DANIEL R. SCHRAMM, L.L.C.
Attorney at Law
121 Chesterfield Business Parkway
Chesterfield, Missouri 63005
Phone: (636) 532-2300
Fax: (636) 532-6002
Email: daniel@dschrammlaw.com
Web site: www.dschrammlaw.com

NEGOTIATING INDEMNIFICATION PROVISIONS AND AGREEMENTS

1. Thresholds for Indemnification Liability

This article confronts the major kinds of issues Missouri lawyers must address in negotiating indemnification provisions in commercial contracts. Parties to a commercial contract often will use a variety of tools to allocate the risks associated with the contract: (1) an indemnity clause, (2) an exculpatory clause, (3) an insurance procurement clause, (4) a limitation of liability clause, or (5) some combination of the four. Although the focus of this article is primarily on indemnification, I will begin with a few basic definitions to differentiate the indemnification clause from the other major types of risk allocation provisions.

(1) An "indemnity clause" is "[a] contractual provision in which one party agrees to answer for any specified or unspecified liability or harm than the other party might incur. Also termed hold-harmless clause; save-harmless clause." *Caballero v. Stafford*, 202 S.W.3d 683, 694 (Mo.App. S.D. 2006), quoting Black's Law Dictionary 784 (8th ed. 2004).

(2) An "exculpatory clause", commonly called a release, is "[a] contractual provision relieving a party from liability resulting from a negligent or wrongful act." *Caballero v. Stafford*, 202 S.W.3d at 694, quoting Black's Law Dictionary 608 (8th ed. 2004).

(3) An "insurance procurement clause" customarily will "require one party to maintain the prescribed insurance and prohibit the parties from filing suit against each other for damages required to be covered by the prescribed insurance." *Storey v. RGIS Inventory Specialists, LLC*, 466 S.W.3d 650, 655 (Mo.App. E.D. 2015).

(4) A "limitation of liability clause" (commonly called "LOL") prevents or limits the transfer of risk between the parties. See, e.g., *Ritchie v. Allied Prop. & Cas. Ins. Co.*, 307 S.W.3d 132, 136-37 (Mo. banc 2009) (construing "limit of liability" clause in an insurance contract). So, for example, an indemnification clause might impose some monetary cap on the indemnitor's liability, impose a notice requirement on the indemnitee, exclude lost profits or other consequential damages, or set a time limit for asserting the claim that is shorter than the normal statute of limitations period for the particular type of contract.

Because the scope of an indemnification clause or a limitation of liability clause will vary dramatically from one contract to another, it is difficult to articulate any generally applicable threshold for indemnification liability. For some contracts, the parties may create an exception for small claims commonly known as "liability baskets" by imposing either a threshold or a deductable. Under the threshold approach, the indemnifying party does not have to provide any indemnification until the threshold amount is met. But once the threshold claim amount is met, the indemnitor must provide coverage for the entire claim going back to the first dollar. Under the deductable approach, the indemnifying party is responsible only for amounts in excess of the deductable.

2. Limits of Indemnification

Just like with the threshold question, the limits of an indemnification will vary

dramatically from one contract to another. The obligation to indemnify is rarely unqualified. The key initial question is the scope of the indemnification clause itself. And the duty to indemnify may be qualified further by limitation of liability provisions that impose monetary caps or procedural conditions for the indemnification.

The three general types of indemnification clauses are the broad form indemnification clauses, more intermediate indemnification clauses, and more limited indemnification:[1]

The broad form clause is a true broad indemnification that requires the indemnitor to assume any and all liability under the contract regardless of fault, even if the liability is caused by the fault of a third party. This kind of unqualified clause could impose massive amounts of liability on the indemnitor and is often scrutinized closely by the courts. Under Missouri law, a contract of indemnity will not be construed to indemnify one against loss or damage resulting from his, her or its own negligent acts unless such intention is expressed in clear and unequivocal terms. *Nusbaum v. City of Kansas City*, 100 S.W.3d 101, 105 (Mo. banc 2003).

A more intermediate form of indemnification requires the indemnitor to assume all liability under the contract, unless the liability is caused by the sole fault or negligence of the indemnitee. The courts may consider the sophistication of the parties in evaluating the distinction between a broad form indemnification and this more intermediate type. See, *Village of Big Lake v. BNSF Ry. Co*., 433 S.W.3d 460, 470 (Mo.App. W.D. 2014). The courts also will consider whether the words "negligence" or "fault" were used in determining if the clause relieved the party's responsibility for his, her or its own fault. *Caballero v. Stafford*, 202 S.W.3d 683, 696 (Mo.App. S.D. 2006).

[1] See, P. Franco, "Managing RISKS in Your Contracts, " (9/1/2007) http://www.contractingbusiness.com/commercial-hvac/managing-risk-your-contracts.

The third more limited form of indemnification is not a true indemnification at all. Instead, this more limited type of provision just calls for comparative fault. Under this third type of indemnification, the indemnitor only assumes liability to the extent of his, her, or its own negligence or fault. But in his treatise on tort law, Professor Prosser drew a distinction between this kind of contribution clause and a true indemnification:

> "There is an important distinction between contribution, which distributes the loss among the tortfeasors by requiring each party to his proportionate share, and indemnity, which shifts the entire loss from one torfeasor who has been compelled to pay it to the shoulders of another who should bear it instead."

Prosser, *Law of Torts*, Sect. 51, at 310 (4th ed. 1971).

So, a partial indemnity provision requiring the indemnitor to "indemnify and hold harmless" the indemnitee only for the indemnitor's own negligence is not really an indemnification at all, but only a form of contractual contribution. See, *Stevens v. Silver Manufacturing Co.*, 70 Ill. 2d 41, 46 (1977).

Once you get by the initial question of what type of indemnification is called for by the clause, the next step is to determine if the indemnification is limited further by limitation of liability provisions. Common clauses to limit liability could include, among other things, monetary liability caps, material and knowledge qualifiers, duty to notify clauses, duration clauses, or anti-sand-bagging clauses.[2]

A monetary cap imposes a limit on indemnification damages up to sum maximum monetary amount. Depending on the importance of particular warranties and representations in the contract, the cap may carve out exceptions for fundamental warranties or significant liabilities. So, far example, the cap might not apply to warranties

[2] See, M. D'Ascenzo, "Limitations on Scope of Indemnification Provisions," (3/27/2015) https://www.metzlewis.com/limitations-on-the-scope-of-indemnification-provisions.

on taxes or environmental liabilities.

An indemnification clause also may be limited in scope by material and knowledge qualifiers. The material qualifier can prevent indemnification unless the aggrieved party can prove the breach was material. The knowledge qualifier can prevent indemnification unless the aggrieved party can show that the indemnifying party had actual knowledge of the falsity of the matter that was the subject of a particular warranty or representation.

Parties also can impose duration clauses to limit the duration of an indemnification. A duration clause sets a time limit for asserting the claim that is shorter than the normal statute of limitations period for the particular type of contract. Say, for example, that contract might say that any claim for indemnification must be asserted by the filing of a lawsuit or the submission of a written claim within 12 months from the date of closing. Other clauses may insist that the indemnified party duly notify the other party as soon as facts forming the basis for the indemnification arise. The failure to notify in a timely fashion may impose a procedural bar to recovery.

An anti-sandbagging clause can prevent an aggrieved party from recovering damages under an indemnity for a false representation if it can be shown that the indemnified party knew that the representation by the indemnitor was false when the representation was made. By contrast, some contracts will give the indemnitee a right of recovery even it the representation was known to be false.

3. Indemnity, Indemnify, Indemnification and "Hold Harmless"

Lawyers typically will make interchangeable use of terms like "indemnity," "indemnify, "indemnification," and "hold harmless." Does it make any difference which terms are used in the contract? The short answer is probably not. Missouri courts seem to

use all these kinds of indemnification terms interchangeably. See e.g., *Caballero v. Stafford*, 202 S.W. 3d 683, 694 (Mo.App. S.D. 2006) (drawing a distinction between an exculpatory clause and a "Hold Harmless and Indemnification" provision, but not between "hold harmless" and "indemnification" when used together).

The terms "indemnify" and "hold harmless" have a long history of joint use in Anglo-American legal practice. *Majkowski v. American Imaging Management Services, LLC*, 913 A.2d 572, 588 (Del.Ch. 2006) (rejecting theory that the use of words "hold harmless" within an indemnification clause implied a separate obligation to advance litigation expenses). As Forest Gump might say, these terms go together "like peas and carrots." Because the terms flow naturally with each other, modern authorities confirm that "hold harmless" has little, if any different meaning from the term, "indemnify." *Id.* at 589. Indeed, Black's Law Dictionary defines "hold harmless" by using the word, "indemnify":

> "[H]old harmless, *vb*., To absolve (another party) from any responsibility for damage or other liability arising from the transaction; INDEMNIFY – Also termed *save harmless."* (capitals and emphasis in original)

Black's Law Dictionary 749 (8th ed. 2004).

Similarly, the definition of an "indemnity clause" in Black's Law Dictionary explicitly recognizes that the related words "indemnify" and "hold harmless" when used within the context of a contractual clause mean essentially the same thing. An "indemnity clause" is defined as:

> "[a] contractual provision in which one party agrees to answer for any specified or unspecified liability or harm that the other party might incur. Also termed hold-harmless clause; save-harmless clause."

Caballero v. Stafford, 202 S.W.3d at 694 (Mo.App. S.D. 2006), quoting Black's Law

Dictionary 784 (8th ed. 2004).

So, in the end, Missouri lawyers should not lose sleep over the question of whether the words "hold harmless" should or should not be included with the language of an indemnification clause. It should not make any difference.

4. Interplay of Insurance, LOL and Indemnity

A typical insurance procurement clause will require one party to obtain a specified amount of insurance coverage to protect against loss or damage by fire or other hazards to property during the term of the contract. "Missouri courts have repeatedly recognized that such insurance procurement clauses customarily will require one party to maintain the prescribed insurance and prohibit the parties from filing suit against each other for damages required to be covered by the prescribed insurance." *Storey v. RGIS Inventory Specialists, LLC*, 466 S.W.3d 650, 655 (Mo.App. E.D. 2015); *Monsanto Chem. Co. v. Am. Bitumuls Co*., 249 S.W.2d 428, 431 (Mo. 1952). The insurance procurement clause thus constitutes evidence of the parties' intent to shift the risk of property loss from each other to the insurance company. *Nodoway Valley Bank v. E.L. Crawford Constr., Inc.*, 126 S.W.3d 820, 828 (Mo.App. W.D. 2004).

When the parties have included an insurance procurement clause in their contract, this may operate to nullify all or part of an indemnification clause. So, for instance, the Western District held in *Nodoway Valley Bank* that a reasonable interpretation of an indemnification clause, when read in harmony with the contract's insurance procurement and waiver of subrogation clauses, was that the indemnification clause referred only to compensation and liability for losses not covered by a property insurance policy. *Id.* at 829-30. The Eastern District adopted this same interpretation of indemnification, insurance procurement and lease surrender clauses in *Storey v. RGIS Inventory Specialists, LLC*, 466 S.W.3d at 656. If the parties choose to deviate from this kind effect from an insurance procurement provision, they

must say so in the contract.

5. Ensuring Enforceability

The law governing the contract may make a big difference in determining if an indemnification clause is enforceable. One of the biggest obstacles to enforcement under state law may occur if the indemnified party is seeking to recover on a purported indemnification from his, her or its own negligent conduct. Missouri has no public policy prohibiting enforcement of an indemnification clause indemnifying a party for his own negligence or fault. But as noted earlier, "[a] contract of indemnity will not be construed so as to indemnify one against lost or damage from his own negligent acts unless such intention is expressed in clear and unequivocal terms." *Nusbaum v. City of Kansas City*, 100 S.W.3d 101, 105 (Mo. banc 2003).

Another possible line of attack on the enforceability of an indemnification clause could arise if it conflicts with an insurance procurement clause. When the parties have included an insurance procurement clause with a waiver of subrogation, this may operate to nullify all or part of an indemnification clause. See, e.g., *Nodoway Valley Bank v. E.L. Crawford Constr., Inc.*, 126 S.W.3d 820, 829-30 (Mo.App. W.D. 2004).

A third possible basis for voiding an indemnification clause could arise if it runs afoul of any applicable limitation of liability provisions. Possible defenses under such clauses could include a whole range of issues. The claim might not meet threshold or deductable requirements; or on the other end, the claim might exceed a monetary liability cap. The claim on a warranty or representation might run afoul of material and knowledge qualifiers, or a duty to notify clause. Or the claim might be stale because it was not asserted in a timely manner under a duration clause. A party seeking to enforce an indemnification clause must account for these possible defenses.

A final attack on enforceability could arise if the indemnification clause violates a state statute. For instance, Missouri has a statute that generally prohibits "broad form indemnity" in public and private construction contracts. See, § 434.100, R.S.Mo.

6. Strategically Negotiating Indemnity and LOL

The logic of inserting indemnification, insurance procurement, or limitation of liability provisions into a contract is to allocate risk to the party who is in the best position to manage the risk. As a practical matter, the party with the strongest bargaining position in negotiations often will be in the best position to dictate how the risks will allocated. But in approaching negotiations, think about the risks of the contract. Take the time to imagine catastrophic consequences or even more minor events that might occur if things go wrong. Then think about whether your client or the other party should bear each of those risks. Do your proposed indemnification, insurance procurement, or LOL provisions allocate the risks fairly or appropriately? If not, then consider revising those provisions to protect your client's interests.

Review all proposed drafts of the contract carefully. And make yourself familiar with Missouri law and how the law will apply to the proposed risk allocation provisions. If in doubt, get the indemnification and limitation of liability provisions clarified to avoid uncertainty. In your rush to get the deal done, you should not overlook the consequences of overly burdensome or inadequate risk allocation provisions.

7. Agreeing to Defend as well as Hold Harmless

An insurance indemnification policy customarily carries with the policy a corresponding duty to defend the insured for claims made under the policy. This duty to defend could be inserted into the language of other indemnity contracts as well. But most case law on the subject is limited to insurance litigation.

The Missouri Supreme Court has explained that the insurer's duty to defend its insured is broader than the duty to indemnify:

> The duty to defend arises *whenever there is a potential or possible liability to pay* based on the facts at the outset of the case and is not dependent on the probable liability to pay based on the facts ascertained through trial. The duty to defend is determined by comparing the language of the insurance policy with the allegations in the complaint. *If the complaint merely alleged facts that give rise to a claim potentially within policy's coverage, the insurer has a duty to defend.*

Columbia Cas. Co. v. Hiar Holding, L.L.C., 411 S.W.3d 258, 265 at n. 10 (Mo. banc 2013). (emphasis in original)

Here are a few practical considerations outside the insurance context. An indemnified party may want to negotiate for a broad duty to defend to avoid losses for third-party claims, even if the claims turn out to be without merit. By contrast, an indemnifying party other than an insurance company ordinarily will want to avoid undertaking a duty to defend obligation. But by excluding an obligation to defend, the indemnifying party is likely to lose control over the defense of the claim. If the parties do agree upon a duty to defend, they will want to consider some control of defense provisions. So, for example, the parties will want to identify the party controlling the defense, to compel the other party's cooperation, and to set terms for who is in charge of settling the claim.

8. Controlling Push-Back: Liability and Risk Allocation

What happens when the opposing side takes what you consider to be an unreasonable position on liability and risk allocation? Say, for example, the other side insists that your client provide indemnification for his her own negligence or fault. And your client doesn't wish to take that risk. Here is where you need to explore with the

client how much risk he, she or it is willing to bear to get the deal done. And you must be clear about the potential consequences of complying with the other side's demands. What is the likelihood that the indemnification provision will come into play? And what are the worst-case scenarios if the indemnification clause is enforced? Will you be able to limit your client's exposure without upsetting the deal? So, you might be able negotiate an exception for the indemnified party's willful or reckless conduct. Or you might impose a monetary cap or short duration period on your client's liability under the indemnification clause. There are no clear answers to these questions. But if your client is willing to compromise to get the deal done, make sure that you fully explain what is at stake and make a proper record of your advice in the dispute.

9. Insurance, Waiver and Subrogation

Subrogation is broadly defined as "the right of one, not a volunteer, who pays another's debt, to recover the amount paid, which in good conscience should be paid by the one primarily responsible for the loss." *Mo. Pub. Entity Risk Mgmt. Fund. v. Am. Cas. Co.*, 399 S.W.3d 68, 74 (Mo.App. W.D. 2013). In essence, the right of subrogation is the right to "step into the shoes" of the other party. This is a common right that an insurance company will assert when it pays on the indemnification of its policy. So, if the insured had claims against third parties, the insurance company can assert those claims on behalf of its insured to recoup some or all of its loss.

The right of subrogation could compromise the effect of an indemnification clause when it is coupled with an insurance procurement clause. As noted in the insurance procurement section, when the parties include an insurance procurement clause in their contract, this may operate to nullify all or part of the indemnification clause. See, *Nodoway Valley Bank v. E.L. Crawford Constr., Inc.*, 126 S.W.3d 820 (Mo.App. W.D. 2004). This is because that the indemnification clause normally is construed to apply only to compensation and liability for losses not covered by the insurance policy. *Id.* at 829-

30. The Western District reached this result, in part, on the theory that it was consistent with a waiver of subrogation in the contract. *Id*. This same result should apply if the indemnified party is named as an additional insured under the insurance policy. This is because insurance company ordinarily has no subrogation rights against its own insured parties. But does that interpretation make sense if the insurance company retains its subrogation rights?

Say, for example, you have contract with another party on some kind of construction project. How do you protect yourself from the claims of the other party's employees who might be injured on the job? Typically, you will want to insist that the other party has some level of workers compensation coverage and that the insurance company will waive subrogation in your favor. This insurance procurement and waiver of subrogation provisions ordinarily would be coupled with an indemnification clause for any claims arising out of the other party's work on the project. The purpose of these interrelated provisions is to protect you from subrogation claims by the insurance company if it pays out on the workers compensation policy. And the indemnification is designed to protect you if the other party's employee should try to invoke the collateral source rule to recover on both the workers compensation policy and on his or her claim against you as a third-party. But the results could vary from state to state depending on whether the indemnification clause will be enforceable in these circumstances.

In our hypothetical construction contract, you would need to consider the effect of a Missouri statute generally prohibiting "broad form indemnity" in public and private construction contracts. See, § 434.100 RSMo (2000). But the Missouri legislature has not invalidated either subrogation waivers or insurance procurement provisions in a construction contract where the party procuring the liability coverage must name the other party as an "additional insured." Indeed, Missouri's anti-indemnity statute expressly allows construction contractors to follow this practice. So, you need to be careful and know the effect on Missouri law in drafting these kinds of contracts.

10. Who May Cause Loss? Who Would Be Responsible?

Will you be able to recover under an indemnification clause if you caused or contributed to cause the loss? In evaluating whether the party causing or contributing to cause the loss may be indemnified, the most important factor to consider is the scope of the indemnification clause.

As noted in the limits of indemnification section, the three general types of indemnification clauses are the broad form indemnification clauses, more intermediate indemnification clauses, and partial or limited indemnification. The broad form clause is a true broad indemnification that requires the indemnitor to assume any and all liability under the contract regardless of fault, even if the liability is caused by the fault of a third party. A more intermediate form of indemnification requires the indemnitor to assume all liability under the contract, unless the liability is caused by the sole fault or negligence of the indemnitee. Under the third limited form of partial indemnification, the indemnitor only assumes liability to the extent of his, her, or its own negligence or fault. This is really just a contribution agreement and not a true indemnity.

In evaluating which type of indemnification is called for under the contract, Missouri applies the rule that a contract of indemnity will not be construed to indemnify one against loss or damage resulting from his, her or its own negligent acts unless such intention is expressed in clear and unequivocal terms. *Nusbaum v. City of Kansas City*, 100 S.W.3d 101, 105 (Mo. banc 2003).

11. Indemnifying Persons Other Than Yourself

For any type of indemnification other than a partial indemnification limited to your own negligence or fault, you ordinary are providing coverage for the acts of others – even if the third party is not a party to your own contract. In advising the client, you need

to make the client aware of the consequences of assuming this responsibility. And in negotiating the terms of risk allocation, you need to be clear about what is or is not covered.

12. Negotiating "No Undisclosed Liabilities" and "Full Disclosure

Most merger and acquisition purchase agreements will have some version of the representation on "no undisclosed liabilities." The buyer will want this representation to be as broad as possible with minimal exceptions. This reflects the buyer's theory that the seller has greater familiarity with the business should bear the risks associated with undisclosed or unknown liabilities. The seller, on the other hand, will want to qualify the disclosure as much as possible to minimize or avoid liability on the representation.

A standard "full disclosure" representation will unequivocally declare: "There are no undisclosed liabilities, except for…." The exceptions typically will refer to liabilities shown on the last balance sheet and specific liabilities identified in a separate exhibit attached to the contract. Sellers often will want to qualify or limit this kind of buyer-friendly representation by using various techniques. First, sellers may try to limit their disclosure to liabilities reported on balance sheets prepared in accordance with Generally Accepted Accounting Principles, or GAAP. Second, they may try to make their disclosures subject to an ordinary course of business exception. Third, sellers may try to qualify their disclosures by making them subject to their actual knowledge or limiting the disclosed liabilities to those that are "material." Finally, sellers may try to exclude the disclosure of liabilities that are the subject of other representations.[3]

[3] See, D. Avery and L. Lingenfelter, "Trends in M&A Provisions: Undisclosed Liabilities Representations," 17 MALR 1376 (BNA 2014).

13. New Ways of Thinking About Indemnity During the Deal

This article explores the three main types of indemnification clauses and ways to qualify the effect of an indemnification with different kinds of limitation of liability provisions. The article also explores ways to allocate the risk in the contract with insurance procurement clauses along with waivers of subrogation. Hopefully, this article will give you some idea of the range of available risk allocation options when you approach a particular contract.

Each contract is different and poses a unique set of risks. The terms for indemnification should not just be accepted at face value without exploring the risks involved. These terms often are subject to intense negotiations. And one party may have greater leverage in the negotiations – maybe because of greater resources, a greater need for the contract, less risk exposure, or a greater willingness to just walk away from the deal. In the face of negotiations, you must fully advise your client of the worst-case scenarios of overly burdensome or insufficient indemnification provisions. The euphoria of getting the deal done may be short-lived if your client faces costly litigation later over the effect of an indemnification.

14. Reciprocity in Indemnification Provisions

A common way of resolving disputes over indemnification is to insist on reciprocity. So, for example, one party will indemnify and hold the other harmless for all damages, losses and attorney's fees caused by the fault of the indemnifying party. In exchange, the other party will give a reciprocal and identical indemnification for losses caused by such other party. A mutual indemnification often is called for when each party to is asked indemnify the other for any breach of its own warranties or representations in the contract. In a similar vein, each party could be asked to indemnify the other for any material breach of the contract.

Reciprocity has a simplistic fairness about it. And lawyers may find it difficult in negotiations to insist that an indemnification only goes in one direction. But it pays to ask if the cost of performance and value of the contract is the same for each party. And you may want to ask if the risk of breach the same for each party. Lawyers should approach questions of reciprocity with some wariness if one of the parties to the contract is engaging in the more dangerous activity. In that situation, the mutual indemnification may seem fair on the surface, but the greater risk associated with the indemnification will fall on the party engaging in the more dangerous activity.

Another adverse effect of a mutual indemnification could arise under the common scenario where each party agrees to indemnify the other for any material breach or default under the contract. Again, this kind of mutual indemnification may seem fair on the surface. Yet the risk of an indemnification for breach of the contract could compromise your client's ability later to take a perfectly defensible stance under the contract when the result of being wrong is the payment of the other side's attorney's fees.

15. Case Law Review

One of the hottest topics under Missouri indemnification case law is the question of whether a clause is sufficiently clear about indemnifying an indemnified party for his, her or its own negligence. Depending on the language of the clause, the Missouri Supreme Court has reached opposite conclusions.

The Court recognized in *Nusbaum* that when parties stand on equal footing, one party may agree to indemnify the other for the indemnitee's own negligence. *Nusbaum v. City of Kansas City*, 100 S.W.3d 101, 105 (Mo. banc 2003) Yet "where any doubt exists regarding the party's intentions, Missouri courts will not construe an indemnity contract to indemnify against one's own negligence." *Id*. The Court in *Nusbaum* ruled that an

indemnity clause was not sufficiently clear on the point because of qualifying language that the indemnification by a Subcontractor to the Owner applied "only to the extent caused in whole or in part by negligent acts or omissions of the Subcontractor…." *Id.* at 105-106. The Court held that the phrase "to the extent caused" in the clause expressed "an intention to limit the indemnitor's liability to the portion of the fault attributed to the indemnitor." *Id*. at 106.

The Supreme Court reached the opposite result in *Utility Service & Maintenance v. Noranda Aluminum*, 163 S.W.3d 910 (Mo banc 2005). The Court held that even though liability limitations for one's own negligence must be clear and unambiguous, sophisticated businesses may limit liability without using such magic words like "negligence" or "fault." *Id*. at 914. The Court ruled that a clause was sufficiently clear because it "specifically states that it includes, but is not limited to, Utility's performance under the contract." *Id*. The indemnification for "any and all claims" thus provided that the indemnified obligation was for more than just Utility's performance, but also included Noranda's negligence. *Id.*

U.S. Magistrate Terry Adelman of the District Court for the Eastern District of Missouri later had to decide a similar question in construing an indemnification clause where Pacer International leased a flatbed semi-trailer from XTRA Lease LLC. See, XTRA Lease LLC v. Pacer Int'l, Inc., 2012 U.S. Dist. LEXIS 84 (E.D. Mo. Jan. 3, 2012). When the trailer got involved in a fatal accident, XTRA filed suit against PACER seeking a defense and indemnification. The indemnification clause provided that Pacer had to indemnify XTRA for claims arising out of or incident to Pacer's performance or to its use, possession or control of the trailer:

> [Pacer] hereby agrees to indemnify and hold harmless XTRA Lease, its affiliates and their successors, assigns, employees, officers, directors, licensors and agents, from and against all losses, liabilities, obligations and expenses (including

reasonable attorneys' fees) for personal injury, (including death) or damages to any person or property, wherever occurring, *arising out of or incident to [Pacer's] performance or failure to perform under the lease or [Pacer's] use, possession or control of ...the equipment*…."

Id. *6-7. (emphasis supplied)

Magistrate Adelman concluded the indemnification clause at issue was closer to *Nusbaum* than *Noranda*. Id. * 11. Although the provisions broadly covered "any and all losses," those losses were limited only to those "arising out of Pacer's use, possession, or control of the equipment." *Id.* "Nothing in the provision explicitly or unequivocally states that Pacer is required to indemnify XTRA for its own negligence." *Id.*

If a lesson is to be drawn from these cases, it would be that minor wording differences may control the question of whether an indemnification clause is sufficiently clear in covering the indemnified party's own negligence. The lawyer must be careful in drafting language consistent with what the parties want in their agreement.

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