

The Pitfalls of Indemnification Clauses

Presented at the ABA - Business Law Section's Spring Meeting, Nashville, TN on March 31, 2005
and will be reprised for the MSBA – Business Law Section in Minneapolis, MN on May 10, 2005.

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INSURANCE CONTRACTS AND INDEMNITY CONTRACTS

Insurance contracts are often referred to as "contracts of indemnity". There is an abundance of case law interpreting insurance contracts that provides a useful source for predicting how a court may interpret an indemnity agreement between two parties. In many cases, courts have borrowed from case law interpreting insurance contracts to provide a useful framework for interpreting indemnity agreements. Some of these concepts are discussed below.

Yet in several respects, insurance contracts are very different from indemnity agreements. While an insurance contract is written by an insurance company whose primary business is to assume specific risks of loss in consideration of a premium, an indemnity agreement is usually set up as a risk-sharing agreement between two contracting parties where indemnification is provided ancillary to and in furtherance of some other independent transactional relationship between the parties.¹ Because of this, insurance concepts will not always govern indemnity agreements. For example, in an insurance contract, any ambiguity regarding the terms of the insurance contract is resolved in favor of the insured.² In contrast, outside the insurance context, courts generally apply traditional contract principles when construing indemnity agreements.³ Indemnity agreements are generally strictly construed if they attempt to shift causal fault from one party to another.⁴ Generally, courts construe ambiguities in such agreements against the party who drafted the contract and the indemnitee.⁵

a. The Duty to Defend

i. Insurance Contracts

In most insurance contracts, the insurer agrees to (1) indemnify or pay certain covered losses for which the policyholder is responsible and (2) defend the policyholder from lawsuits for which the policy provides coverage through retaining and compensating an attorney. These dual obligations are commonly referred to as the "duty to indemnify" and the "duty to defend". The duty to defend and the duty to indemnify are separate obligations. Both

¹ See generally *Stickovich v. City of Cleveland*, 757 N.E.2d 50, 62 (Ohio Ct. App. 2001); *Dietz-Britton v. Smythe Cramer Co.*, 743 N.E.2d 960, 973 (Ohio Ct. App. 2001) (explaining difference between insurance contracts and risk-shifting agreements that are not insurance contracts).

² *Reinsurance Ass'n of Minn. v. Timmer*, 641 N.W.2d 302 (Minn. Ct. App. 2002); *Griffin v. Shelter Mut. Ins. Co.*, 18 S.W.3d 195, 199-200 (Tenn. 2000); *Fryman v. Pilot Life Ins. Co.*, 704 S.W.2d 205, 206 (Ky. 1986); *Ramsay v. Md. Am. Gen. Ins. Co.*, 533 S.W.2d 344 (Tex. 1976).

³ *United States v. Seckinger*, 397 U.S. 203 (1970); *Martin & Pitz Assocs., Inc. v. Hudson Constr. Servs., Inc.*, 602 N.W.2d 805 (Iowa 1999); *Cozzi v. Owens Corning Fiber Glass Corp.*, 164 A.2d 69 (N.J. Super. Ct. App. Div. 1960) (applying general contract principles).

⁴ *Smith v. Tenneco Oil Co.*, 803 F.2d 1386 (5th Cir. 1986); *Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 548 N.E.2d 903, 905 (N.Y. 1989); *Fretwell v. Protection Alarm Co.*, 764 P.2d 149 (Okla. 1988); *Lewis v. Dunn Leasing Corp.*, 244 S.E.2d 706, 709 (N.C. Ct. App. 1978). But see *Applied Indus. Materials Corp. v. Mallinckrodt, Inc.*, 102 F. Supp. 2d 934 (N.D. Ill. 2000) (holding that the Illinois Supreme Court would not likely mandate strict construction of all indemnity agreements).

⁵ See *Topp Copy Prods., Inc. v. Singletary*, 626 A.2d 98, 99 (Pa. 1993) (ambiguities must be construed against indemnitee); *Batson-Cook Co. v. Ga. Marble Setting Co.*, 144 S.E.2d 547 (Ga. Ct. App. 1965).

of these duties rest on contract. The duty to defend is distinct from and broader than the duty to indemnify.⁶ Thus, even though the underlying action produces a result that does not trigger a duty to indemnify under an insurance policy, the insured still may have a duty to defend.⁷

As a general rule, the obligation to defend is generally determined by comparing the complaint with the terms of the policy language.⁸ This applies even where the allegations of a complaint are groundless or frivolous.⁹ If any part of the lawsuit is arguably within the scope of coverage, the insurer must defend the lawsuit.¹⁰ If any claim is arguably covered, the insurer must provide a defense against all claims. Some liability policies do not provide a duty to defend. Others provide that the insurer will reimburse the policyholder for legal fees incurred in defending an action covered by the policy.

ii. Indemnity Contracts

Similar principles would likely guide the interpretation of an indemnity agreement. If the indemnitor undertakes a "duty to defend", then the indemnitor would be expected to defend the indemnitee against the claim through appointment of an attorney or reimbursement of defense costs. In contrast, if the indemnitor has only agreed to indemnify (and not specifically agreed to undertake defense of the indemnitee), the obligation to indemnify would arise only when the indemnitee sustains an actual loss.¹¹ This means that the indemnitee must make payment on an underlying claim, judgment or settlement to trigger the indemnitor's duty to reimburse the indemnitee. If the indemnification agreement provides for indemnification against liability, the indemnitor's obligations arise as soon as liability is fixed.¹²

b. Notice of a Claim

i. Insurance Contracts

In an insurance context, a policyholder must "tender the defense" to the insurer. Generally, the policyholder need only give notice of the lawsuit to the insurer and an opportunity to defend.¹³ Once notice is given, the insurer may have the responsibility to contact the insured to determine whether the assistance of the insurer is needed.¹⁴ Without a proper tender, the duty to defend is not invoked and the insurer cannot be

⁶ *Erie Ins. Exch. v. Muff*, 851 A.2d 919, 925-26 (Pa. Super. Ct. 2004); *Hecla Mining Co. v. N.H. Ins. Co.*, 811 P.2d 1083, 1089 (Colo. 1991); *Brown v. State Auto. & Cas. Underwriters*, 293 N.W.2d 822, 825 (Minn. 1980).

⁷ See, e.g., *Kirk v. Mt. Airy Ins. Co.*, 951 P.2d 1124 (Wash. 1998); *Mains v. State Auto. Mut. Ins. Co.*, 698 N.E.2d 488, 491 (Ohio Ct. App. 1997); *Boston Ins. Co. v. Maddux Well Serv.*, 459 P.2d 777 (Wyo. 1967).

⁸ *Am. Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842 (Tex. 1994); *Garvis v. Employers Mut. Cas. Co.*, 497 N.W.2d 254, 256 (Minn. 1993); *Am. Nat'l Prop. & Cas. Co. v. Gray*, 803 S.W.2d 693 (Tenn. Ct. App. 1990).

⁹ *Krevolin v. Dimmick*, 467 A.2d 948 (Conn. Super. Ct. 1983); *Hodges v. State Farm Mut. Auto Ins. Co.*, 488 F. Supp. 1057 (D.S.C. 1980); *Chipokas v. Travelers Indem. Co.*, 267 N.W.2d 393 (Iowa 1978).

¹⁰ *Ohio Cas. Ins. Co. v. Clark*, 583 N.W.2d 377 (N.D. 1998); *Auto-Owners Ins. Co. v. City of Clare*, 521 N.W.2d 480 (Mich. 1994); *White Mountain Cable Constr. Co. v. Transamerica Ins. Co.*, 631 A.2d 907 (N.H. 1993).

¹¹ *Larson Mach., Inc. v. Wallace*, 600 S.W.2d 1 (Ark. 1980) (stating indemnitee must show actual loss by payment or satisfaction of judgment or by other payment under compulsion); *F. J. Schindler Equip. Co. v. Raymond Co.*, 418 A.2d 533 (Pa. Super. Ct. 1980) (holding indemnitee must pay damages to third party).

¹² See *Trim v. Clark Equip. Co.*, 274 N.W.2d 33 (Mich. Ct. App. 1978) (noting indemnitee need only show potential liability to injured parties and that settlement is reasonable); *Williams v. Johnston*, 442 P.2d 178 (Idaho 1968) (right to indemnification arises when liability to third party is established).

¹³ *Home Ins. Co. v. Nat'l Union Fire Ins. of Pittsburgh*, 658 N.W.2d 522, 532-33 (Minn. 2003); *Towne Realty, Inc. v. Zurich Ins. Co.*, 548 N.W.2d 64 (Wis. 1996) (insert parenthetical); *White Mountain Cable Constr. Co. v. Transamerica Ins. Co.*, 631 A.2d 907 (N.H. 1993) (holding that tender was sufficient where insurer had notice of complaint within six months of its filing).

¹⁴ *Home Ins. Co.*, 658 N.W.2d at 533-34.

responsible for defense costs incurred by the policyholder.¹⁵ To ensure it is proper, the tender of defense should be in writing, attach the claim or lawsuit, and ask the insurer to defend the claim or lawsuit.

Policy provisions that impose a duty to defend on the insurer also have the effect of giving the insurer exclusive control over the litigation.¹⁶ Even where an insurer does not have a duty to defend, the insured should provide the insurer with notice of the claim because the duty to indemnify is usually conditioned on the right to control litigation.¹⁷

ii. Indemnity Contracts

In an indemnity context, unless an indemnity agreement contains a specific provision to the contrary, an indemnitee may not be required to give the indemnitor notice of claims against the indemnitee.¹⁸ If, however, the parties contractually established that proper notice was a condition precedent to liability under an indemnification provision, an indemnitee's failure to give notice to the indemnitor may bar the indemnitee's claim.¹⁹

c. Settlement

i. Insurance Contracts

In an insurance context, the insurer generally retains the right to control settlement through its policy provisions. But if the insurer unjustifiably refuses to defend or otherwise disputes the existence of insurance coverage, the insured may make a reasonable settlement without losing its right to recover from the insurer under the policy.²⁰ Under those circumstances, some jurisdictions provide that the policyholder may have the right to enter into a stipulated judgment in which the policyholder acknowledges that there is a potential that judgment may be entered against him and stipulates to entry of judgment for a specific amount.²¹ Judgment is entered on that amount, and the injured claimant agrees not to execute judgment and allows the claimant to proceed in an action against the insurer. If an insurer is defending under a reservation of rights, the insurer generally is entitled to notice

¹⁵ See *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 739 (Minn. 1997) (policyholder generally cannot recover costs of defense before tender of the claim).

¹⁶ *Am. Ins. Group v. Risk Enter. Mgmt., Ltd.*, 761 A.2d 826, 829 (Del. 2000); *Safeco Ins. Co. v. Ellinghouse*, 725 P.2d 217, 226 (Mont. 1986). Even where the insurer does not have a duty to defend, some policy provisions may give the insurer a right to defend. Under those circumstances, the insured must give notice to the insurer because the insurer has the right and must be given the opportunity to control potential litigation. See, e.g., *Ohio Cas. Ins. Co. v. Carman Cartage Co.*, 636 N.W.2d 862 (Neb. 2001).

¹⁷ See *M&M Elec., Inc. v. Commercial Union Ins. Co.*, 670 N.Y.S.2d 909 (N.Y. App. Div. 1998) (noting insurer's ability to pay is normally coupled with the insurer's right to control the defense of its insured to protect its financial interests) (citing 7C John Appleman, *Insurance Law and Practice* § 4681).

¹⁸ *ELRAC, Inc. v. Cruz*, 699 N.Y.S.2d 647 (N.Y. Civ. Ct. 1999). But see *Rothey v. Walker Bank & Trust Co.*, 754 P.2d 1222 (Utah 1988) (noting that while notice is not generally necessary to invoke the indemnitor's liability, rules of estoppel may apply); *Morris v. Schlumberger, Ltd.*, 445 So. 2d 1242 (La. Ct. App. 1984) (equitable principles of equity apply where contract is silent on issues of tender and notification).

¹⁹ *Am. Home Assur. Co. v. Int'l Ins. Co.*, 684 N.E.2d 14, 16 (N.Y. 1997) (stating absent a valid excuse, a failure to satisfy notice requirement vitiates the policy); *McLin v. Leigh*, 598 N.E.2d 731 (Ohio Ct. App. 1991). But see *Alcazar v. Hayes*, 982 S.W.2d 845, 850 (Tenn. 1998) (noting modern trend considers whether the insurer has been prejudiced by untimely notice).

²⁰ *Henning v. Cont'l Cas. Co.*, 254 F.3d 1291 (11th Cir. 2001); *Sanderson v. Ohio Edison Co.*, 635 N.E.2d 19 (Ohio 1994); *Nixon v. Liberty Mut. Ins. Co.*, 120 S.E.2d 430 (N.C. 1961).

²¹ See *Medd v. Fonder*, 543 N.W.2d 483 (N.D. 1996); *Miller v. Shugart*, 316 N.W.2d 729, 733-34 (Minn. 1982); *Damron v. Sledge*, 460 P.2d 997 (Ariz. 1969).

before the agreement is completed.²² If an insurer has made an outright denial of coverage, the insurer may not be entitled to notice.²³

ii. Indemnity Contracts

In an indemnity context, the rules are similar. If the indemnitor has accepted its indemnity obligations, the indemnitor would control settlement. If the indemnitor has denied its obligations or failed to approve settlement of the claim, the indemnitee generally has the right to enter into a reasonable settlement without consultation with the indemnitor.²⁴ This holds true even where the indemnity agreement provides that the indemnitor cannot consummate a settlement without the indemnitor's consent.²⁵ In general, however, the indemnitee owes a duty of good faith to its indemnitor. Any act by the indemnitee that prejudices the indemnitor's rights will release the indemnitor's obligations to the extent of the prejudice.²⁶

²² See *State Farm Mut. Auto. Ins. Co. v. Peaton*, 812 P.2d 1002, 1011 (Ariz. Ct. App. 1990); *Miller v. Shugart*, 316 N.W.2d 729, 732-33 (Minn. 1982).

²³ *D.E.M. & J.J.M. v. Allickson*, 555 N.W.2d 596, 602 (N.D. 1996); *Ins. Co. of N. Am. v. Spangler*, 881 F. Supp. 539 (D. Wyo. 1995); *Brownsdale Co-op. Ass'n v. Home Ins. Co.*, 473 N.W.2d 339, 341-42 (Minn. Ct. App. 1991).

²⁴ *Sequa Coatings Corp. v. N. Ind. Commuter Transp. Dist.*, 796 N.E.2d 1216, 1230 (Ind. Ct. App. 2003); *ELRAC, Inc. v. Cruz*, 699 N.Y.S.2d 647 (N.Y. Civ. Ct. 1999).

²⁵ *Luton Mining Co. v. Louisville & N. R. Co.*, 123 S.W.2d 1055, 1060 (Ky. 1938).

²⁶ *New Amsterdam Cas. Co. v. Lundquist*, 198 N.W.2d 543, 549 (Minn. 1972) (indemnitee had duty to minimize loss and communicate offers of settlement); *Wolthausen v. Trimpert*, 105 A. 687, 690 (Conn. 1919) (noting indemnitee's duty to act in good faith and use ordinary care).

ARTICLE VII. LIMITATION OF LIABILITY

7.1 REMEDY EXCLUSIONS. NEITHER PARTY SHALL BE LIABLE TO THE OTHER PURSUANT TO THIS AGREEMENT FOR ANY AMOUNTS REPRESENTING LOSS OF PROFIT, LOSS OF BUSINESS OR OTHER INDIRECT, CONSEQUENTIAL, EXEMPLARY, OR PUNITIVE DAMAGES OF THE OTHER PARTY.

7.2 DOLLAR CAP. THE LIMIT OF EITHER PARTY'S LIABILITY (WHETHER IN CONTRACT, TORT, NEGLIGENCE, STRICT LIABILITY IN TORT, BY STATUTE OR OTHERWISE) TO THE OTHER PARTY OR ANY THIRD PARTY CONCERNING PERFORMANCE OR NON-PERFORMANCE BY SAID PARTY, IN ANY MANNER RELATED TO THIS AGREEMENT, FOR ANY AND ALL CLAIMS SHALL NOT EXCEED AN AMOUNT EQUAL TO TWO (2) TIMES THE TOTAL FEES PAID AND PAYABLE BY LICENSEE TO LICENSOR UNDER THIS AGREEMENT.

7.3 Exclusions. The limitations or exculpations of liability set forth in Sections 7.1 and 7.2 above shall not apply to (a) either party's liability (i) for claims, demands, loss, damage or expense relating to bodily injury or death of any person or damage to real and/or personal property, or (ii) resulting from its gross negligence or willful, wanton, or reckless misconduct; (b) Licensor's liability under Article VIII (Indemnification) and (c) either party's breach of its obligations under Article X (Confidentiality/Data Security).

ARTICLE VIII. INDEMNIFICATION

8.1 Defense and Indemnification Obligations. Licensor agrees to indemnify, defend and hold harmless Licensee and its Affiliates and their respective successors, officers, directors, shareholders, employees, agents and Third Party Service Providers from and against all losses and liabilities and all damages, expenses, costs, and fees, including reasonable attorneys' fees, arising from: (a) any claim, suit, action or proceeding (each a "Claim") brought against Licensee by a third party (other than an Affiliate) alleging that the Software infringes any copyright, trademark, patent or other proprietary right or misappropriates any trade secret; (b) any Claim brought against Licensee by a third party arising out of any breach by Licensor of any of the terms and conditions of this Agreement; (c) the death or bodily injury of any agent, employee, customer or business invitee of Licensee; or (d) the damage, loss or destruction of any tangible property of Licensee. Licensee shall provide Licensor: (i) reasonably prompt written notice of the existence of such Claim; (ii) control over the defense or settlement of such Claim, provided that Licensor shall not settle such Claim without Licensee's prior written consent, which consent shall not be unreasonably withheld, and provided that Licensee shall have the right to participate in the defense of any such Claim at its expense and through counsel of its choosing; and (iii) non-financial assistance at Licensor's request to the extent reasonably necessary for the defense of such Claim.

8.2 Infringement Claim Remedies. In the event an injunction is sought or obtained against use of the Software or Documentation or in Licensor's reasonable opinion is likely to be sought or obtained, Licensor shall within a commercially reasonable time, at its option and expense, either (a) procure for Licensee and Affiliates the right to continue to use the infringing Software or Documentation as set forth in this Agreement, (b) replace or modify the infringing Software or Documentation to make its use non-infringing while being capable of performing the same function without degradation of performance, or (c) if neither of the foregoing options is commercially reasonable, Licensor may terminate such infringing License(s) and, at Licensee's request and direction, will terminate any other Licenses that are dependent upon or are materially interrelated with the infringing Licenses, and upon such termination, Licensor shall issue to Licensee the refund set forth in Section 6.5. Licensor shall have no indemnity obligation to Licensee or its Third Party Service Providers under Section 8.1(a) to the extent the claim(s) of Infringement is based upon (i) a modification of the Software by Licensee, a Licensee Affiliate, or a Third Party Service Provider at Licensee's direction; or (ii) the continued use of the Software by Licensee or an Affiliate for greater than a reasonable period of time after a non-infringing alternative with equivalent or better functionality and performance has been made available by Licensor for installation at Licensor's sole expense.

15 LIMITATION OF LIABILITY

(a) NEITHER PARTY SHALL BE LIABLE UNDER THIS AGREEMENT TO THE OTHER OR ANY THIRD PARTY FOR ANY INDIRECT, SPECIAL, INCIDENTAL, PUNITIVE OR CONSEQUENTIAL DAMAGES (INCLUDING WITHOUT LIMITATION DAMAGES FOR LOSS OF GOODWILL, WORK STOPPAGE, COMPUTER FAILURE OR MALFUNCTION, LOST OR CORRUPTED DATA, LOST PROFITS, LOST BUSINESS OR LOST OPPORTUNITY), OR ANY OTHER SIMILAR DAMAGES, EVEN IF THE OTHER PARTY HAS BEEN INFORMED OF THE POSSIBILITY THEREOF.

(b) EXCEPT AS PROVIDED HEREAFTER, EACH PARTY'S TOTAL LIABILITY FOR ANY LOSS, COST, CLAIM OR DAMAGES OF ANY KIND ARISING OUT OF OR RELATED TO AN ORDER CONFIRMATION MADE UNDER THIS AGREEMENT SHALL NOT EXCEED AN AMOUNT EQUAL TO THE AMOUNT OF THE FEES PAID OR PAYABLE BY CUSTOMER TO LICENSOR UNDER THIS AGREEMENT. THIS LIMITATION ON LIABILITY WAS AND IS AN EXPRESS PART OF THE BARGAIN BETWEEN LICENSOR AND CUSTOMER AND WAS A CONTROLLING FACTOR IN THE SETTING OF THE FEES PAYABLE TO LICENSOR HEREUNDER.

(c) NOTHING IN THIS SECTION SHALL APPLY TO: (i) EITHER PARTY'S LIABILITY (A) FOR CLAIMS, DEMANDS, LOSS, DAMAGE OR EXPENSE RELATING TO BODILY INJURY OR DEATH OF ANY PERSON OR DAMAGE TO PERSONAL PROPERTY, OR (B) RESULTING FROM ITS GROSS NEGLIGENCE OR WILLFUL, WANTON, OR RECKLESS MISCONDUCT; (ii) LICENSOR'S LIABILITY UNDER SECTION 17 (INDEMNIFICATION); AND (iii) EITHER PARTY'S LIABILITY TO THE OTHER IN CONNECTION WITH AN INFRINGEMENT OF SECTION 16 (CONFIDENTIALITY) OF THIS AGREEMENT.

17. INDEMNIFICATION

(a) Licensor shall indemnify, defend and hold harmless Customer and its Affiliates and their respective successors, officers, directors, shareholders, employees, agents and Third Party Service Licensors from and against all liabilities, damages, expenses, costs, and fees, awarded against Customer (including, without limitation, reasonable costs and legal fees thereby incurred by Customer) arising out of (i) any third party suit, claim or other legal action alleging that the use of the Software, Services, or Documentation infringes any copyright, trademark, United States patent, or other proprietary right, or misappropriates any trade secret; ("Legal Action"). Notwithstanding the foregoing, Licensor shall have no indemnification obligations with regard to any Legal Action arising out of: (i) combination of the Software with software or products not supplied, or approved in writing by Licensor; (ii) any repair, adjustment, modification or alteration to the Software by Customer or any third party, unless approved in writing by Licensor; (iii) any breach by Customer of its obligations under this Agreement; or (iv) any refusal by Customer to install and use a non-infringing version of the Software offered by Licensor under Section 7(b). Section 7(b) and this Section 17(a) state the entire liability of Licensor with respect to any intellectual property infringement by the Software.

(b) Notice of Legal Action. Customer shall give Licensor: (i) reasonably prompt written notice to Licensor of any Legal Action, (ii) shall furnish copies to Licensor of all communications, notices and/or other actions relating to any Legal Action, and (iii) non-financial assistance at Licensor's request to the extent reasonably necessary for the defense of such Legal Action. Customer shall give Licensor the sole control over the defense or settlement of any Legal Action. Licensor shall conduct its defense at all times in a manner which is not adverse to Customer's interests. Customer shall have the right to participate in the defense of any such Legal Action and may employ its own counsel to assist it with respect to any such claim, provided that Customer shall bear all costs of engaging its own counsel, unless engagement of counsel is necessary because of a conflict of interest with Licensor or its counsel, or because Licensor fails to assume control of the defense.

ARTICLE 7. LIMITATION OF LIABILITY

7.1. REMEDY EXCLUSIONS. NEITHER PARTY SHALL BE LIABLE TO THE OTHER PURSUANT TO THIS AGREEMENT FOR ANY INCIDENTAL, CONSEQUENTIAL, SPECIAL, INDIRECT, EXEMPLARY OR PUNITIVE DAMAGES OF THE OTHER PART (WHETHER IN CONTRACT, TORT, NEGLIGENCE, STRICT LIABILITY IN TORT, BY STATUTE OR OTHERWISE), EVEN IF THAT PARTY HAD BEEN ADVISED ABOUT OR SHOULD HAVE BEEN AWARE OF THE POSSIBILITY OF SUCH DAMAGES.

7.2. LICENSOR'S LIABILITY CAP. THE LIMIT OF LICENSOR'S LIABILITY (WHETHER IN CONTRACT, TORT, NEGLIGENCE, STRICT LIABILITY IN TORT, BY STATUTE OR OTHERWISE) TO LICENSEE CONCERNING PERFORMANCE OR NON-PERFORMANCE BY LICENSOR, IN ANY MANNER RELATED TO THIS AGREEMENT, FOR ANY AND ALL CLAIMS SHALL NOT EXCEED (A) FIVE MILLION DOLLARS (\$5,000,000) OR (B) AN AMOUNT EQUAL TO THE TOTAL FEES PAID AND OWING BY LICENSEE TO LICENSOR UNDER THIS AGREEMENT, WHICHEVER IS GREATER.

7.3. LICENSEE'S LIABILITY CAP. THE LIMIT OF LICENSEE'S LIABILITY (WHETHER IN CONTRACT, TORT, NEGLIGENCE, STRICT LIABILITY IN TORT, BY STATUTE OR OTHERWISE) TO LICENSOR CONCERNING PERFORMANCE OR NON-PERFORMANCE BY LICENSEE, IN ANY MANNER RELATED TO THIS AGREEMENT, FOR ANY AND ALL CLAIMS SHALL NOT EXCEED (A) FIVE MILLION DOLLARS (\$5,000,000) OR (B) THE TOTAL FEES PAID AND OWING BY LICENSEE TO LICENSOR UNDER THIS AGREEMENT, WHICHEVER IS LESS.

7.4. Exclusions. The limitations or exculpations of liability set forth in Sections 7.2 and 7.3 above shall not apply to either party's liability resulting from its gross negligence or willful, wanton, or reckless misconduct. Notwithstanding the foregoing, the limitations or exculpations of liability set forth in Section 7.1 above shall not apply to (a) Licensor's breach of its obligations under Article 10 (Confidentiality/Data Security) and (b) Licensor's liability under Section 8.1(iv) below; provided Licensor's liability will not exceed the liability cap set forth in Section 7.2 above. In addition, and notwithstanding any terms to the contrary, the limitations or exculpations of liability set forth in Section 7.2 above shall not apply to Licensor's liability under Sections 8.1(i), 8.1(ii) and 8.1(iii) below. For the avoidance of doubt, any amounts which are required to be paid to a third party, whether by judgment or settlement, arising from Claims under Sections 8.1(i), 8.1(ii) and 8.1(iii) will be deemed direct damages.

ARTICLE 8. INDEMNIFICATION

8.1. Defense and Indemnification Obligations. Licensor agrees to indemnify, defend and hold harmless Licensee, Third Party Service Providers, Authorized Users, Regular Named Users, and Custom Users and their respective successors, officers, directors, shareholders, employees, agents (each an "Indemnified Party") from and against all losses and liabilities and all damages, expenses, costs, and fees, including reasonable attorneys' fees, arising from: (i) any claim, suit, action or proceeding (each a "Claim") brought against an Indemnified Party by a third party (other than an Affiliate) alleging that the Software, Deliverables, and/or Developed Work infringes any copyright, trademark, patent or other proprietary right or misappropriates any trade secret; (ii) any Claim brought against an Indemnified Party by a third party arising out of any breach by Licensor of any warranty in this Agreement; (iii) the death or bodily injury of any agent, employee, customer or business invitee of an Indemnified Party; or (iv) the damage, loss or destruction of any tangible personal property or real property of an Indemnified Party. The Indemnified Party shall provide Licensor: (A) reasonably prompt written notice of the existence of such Claim; (B) control over the defense or settlement of such Claim, provided that Licensor shall not settle such Claim without the Indemnified Party's prior written consent, which consent shall not be unreasonably withheld, and provided that the Indemnified Party shall have the right to participate in the defense of any such Claim at its expense and through counsel of its choosing; and (C) non-financial assistance at Licensor's request to the extent reasonably necessary for the defense of such Claim. A failure by an Indemnified Party under this Section 8.1, shall only affect Licensor's obligations under this Section 8.1 to the extent such failure materially prejudices Licensor's ability to defend a Claim under this Section 8.1.

Infringement Claim Remedies. In the event an injunction is sought or obtained against use of the Software, Documentation, Deliverables, and/or Developed Work or in Licensor's reasonable opinion is likely to be sought or obtained, Licensor shall within a reasonable time, at its option and expense, either (a) procure for the Indemnified Party right to continue to use the infringing Software, Documentation, Deliverables, and/or Developed Work as set forth in this Agreement, (b) replace or modify the infringing Software, Documentation, Deliverables, and/or Developed Work to make its use non-infringing while being capable of performing the same function without material degradation of performance, or (c) if neither of the foregoing options are possible, LICENSEE may terminate the Agreement, any Schedule(s) and/or portion(s) thereof, upon notice and without further opportunity to cure, pursuant to Section 9.2(a). In the event that LICENSEE elects to terminate under subsection (c) above, then, in addition to any other remedies set forth in this Agreement or at law and/or in equity, Licensor agrees to pay the Indemnified Party's damages in the form of the costs incurred by the Indemnified Party in acquiring replacement software and systems. These damages will not exceed the total fees paid under this Agreement, pro-rated under a five-year straight-line depreciation calculated from the date of the first Invocation and ending upon the date Licensor's obligations first set forth above in this Section 8.2 arise. Licensor shall have no indemnity obligation to an Indemnified Party or its Third-Party Service Providers under Section 8.1(i) to the extent the claim(s) of Infringement is based upon (i) a modification of the Software, not based on the Documentation or otherwise directed or approved by Licensor, by the Indemnified Party, or at the Indemnified Party's direction; or (ii) the continued use of the Software by the Indemnified Party for greater than a reasonable period of time after a non-infringing alternative with equivalent or better functionality and performance, including compatibility with the Indemnified Party's configuration and implementation of the Software, has been made available by Licensor for installation at Licensor's sole expense. The provisions of this Article 8 shall survive the termination, non-renewal, rescission or expiration of this Agreement.

3. EXCLUSIVE WARRANTY REMEDIES.

For any breach of warranties contained in Section 2 of this Article, Client's exclusive remedy and Licensor's entire liability shall be as follows:

- (A) **LICENSED PRODUCTS.** The correction of errors in the Licensed Products that cause breach of warranty, or if Licensor is unable to provide such correction, Client shall be entitled to terminate this Agreement as it relates to the non-conforming Licensed Products and receive a refund of the License Fees paid for the non-conforming Licensed Product(s).
- (B) **SERVICES.** The re-performance of the Services, or if Licensor is unable to perform the Services as warranted, Client shall be entitled to recover the fees paid to Licensor for the unsatisfactory Services.
- (C) **CUSTOMER SUPPORT AND SOFTWARE ENHANCEMENTS.** The correction of errors in the Licensed Products that cause breach of warranty, or if Licensor is unable to provide such correction, Client shall be entitled to terminate this Agreement as it relates to the non-conforming Licensed Products and receive a refund of the Customer Support and/or Software Enhancements Fees paid for the non-conforming Licensed Products for the then current Subscription Period.

- 4. INDEMNITIES. INFRINGEMENT.** Licensor, at its sole expense, agrees to defend, indemnify and hold harmless Client against any claim and all liability, suits, losses, damages and fees (including reasonable attorney fees when Licensor is unable to provide counsel), arising out of the use of the Licensed Products, in connection with any allegations that the Licensed Products or Modifications infringes a copyright, patent, trademark, trade secret, or other proprietary right of a third party. Client will notify Licensor in writing within thirty (30) days of the claim and will provide Licensor with the information, reasonable assistance and authority to enable Licensor to perform Licensor's obligations under this paragraph. Licensor has sole control of the defense and all related settlement negotiations. Licensor shall have no liability for any claims of infringement to the extent that such claims result from the use of the Licensed Products in conjunction with non-Licensor software or other non-Licensor products or upon a use of the Licensed Products in a manner not contemplated by the Published Product Specifications. Nothing in this provision shall be construed as a limitation on Client's ability to retain legal counsel at its own expense to monitor the proceedings. The obligations of Licensor stated in this section survive termination where there has been termination of use, expiration, non-renewal, or rescission of this Agreement provided Client is using the latest version of the Software at the time of termination.

Licensor further agrees that if Client is prevented from using the Licensed Product(s) due to an actual or claimed infringement of any patent, copyright or other intellectual property right, then at Licensor's option and sole expense and except as provided in the paragraph above, Licensor shall promptly either:

- (i) procure for Client, at Licensor's expense, the right to continue to use the Licensed Product(s);
- (ii) replace or modify the Licensed Product(s) at Licensor's expense so that the Licensed Product(s) become non-infringing, but functionally-equivalent and compatible; or
- (iii) in the event that neither (i) or (ii) are reasonably feasible, Client may terminate the Agreement as to the infringing Licensed Product(s) and Licensor will refund: (a) Client's License Fees for the infringing Licensed Product(s) amortized over a five (5) year straight-line depreciation period from the execution of the Agreement; and (b) the Customer Support and Enhancement Fees paid by Client for that Licensed Product(s) based on the then-current subscription period. Said refund will not bar Client from pursuing any other remedies provided under the terms of this Agreement.

Limitation of Liability. IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER PARTY FOR REPROCUREMENT COSTS, LOST PROFITS, BUSINESS INTERRUPTION, LOSS OF USE, OR INCIDENTAL, SPECIAL, INDIRECT, EXEMPLARY, OR CONSEQUENTIAL DAMAGES OF ANY NATURE, EVEN IF IT HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IN NO EVENT SHALL SELLER'S LIABILITY ARISING IN CONNECTION WITH ANY PRODUCT(S) SOLD OR TO BE SOLD UNDER THE AGREEMENT (WHETHER SUCH LIABILITY ARISES FROM A CLAIM UNDER CONTRACT, WARRANTY, OR OTHERWISE) EXCEED THE ACTUAL AMOUNT PAID BY CUSTOMER TO SELLER FOR THE LOT OF PRODUCT(S) INVOLVED IN SUCH CLAIM. THIS LIMITATION OF LIABILITY SHALL NOT APPLY TO SELLER'S OBLIGATIONS OF INDEMNIFICATION HEREUNDER, TANGIBLE PROPERTY DAMAGE, DAMAGES ARISING FROM TORTIOUS CONDUCT AND BREACHES OF ANY CONFIDENTIALITY OBLIGATION. THE LIMITATIONS IN THIS SECTION SHALL NOT BE DEEMED TO PRECLUDE ANY LIABILITY WHICH, UNDER APPLICABLE PRODUCTS LIABILITY LAW, CANNOT LEGALLY BE PRECLUDED BY CONTRACT.

Indemnification. Seller shall indemnify, defend, and hold harmless Customer from any and all suits, liability, claims, losses, damages and fees (including reasonable attorney's fees), arising out of the use of the Product(s), in connection with any allegations that the Product(s) infringes any patent, copyright, trademark, trade secret or violates any other proprietary right of a third party. Seller shall be given reasonably prompt notice of such claim and given information, reasonable assistance (except financial), and sole authority to defend or settle the claim. The obligations of the Seller stated in this provision survive termination, expiration, non-renewal, or rescission of this Agreement. Customer, at its option and expense, may be represented by its own counsel in any such proceeding. Seller shall have no obligations or liability pursuant to this section or otherwise in connection with any actual or alleged patent infringement based on (i) use of any Products in combination with any product, part, or accessory not sold by Seller specifically for use with such Product, (ii) use of any Product in a manner not recommended by Seller or for which it was not designed, (iii) any Product that has been modified or altered in any way by anyone other than an employee or authorized agent of Seller, (iv), in the case of a pharmaceutical Product, any labeling not supplied by Seller or use of the Product except as specifically recommended in Seller's labeling of the Product, (v) in the case of a bulk pharmaceutical Product, any formulation of the Product, and (vi) any Product manufactured in accordance with specifications supplied by Customer or by any party other than Seller. Customer shall indemnify Seller for any and all expenses, direct or indirect, arising when any patent infringement is alleged or threatened because of goods made in compliance with specifications supplied by Customer.

THIS SECTION STATES SELLER'S SOLE AND EXCLUSIVE LIABILITY FOR ANY CLAIM OF ANY THIRD PARTY BY WAY OF INFRINGEMENT OR THE LIKE.

SECTION 4 – WARRANTIES

Each party hereby represents and warrants that: (i) it has full right, power and authority to enter into and fully perform its obligations under this Agreement; (ii) the execution, delivery and performance of this Agreement by such party does not conflict with any other agreement to which it is a party or by which it is bound; (iii) any products, materials, or information provided by it will not infringe or otherwise violate the **Rights** of any other person or organization; and (iv) it will substantially comply with all material laws and regulations applicable to its activities in connection with this Agreement.

SECTION 14 – INDEMNIFICATION

*Indemnification from
Vendor to DR*

The Vendor and its successors and assigns shall indemnify, defend, and hold harmless DR and its successors and assigns, and any **Resellers** (including their successors and assigns) from and against and in respect of any and all third party claims, demands, losses, costs, expenses (including, but not limited to, the cost of obtaining an opinion of counsel in response to a notice of potential infringement of the **Rights** of any other person or organization), obligations, liabilities, damages, recoveries and deficiencies, including interest, penalties, reasonable attorneys' fees and costs, that DR may incur or suffer, which arise, result from, or relate to:

- (i) The breach by the Vendor of any of its representations and warranties set forth in this Agreement; or
 - (ii) The failure of the Vendor to perform any of its obligations under this Agreement; or
 - (iii) The assertion of any infringement or other claims alleging that the **Products, Software, Documentation, Vendor Trademarks**, or other materials provided by the Vendor violate the **Rights** of any other person or organization; or
 - (iv) Claims relating to the violation of the Vendor's privacy policies; or
 - (v) Damages to property or personal injury caused by the negligence or willful acts of the Vendor or any of its employees or agents; or
 - (vi) In the event the Vendor is obligated to make sales, use, or other **Transaction** related tax payments pursuant to the provisions of **Exhibit C**, any obligation or liability of DR to make any such tax payments in any state or jurisdiction indicated in **Exhibit C** or otherwise.
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Indemnification from DR to Vendor

DR and its successors and assigns shall indemnify, defend, and hold harmless the Vendor and its successors and assigns from and against and in respect of any and all third party claims, demands, losses, costs, expenses (including, but not limited to, the cost of obtaining an opinion of counsel in response to a notice of potential infringement of the **Rights** of any other person or organization), obligations, liabilities, damages, recoveries and deficiencies, including interest, penalties, reasonable attorneys' fees and costs, that the Vendor may incur or suffer, which arise, result from, or relate to:

- (i) The breach by DR of any of its representations and warranties set forth in this Agreement; or
- (ii) The failure of DR to perform any of its obligations under this Agreement; or
- (iii) The assertion of any infringement or other claims alleging that the **DR Materials**, DR's **Trademarks**, or other materials provided by DR, (including, but not limited to, **Software Passport**) violate the **Rights** of any other person or organization; or
- (iv) Damages to property or personal injury caused by the negligence or willful acts of DR or any of its employees or agents.

Notice and Response Procedure for Indemnification Claims

In the event DR or the Vendor receive notice of a claim that gives rise to an indemnification obligation on the part of the other party, the party seeking indemnification (the "**Indemnified Party**") shall provide prompt written notice of such claim to the other party (the "**Indemnifying Party**"), and tender the defense of such claim to the **Indemnifying Party**. Upon receipt of such notice, the **Indemnifying Party** shall respond in writing to the tender of defense within ten (10) business days of receipt of the tender of defense. The **Indemnifying Party's** response shall either:

- (i) Accept the tender of defense, as well as acknowledge its obligation to indemnify and hold harmless under this provision; or
- (ii) Accept the tender of defense with a reservation of rights with regard to any subsequent obligation to indemnify or hold harmless; or
- (iii) Reject the tender of defense, setting forth in detail its reasons for disclaiming its obligation to defend under this provision.

A failure by the **Indemnifying Party** to respond in writing to the tender of defense within the time specified in this subsection, shall be deemed a waiver of any objection to its obligation to defend the **Indemnified Party**, but a reservation of the **Indemnifying Party's** rights to object to any subsequent obligation to indemnify or to hold harmless the **Indemnified Party**.

When the Indemnifying Party May Control the Defense

In the event the **Indemnifying Party** accepts the tender under romanette (i) of the above "Notice and Response Procedure for Indemnification Claims" provision, the **Indemnifying Party** shall thereafter have control of the defense of such claim, including the ability to select which firm defends the claim, and it shall be responsible for the fees and expenses associated with such claim. The **Indemnifying Party** will have the right to settle the claim, provided, however, that **Indemnifying Party** shall not agree to any settlement that (i) imposes restrictions on the **Indemnified Party**, (ii) makes an admission or liability or wrongdoing on behalf of the **Indemnified Party**, or (iii) requires any action by the **Indemnified Party**, including without limitation, the payment of any amounts, without the **Indemnified Party's** prior written consent, which consent shall not be unreasonably withheld, subject to appropriate modifications to the terms and conditions of this Agreement based on such restrictions and/or actions.

When the Indemnifying Party Shall Not Control the Defense

In the event the **Indemnifying Party** accepts the tender under romanette (ii) of the above “Notice and Response Procedure for Indemnification Claims” provision, or if the **Indemnifying Party** remains silent in the face of a written notice and tender of defense, the **Indemnified Party** shall thereafter have the right to control of the defense of such claim, including the right to select which firm defends the claim. If the **Indemnified Party** is controlling its own defense at the **Indemnifying Party’s** expense under this subsection, the **Indemnifying Party** shall contract directly with the law firm selected by the **Indemnified Party** to pay all defense expenses on a monthly basis within 30 days of the tender of each month’s expenses from the **Indemnified Party**.

Liability for Improper Refusal to Defend Claim

In the event the **Indemnifying Party** rejects the tender under above “Notice and Response Procedure for Indemnification Claims” provision, the **Indemnified Party** shall thereafter have control of the defense of such claim, including the ability to select which firm defends the claim.

The **Indemnifying Party** further agrees that, in the event that the **Indemnified Party** files a declaratory judgment action (or pursues any other legal process) to compel the **Indemnifying Party** to honor its obligations under this Section, and should the **Indemnified Party** prevail in that action, the **Indemnifying Party** shall be liable for the legal fees and expenses incurred by the **Indemnified Party** to compel the **Indemnifying Party** to honor its obligations under this Section. Moreover, the **Indemnifying Party** expressly waives any right it may have under statutory or common law which might operate to make the recovery of fees under this provision a mutual right.

SECTION 15 – LIMITATION OF LIABILITY

Under no circumstances shall DR’s total liability under this Agreement for any cause exceed the net amount realized by DR under this Agreement. **Even though both have been advised of the possibility of such damages, and notwithstanding the failure of essential purpose of any limited remedy provided herein, and save for their respective obligations under the indemnification section, NEITHER DR NOR THE PUBLISHER SHALL HAVE ANY LIABILITY TO EACH OTHER OR TO ANY OTHER PERSON OR ORGANIZATION FOR ANY DAMAGES RELATING TO ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL OR SPECIAL DAMAGES OF ANY DESCRIPTION, WHETHER ARISING OUT OF WARRANTY OR OTHER CONTRACT, NEGLIGENCE OR OTHER TORT, OR OTHERWISE.**
