



# Indemnity & Limitations On Liability

Orchestrating The Instruments Of Your Contract In Harmony

Presented by Nancy Cundiff

# Speaker

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## FIRM OVERVIEW

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At Lewis Brisbois, diversity is an integral part of our firm culture and our daily life. We accomplish diversity not by committee or initiative, but through the honest and consistent practice of hiring the best people for the job and rewarding excellence. The success of these policies is reflected in the fact that Lewis Brisbois has repeatedly received national recognition for its commitment to embracing diversity. Lewis Brisbois is committed to hiring and retaining a diverse group of talented lawyers and staff, and demonstrates that commitment through non-discriminatory hiring, retention and promotion policies. The diversity of Lewis Brisbois' client base is matched by the diversity of our attorneys.

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Lewis Brisbois is known for its commitment to principled advocacy, an unflinching work ethic, and unyielding recognition of our duty to provide the highest level of service to our clients, who choose us because we take the time to understand their business interests and internal culture.

We have developed sophisticated proprietary risk evaluation and litigation management processes that many of our clients have incorporated into their business practices, and we help them manage and defend claims and litigation. As a result, they are avoiding and reducing losses that impact their bottom line.

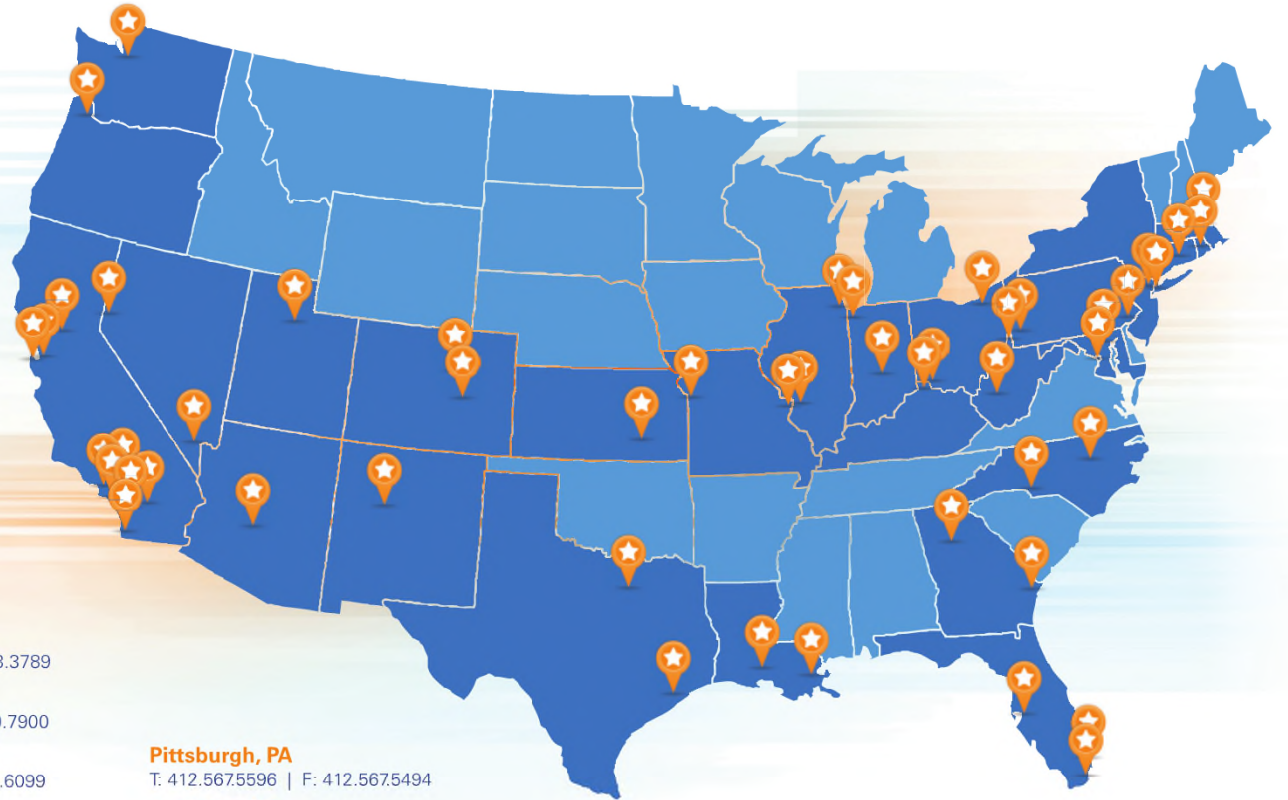
Our practice includes pre-suit counseling and problem solving based on a structured and accurate analysis of likely outcome. We know our clients' objectives are often best served by a pre-suit resolution and we are often judged by the advice and counsel we provide toward that end. However, when trial is the answer and in the client's

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- Trade Secrets & Non-Compete Disputes
- Transportation
- Trial
- Water & Waste Water
- Workers' Compensation

# Risk Allocation Instruments

Keeping it in key and on tempo



# Contractual Indemnity – A Key Risk Allocation Instrument

- Undertaking to pay for:
  - Future and existing losses
  - Future and existing liabilities



# Indemnities In a Nutshell

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- A promise by A to compensate B if B incurs liability under a specific type of claim
- Effect?
  - A is exposed to more financial risk / B can enjoy increased compensation for the relevant claim
  - In practice this elevation can be less dramatic than sometimes thought



# Common examples

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- Data
  - Privacy laws
  - Data corruption
- 3<sup>rd</sup> party claims
  - Intellectual property rights/ injuries/ property damage
- Breach of law/ regulation
- Confidentiality
- Deliberate acts

# Indemnity Schemes

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- Fault based
- Knock-for-knock/ mutual hold harmless
- Possession based

# Fault Based Indemnity



# Fault Based Indemnity

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- Negligence
- Willful/ intentional conduct
- Breach of agreement
- Failure to comply with law
- Breach of representation
- Breach of warranty
- Injury
- Death
- Disease
- Property

# Knock-For-Knock/Mutual Hold Harmless

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- Typically energy sector
  - Each party responsible for its own property and employees
- \*Consider impact of anti-indemnity statutes

# Possession Based

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Determined based on the party in possession of the property, project, site, etc.

# Forms of Indemnity Clauses

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- Broad: indemnifies **Receiver** for any loss even if caused by the **Receiver's** own negligence.
- Intermediate: indemnifies **Receiver** for entire loss if responsibility for some of the loss can be placed on **Giver**.
- Limited: indemnifies **Receiver** only for the amount of the loss directly attributable to **Giver's** negligence.

# Louisiana's Anti-Indemnity Acts

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- Louisiana Oilfield Anti-Indemnity Act (LOAIA) – La. R.S. 9:2780
- Louisiana Construction and Motor Carrier Anti-Indemnity Act –  
La. R.S. 9:2780.1
- Public Works – La. R.S. 38:2195 and La. R.S. 38:2216(G)



# Louisiana Oilfield Anti-Indemnity Act (LOAIA)

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- No indemnity for own negligence or fault—including strict liability—that causes death or bodily injury to another
- No waiver of subrogation or naming other party as an additional insured on the indemnitor's insurance policy to circumvent the LOAIA.
- *Marcel* exception
- LOAIA has broad scope and inconsistent interpretation

# Louisiana Construction Anti-Indemnity Act

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- No indemnity for negligence, intentional acts or omissions of indemnitee, or a third party over whom indemnitor has no control
- Cannot circumvent by requiring indemnitor to purchase liability insurance for acts or omissions of indemnitee or such third party. Must have evidence indemnitee paid cost of such insurance.
- Louisiana law prevails

# Louisiana Construction Anti-Indemnity Act

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- Construction contract definition includes agreements:
  - For the design, construction, alteration, renovation, repair or maintenance
  - Of buildings, structures, highways, roads, bridges, water lines, sewer lines, oil lines, gas lines,
  - Appurtenances or improvements to real property
  - Including moving, demolition and excavation
- Does not include
  - dirt or gravel roads used to access oil and gas wells and associated facilities
  - oil flow lines and gas gathering lines from the point where product is co-mingled for transportation.

# Louisiana Construction Anti-Indemnity Act

## Choice of Law/Venue

- La R.S. 9:2779 holds choice of forum and choice of law provisions invalid
- When one party is domiciled in Louisiana, and
- The work, materials, and equipment involve a construction project in Louisiana
- Requires the lawsuit or arbitration to occur in Louisiana
- Voids provision requiring interpretation of the agreement under another jurisdiction's law
- La. R.S. 9:2778 same provisions with respect to public contracts involving the state or a political subdivision of the state
- Effectively prevents ability of a party to contract around application of Louisiana Construction Anti-Indemnity Statute

# Louisiana Motor Carrier Anti-Indemnity Act

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- No indemnity for negligence, intentional acts or omissions of indemnitee, or a third party over whom indemnitor has no control
- Cannot circumvent by requiring indemnitor to purchase liability insurance for acts or omissions of indemnitee or such third party
- Louisiana law prevails

# Louisiana Anti-Indemnity Act – Motor Carriers

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- “Motor carrier transportation contract”:
  - any contract covering the transportation of property, for compensation or hire by a motor carrier
  - entrance upon property for the purpose of loading, unloading, or transporting property, for compensation or hire
  - or a service incidental to any such activity, including but not limited to storage of property
  - Excludes those for agricultural products as defined in R.S. 9:3306 and timber without limitation, except the Uniform Intermodal Interchange and Facilities Access Agreement administered by the Intermodal Association of North America or other agreements providing for the interchange, use, or possession of intermodal chassis, containers, or other intermodal equipment

# Louisiana Anti-Indemnity – Public works

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- La. R.S. 38:2195
- Applies to public contracts
- Prohibits requiring a public entity from assuming liability for damage arising out of injuries or property damage to the contracting parties or third parties caused by negligence of others
- Post-1991

# Louisiana Anti-Indemnity – Public Works

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- La. R.S. 38:2195
- Does not prohibit provisions naming another as a co-insured or additional beneficiary in a contract of insurance
- Does not apply to intrastate intergovernmental contracts and to contracts with private providers for the placement and care of persons in the custody of the state
- Does not apply to contracts between any public entity and the owner of immovable property when the purpose of such contract is to grant the public entity a servitude, right of way, or other authority to go upon, construct works, perform activities, or otherwise exercise control over or use the owner's property



# Louisiana Anti-Indemnity – Public Works

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- La. R.S. 38:2216(G)
- Prohibits provisions requiring contractor to hold harmless/indemnify public body for damages arising out of injuries or property damage to third parties caused by the negligence of the public body
- Prohibits provisions requiring contractor to hold harmless/indemnify architect, landscape architect, engineer, or land surveyor engaged by the public body for such damages caused by the negligence of such architect, landscape architect, engineer, or land surveyor
- Nullifies provisions which waive the rights of a contractor to recover delay damages / equitable adjustment, for delays caused in whole, or in part, by acts or omissions within the control of the contracting public entity

# Louisiana Practice Tips

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- Expressly state the intention to indemnify and the scope of the indemnity
- To indemnify another party for their own negligence, specifically support the provision with an insurance provision
- State that part of the contract consideration includes the indemnitor's recovery of the cost of the insurance for the indemnitee – must have evidence of this
- Utilize a separate additional insured provision stating that it applies to the indemnitee's own negligence

# Louisiana Practice Tips

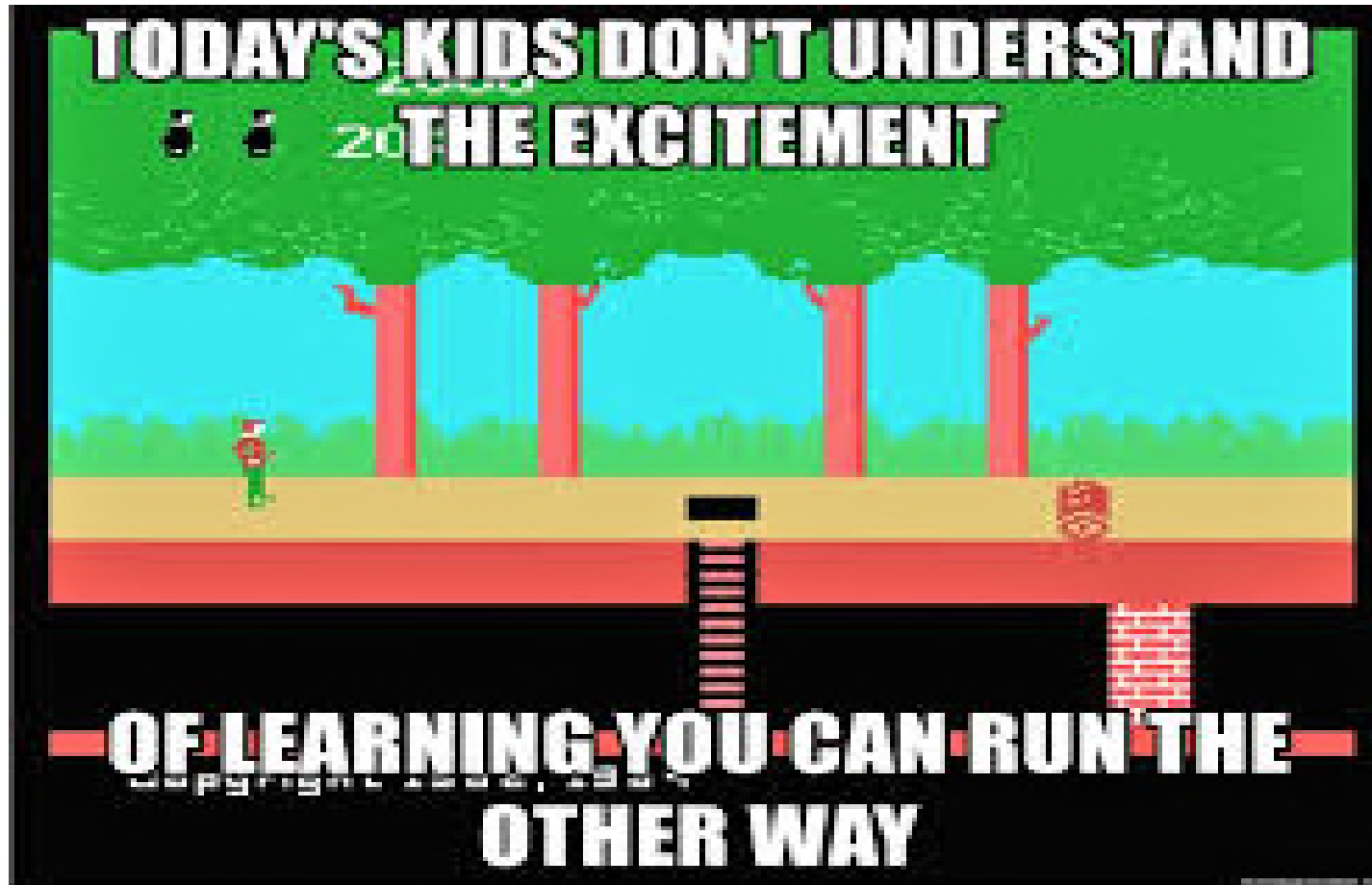
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- Use severability clauses to protect the remainder of the contract from any invalid provision
- Cannot avoid Louisiana law or jurisdiction, but consider a venue provision requiring disputes to be brought in a particular court or parish of Louisiana
  - Avoids disputes in liberal parishes
  - Nominate a federal court in Louisiana

# One Size Does Not Fit All



# Common Indemnity Pitfalls



# Common Indemnity Pitfalls

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- Overlooking or failing to adequately address direct claims (scope)
- Excluding or insufficiently defining indemnification procedures
- Overlooking or failing to include a sole remedy provision
- Including an inconsistent limitation of liability provision

# Parts of Indemnity

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# Parts of Indemnity

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- Party giving/ party receiving
- What is given?
  - Indemnify?
  - Hold harmless?
  - Defend?
- Scope of claims included



# Parts Of Indemnity (cont.)

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- Scope of damages included
- Triggers
- Indemnification procedures
- Rights after tender
- Statute of limitations

# Parties Affected By Indemnity Agreement

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- Reciprocal indemnity
- Third party beneficiaries
- Assignment provisions – consent required? Credit worthy?
- Consider Who Should Be Included:
  - Affiliates, partners, directors, employees, agents, representatives, insurers, other contractors, subcontractors, co-lessees, co-owners, joint ventures, and “lagniappe”

# Hold Harmless

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- Greater protection
- Receiver will not be held liable for identified actions
- Often used for activities or purchases that involve some degree of unavoidable risk
- If you're holding another party harmless, it essentially means you may not blame them for any loss or liability

# Duty to Defend

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- Broader than indemnity obligation – may apply whether or not third party claim has merit
- Control and scope of defense
- Control of settlement

# Goals of Receiver of Indemnity

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- Broad language: all losses, liabilities, claims, causes of action
- Broad nexus phrase: 'arising from', 'relating to', 'based upon'
- Known and unknown
- Direct and consequential
- Broad inclusion of related parties and entities
- Control of defense and settlement
- Notice does not affect duty to defend nor recovery of litigation expenses incurred before tendering

# Goals of Giver of Indemnity

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- Be specific – exclude that which is not explicitly identified
- Narrow nexus phrase: ‘caused by’, ‘solely resulting from’, ‘to the extent they arise out of’
- Look for limits on causes: death, injury, destruction of property, violation of law, breach of representation or warranty
- Limit parties indemnified
- Strict notice requirements
- Consider alternatives: commercial or liquidated damages
- Sole remedy provision

# Sole Remedy Provisions

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- Protects the **Giver** by prohibiting the **Receiver** from successfully seeking recourse for covered claims beyond indemnification

# Sole Remedy Provisions

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- **Giver** should seek to:
  - Include a comprehensive sole remedy provision.
  - Exclude either:
    - a cumulative remedies clause from the agreement; or
    - the indemnification clause from the cumulative remedies provision
- **Receiver** should seek exclusions for:
  - Equitable remedies (specific performance and injunctive relief)
  - Claims for fraud and willful misconduct (or willful breach)



# More Indemnity Considerations

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- Ensure direct claims vs. third party claims is clear
- Do you need to extend to third party claims?
- Allocation when fault is mutual
- Notice of claims required
- Choice of law
- Right to mitigate losses

# Indemnity Is Not

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# Indemnity Is Not

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- Surety
- Guarantee
- Contribution
- Release

# Limitation of Liability Clauses -

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# Dangers of an Inconsistent Limitation of Liability Provision

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- **Giver** with power may demand:
  - Waiver of incidental and consequential damages
  - Monetary cap on indemnity
  - Carve-out of certain types of claims (e.g. third party IP claims, product liability, environmental)
- Big impact on allocation of risk

# Waiver of Incidental & Consequential Damages

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- Typically disclaims indirect, consequential, incidental, punitive and special damages
- Limits indemnifying party's liability regarding certain actual and direct damages
- If your agreement contains **both** a consequential damages waiver and an indemnification provision, you must negotiate whether to exclude indemnification from the consequential damages waiver

# Waiver of Incidental & Consequential Damages

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- **Giver** – Wants waiver of incidental and consequential damages for all claims
- **Receiver** – Wants to exclude the indemnity from the waiver, because otherwise:
  - The indemnified party must pay for indirect or consequential damages stemming from third-party claims, even if these damages are caused by the indemnifying party's bad acts
  - If the consequential damages waiver covers lost profits, lost revenues and diminution in value, these types of damages may be comprised of direct damages, and so the parties may inadvertently exclude some direct damages from the indemnification coverage

# Monetary Cap on Indemnification-Related Damages

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- **Giver** wants this.
  - May appear either:
    - In a general limitation of liability clause covering all contract liabilities (including indemnity)
    - As part of the indemnification provision
  - May also ask for a threshold amount to trigger indemnity so not on hook for all minor complaints and issues



# Monetary Cap on Indemnification-Related Damages

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- **Receiver** consideration: How does cap limit the ability to recover for indemnifiable damages. Should seek to:
  - Raise the liability cap to an amount that is proportional to the risk it has agreed to shoulder
  - Eliminate cap on indemnification by:
    - Excluding cap; or
    - Carving out indemnification provision from the cap

# Unlimited Liabilities???

Mostly a matter of convention and negotiation

<b>ALWAYS</b>	<b>COMMON</b>	<b>MORE AGGRESSIVE</b>
<ul style="list-style-type: none"><li>• Death/Injury From Negligence</li><li>• Fraud</li></ul>	<ul style="list-style-type: none"><li>• Breach of IP Rights</li><li>• Breach of Confidentiality</li><li>• Data Protection</li><li>• Willful Default</li></ul>	<ul style="list-style-type: none"><li>• IT Security</li><li>• Breach of Law/Regulation</li><li>• Specific Causes</li></ul>

# Alternatives to Indemnity

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- Relying on state common law or statute for recourse (e.g. bringing a lawsuit for breach of warranty, breach of contract, or fraud)
- Conditioning the purchase price on fulfillment of certain conditions
- Using a right of offset by escrowing a part of the consideration with a third party
- Deferring payment so that the indemnified party can deduct potential indemnity payments from future payments
- Quarantine the transaction related risk (e.g. Buyer uses its own subsidiary to purchase the seller or the seller's assets)
- Provide contractual work-arounds for anticipated problems (e.g. requiring the infringing party to provide a non-infringing replacement in the event of intellectual property infringement)

# Innovation in Risk Management and Allocation

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- Ask tough questions about your client's processes
- Explore the needs of your clients and imagine new ways to satisfy them
- Be creative with both your questions and assumptions to identify the unique challenges presented to your clients and develop innovative solutions

# What's Missing?

- Sample mutual indemnification, limited to third party claims and damages:
- Each Party hereby agrees to indemnify, defend and hold the other Party, its Affiliates, its licensees, its licensors, and its and their officers, directors, employees, consultants, contractors, sublicensees and agents (and, in case of such licensors, their trustees, faculty, medical and professional staff and students) (collectively, "Representatives") harmless from and against any and all damages or other amounts payable to a Third Party claimant, as well as any reasonable attorneys' fees and costs of litigation (collectively, "Damages") arising out of or resulting from any claim, suit, proceeding or cause of action (each, a "Claim") brought by a Third Party against a Party or its Representatives based on: (a) breach of any representation or warranty by the Indemnifying Party contained in this Agreement, (b) breach of any applicable Law by such Indemnifying Party, or (c) gross negligence or willful misconduct by such Indemnifying Party, its Affiliates, or their respective employees, contractors or agents.



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