is assuming them where they would not normally exist. Is a hold harmless agreement or indemnity clause enforceable in law? There have been few legal challenges to these agreements in UK law but it is generally accepted that they would be enforceable although the exact terms and conditions of the clause and other clauses in the contract that may have bearing on this may allow a challenge in some circumstances. It is also worth noting that certain forms of hold harmless clauses are not enforceable in certain states of the USA. Where can I get more information of hold harmless clauses and insurance? You can call us direct to discuss your situation with specialist liability insurance broker. Posted at 04:50h in News by Author In this update we look at a particular type of indemnity clause known as a "hold harmless clause" and what implications such clauses have for liability insurance coverage. We often come across indemnity clauses in contracts which require one contracting party to "hold harmless" the other contracting party. There are also judicial statements to the effect that an indemnity is a contract by one party to keep the other harmless against loss. So, is there a difference between an indemnity clause and a hold harmless clause? More particularly, what are their insurance implications from a company's financial liability standpoint? Essentially, a "hold harmless" clause gives the recipient of that clause ("the recipient") the benefit of being "held harmless" – or "not be legally bothered" – by the other contracting party or any other party claiming against the recipient. Like an indemnity clause, a hold harmless clause is a risk transfer mechanism. An indemnity is sometimes distinguished from a hold harmless by saying the indemnity relates only to reimbursement of an actual loss and that the "hold harmless" obligation requires the grantor of that benefit to hold harmless the recipient from risks of potential loss as well as actual loss. Other views are that the two terms are synonymous or, in fact, exclusive from each other. An example of a hold harmless clause is: "The contractor holds the principal harmless from any action, claims, liability or loss in respect of the performance of the services." Under this hold harmless clause, the contractor is not only prevented from bringing any claim against the principal (even if the principal has contributed to the loss or liability in the first place), the contractor may be required to "hold the principal harmless" by ensuring that the principal does not suffer any loss or liability as a result of the performance of the services which may include claims by a third party. The reality is that the precise operation and application of the clauses depend very much on the actual wording of the clauses and the courts' interpretation of them. At a simplistic level, however, we can say that the practical effects of both types of clauses are similar – they are both about risk allocation and the extent of risks that each party is prepared to assume. Careful drafting of the clauses determines the extent of the protection that is given to the recipient of the hold harmless obligation. Insurance Implications – Waiver of Subrogation Rights If an insured agrees in a contract to "hold harmless" another party without any right to adjust their respective liabilities according to each party's contribution to the loss or liability, this may jeopardise a company's insurance for financial liability risks. First, a hold harmless clause involves an assumption of contractual liability which is typically excluded by contractual liability exclusions in insurance policies. Whilst an extension may be provided in a policy to cover liability assumed under contracts, insureds must read the wording of the extension carefully to ensure that they understand the precise ambit of the cover. For instance, if the contractual liability extension covers only the loss that results from an act, error or omission of the insured in the provision of the relevant services or supply, then a loss that falls within the hold harmless provision but did not in fact result from an act, error or omission of the insured would not be covered by the policy. "Careful drafting of the clauses determines the extent of the protection that is given to the recipient of the hold harmless obligation." Furthermore, a hold harmless clause, like an indemnity clause, also involves a waiver of the insurer's right of subrogation which is an issue often overlooked when parties agree to accept risks under such clauses. Insurers have a right of subrogation, both as a matter of law and under the insurance contract, to "step into the shoes" of the insured and bring a claim against other parties who have some responsibility for the loss or damage. This right is a key element of an insurance contract because it allows insurers to recoup some of what they have paid to the insured by way of the insurance claim. But, in subrogating "into the shoes of the insured", the insurer can only exercise those rights that an insured has. If, for instance, a clause in a contract provides that Party A must hold harmless Party B in respect of "any action, claims, liability or loss arising from the performance or supply of the services provided under the agreement", then the insurer of Party A is similarly constrained by the terms of that hold harmless clause. One effect of the hold harmless agreement is that Party A is prevented from suing Party B for any loss caused by Party B. Then the insurer of Party A is similarly prevented by the hold harmless agreement from suing and recovering anything from Party B. By allocating risks between the contracting parties, hold harmless clauses can therefore operate to waive or limit an insurer's subrogation rights. If Party A (in the above example) claimed under its Professional Indemnity Insurance Policy for its liability to Party B, would that claim be successful? Most insurance polices provide as a condition of the contract of insurance that the insured must not do anything to impair the insurer's rights of subrogation. A breach of such a condition may prejudice the insured's claim under the policy. Depending on the precise wording of the condition in the policy and the extent of the prejudice suffered by the insurer, the insured's claim might be reduced to nil. What to Look for in a Policy Having said that, some insurers in the marketplace acknowledge the fact that indemnity and hold harmless clauses are common negotiating tools in commercial contracts and so, notwithstanding the fact that such clauses have the effect of waiving some or all of the insurer's subrogation rights, specifically provide by way of an extension that such clauses will not prejudice the insured's claim under the policy. Such an extension is a significant concession on the part of the insurer. In the example above, the insurer of Party A having indemnified Party A would not be able to subrogate into Party A's shoes and bring a claim against Party B, irrespective of the fact that Party B may have contributed to the loss. Much depends, however, on the precise wording of the indemnity or hold harmless clause in determining the extent to which insurer's right of subrogation has been waived or limited. Some policies, however, whilst accepting the existence of indemnity and hold harmless clauses and providing policy coverage for liability assumed under contracts contain, nevertheless, conditions in the policy which prohibit the insured from limiting the insurer's rights of subrogation. In such cases, there is an inconsistency in the insurance policy coverage. On the one hand, the insurer is providing coverage for contractual liability assumed under contracts but, on the other hand, they are saying that any waiver or limitation of the insurer's subrogation rights may prejudice the insured's insurance coverage. Stay Informed – Connect with us on LinkedIn Important Notice This article provides information rather than financial product or other advice. The content of this article, including any information contained in it, has been prepared without taking into account your objectives, financial situation or needs. You should consider the appropriateness of the information, taking these matters into account, before you act on any information. In particular, you should review the product disclosure statement for any product that the information relates to it before acquiring the product. Information is current as at the date the article is written as specified within it but is subject to change. CRM Brokers make no representation as to the accuracy or completeness of the information. Various third parties have contributed to the production of this content. All information is subject to copyright and may not be reproduced without the prior written consent of CRM Brokers. The hold harmless clause is a statement in a legal contract that absolves one or both parties in a contract of legal liability for any injuries or damage suffered by the party signing the contract. A business may add a hold harmless agreement to a contract when the service being retained involves risks that the business does not want to be held responsible for legally or financially. This clause is also known as a hold harmless provision. Businesses that offer high-risk activities, such as skydiving sessions, commonly use a hold harmless clause. Although it is not an absolute protection from liability, it indicates that the customer has acknowledged certain risks and agreed to take them. This hold harmless clause may be in the form of a letter. A hold harmless clause is used to protect a party in a contract from liability for damages or losses. In signing such a clause, the other party accepts responsibility for certain risks involved in contracting for the service. In some states, the use of a hold harmless clause is prohibited in certain construction jobs. The hold harmless clause may be unilateral or reciprocal. With a unilateral clause, one party to the contract agrees not to hold the other party liable for injuries or damages incurred. With a reciprocal clause, both parties to the contract agree to hold the other harmless. The hold harmless clause is not absolute protection against lawsuit or liability. The hold harmless clause is common in many less obvious situations than a contract for skydiving lessons. An apartment lease may have a hold harmless clause stating that the landlord is not responsible for any damage caused by the tenant. A homeowner hiring a roofer might request a hold harmless clause to protect against a lawsuit if the roofer falls off the roof. A sports club may include a hold harmless clause in its contract to prevent its members from suing if they are injured in the course of participating in tennis matches. In this example, the hold harmless clause might require the participant to accept all risks associated with the activity, including the risk of death. Contractors often add hold harmless clauses to their contracts to protect their businesses against potential liability arising from their work. For example, a contractor hired to add a deck to a private home may add the clause to preempt a lawsuit if an injury occurs on the deck at a later date. The homeowner, in turn, may add a hold harmless clause to prevent a lawsuit if the contractor suffers an injury during the course of the work. The first situation described above represents a unilateral hold harmless clause. The contractor is the only one demanding to be held harmless. The second example represents a reciprocal clause. The homeowner is also requesting indemnity from the contractor. A hold harmless clause does not always protect against lawsuit or liability. Some states do not honor hold harmless agreements that are nebulous in language or overly broad in scope. Moreover, the clause may be deemed null and void if signers present a strong case that they were coerced or beguiled into signing a hold harmless clause.