

The Basics of Indemnity Law

By Matthew S. LaBeau and Peter J. Tomasek

When a complaint comes in, it's natural for attorneys to read it and immediately start addressing the elements and defense to the plaintiff's claim. In a legal-malpractice claim, for example, the first direction you may turn is to the case-within-a-case requirement. Or maybe you'll skim through a couple of old briefs to refresh your memory about the statute of limitations.

In addition to attacking the claims of the plaintiff, it's crucial for attorneys to take time to understand where else they need to focus their attention: Is there someone else to blame? Or, asked differently, what about indemnity?

Here's how the Michigan Supreme Court recently described indemnity: "Generally, indemnification is an equitable doctrine that shifts the entire burden of judgment from one tortfeasor who has been compelled to pay it, to another whose active negligence is the primary cause of the harm."¹ Put more simply, "indemnity seeks to transfer the entire loss imposed on a tortfeasor to another, who in equity should pay."²

But how do you figure out if you need to worry about or assert indemnity? And if you do figure it out, how do you actually do that? And what should you do if the other party doesn't agree with you?

The purpose of this article is to dip our toes in the indemnity-law pool and, hopefully, start to answer those questions. If an attorney is able to navigate the indemnity waters from the outset of a case, he or she has a significant chance of saving the client a lot of time and money.

Types of indemnity

In Michigan, you're likely to run into indemnity-law issues in three different scenarios: contractual indemnity, common-law indemnity, and implied-contractual indemnity. Contractual indemnity, as you'd expect, is based on contract principles.



Common-law indemnity, which has nothing to do with contracts, is more equity-based. And implied-contractual indemnity is sort of based on both, but isn't really based on either.

Contractual indemnity

A contract is perhaps the most common situation in which attorneys find indemnity. Rarely does it show up as a stand-alone agreement. Instead, you may find a so-called (and probably boilerplate) "indemnity" clause in a contract. Examples of contracts that might have an indemnity clause include agreements like real-property leases or rental agreements. The reason these contracts often include indemnity clauses makes sense: one party (the indemnitee) won't agree to do something—e.g., lease an office space or rent a car—unless the other party (the indemnitor) is willing to indemnify it.

Indemnity clauses, like other contract clauses, are generally interpreted and applied as written. Unfortunately, they can also be filled with legalese and, therefore, difficult to interpret and apply. And that interpretation and application often depend on which state's statutory-construction rules apply. For example, in California, if a party wishes to contract for indemnification against his or her own negligence, the indemnity clause *must* explicitly refer to negligence.³ Conversely, in Michigan, an explicit reference to negligence isn't necessarily required.⁴ It's also true that indemnity clauses are construed against the drafter (and/or against the indemnitee).⁵ But this narrow statutory-construction rule is subordinate to the much broader rule of interpreting and applying contract clauses in a way that reflects the parties' intent.⁶

Of course, if you don't have a contract with an indemnity clause, none of this matters. Instead, you need to rely on something else. And under common law, you may still be in luck.

Common-law indemnity

Common-law indemnity arises solely out of equity: an innocent person shouldn't be held liable for another's wrongful acts.⁷ Unlike contractual indemnity, common-law indemnity's roots are in equity, so fault is its centerpiece: the indemnitor has no common-law obligation to indemnify unless he or she is at fault, and the indemnitee is not entitled to indemnity unless he or she is free from fault.⁸

Was your client free from fault? The answer to this question often comes down to whether your client was "actively" negligent.⁹ To determine whether that's the case, courts look to the primary plaintiff's complaint and ask whether it alleges *active*, as opposed to *passive*, negligence.¹⁰ And if it does, he or she is likely out of luck.¹¹ But when the primary complaint alleges both active and passive negligence alternatively (or just passive negligence), the indemnity issue likely won't be resolved until the jury decides whether the principal defendant is liable *and why* via a special-verdict form.¹²

AT A GLANCE

In Michigan, you're likely to run into indemnity-law issues in three different scenarios: contractual indemnity, common-law indemnity, and implied-contractual indemnity.

The most common of the three is contractual indemnity, which usually shows itself in "indemnity" clauses in a contract.

To rely on an indemnity clause, you'll start by sending a letter on your client's behalf as your "tender of defense," but, more often than not, that letter won't be the end of the story.

Perhaps the best example of the active-versus-passive-negligence debate comes from the employer-employee context.¹³ When an employee injures someone while on the job, it's certainly possible that the employer could be held vicariously liable. The employer, then, could turn to the employee for common-law indemnity. However, if the employer was also actively negligent, common-law indemnity would be precluded. Moreover, practical economic concerns usually result in the employer's deciding against doing so.

Another common example comes from auto lawsuits involving Michigan's owner's-liability statute, MCL 257.401.¹⁴ When someone is injured in a car accident, the owner can still be held liable by operation of law, even if the owner wasn't actually involved in the accident. However, the owner can also turn to the driver for indemnity—unless, of course, he or she was actively negligent in some way. The most likely example of this involves negligent-entrustment claims. That is, a plaintiff claims that the car's owner is liable not only by operation of law *but also* because he or she actively and negligently entrusted the car to the driver.¹⁵ In that circumstance, indemnity might not be enough.

But if you don't have a contract with an indemnity clause and you don't think common-law indemnity will save the day, your options get muddier.

Implied-contractual indemnity

In this situation, you're probably left with implied-contractual indemnity, which is sort of the halfway point between the two. Like common-law indemnity, fault plays (or at least could play) a role. But, like contractual indemnity, implied-contractual

indemnity is based largely (or at least theoretically) on a contract—albeit one that’s implied in fact based on the parties’ actions.

The best illustration of how implied-contractual indemnity works is the case from which it arguably stems: *Hill v Sullivan Equip Co.*¹⁶ In that case, the principal plaintiff was injured at work when his arm got stuck on a screw conveyor.¹⁷ He sued the company that designed, manufactured, and installed the conveyor, but the manufacturer filed a third-party complaint against the employer, blaming the employer for requiring it to install the conveyor without a protective cover and falsely assuring it that the conveyor would be inaccessible to employees.¹⁸

At this point, you may be thinking, “Wait, it sounds like the manufacturer *and* the employer might have both been actively negligent.” You’re probably right, which is why the Court of Appeals held that common-law indemnity did not apply.¹⁹ After that, the Court turned to the manufacturer’s alternative reliance on “an implied indemnity contract.”²⁰ It explained: “To determine whether a third-party plaintiff has stated a cause of action for indemnity based on an implied contract, the court must look to the third-party complaint as well as the original complaint.”²¹ Appreciating that the employer “unqualifiedly rejected a proposed protective cover for the machine which injured plaintiff and advised [the manufacturer] that the machinery would be situated and used so that it would be inaccessible to workers while in operation,” the Court of Appeals reversed the trial court’s summary dismissal of the manufacturer’s indemnity claim.²²

If you’re thinking that sounds like a hard rule to apply outside of a practically identical scenario, you’re not alone. In reality, it’s fairly difficult to guarantee when implied-contractual indemnity is a sure thing. And to make the muddy waters even muddier, it’s not really clear whether a party asserting implied-contractual indemnity must be free from fault, which seems to directly contradict *Hill*.²³

Indemnity in practice

So let’s say you run into a contractual-indemnity issue, as that’s the most common. You represent a law firm that rents office space in Southfield. When the firm’s lights go out, its office manager contacts the building’s maintenance supervisor

to arrange repairs. The maintenance supervisor hires an outside company, which sends an employee to make the repairs. That employee is fatally electrocuted because the maintenance supervisor negligently left a live wire uncovered.

The employee’s estate files a wrongful-death lawsuit against several defendants *including the firm*. You represent that firm. Now what?

First, you turn to your lease: Does it include an indemnity clause? It probably has one like this:

Mutual Indemnification: Landlord shall indemnify, defend, and hold harmless (“indemnify”) Tenant from third-party claims, liability, and/or costs due to the default, work, negligence, acts, or omissions of Landlord and its agents, employees, or visitors. Tenant shall indemnify Landlord from third-party claims, liability, and/or costs due to the default, work, negligence, acts, or omissions of Tenant and its agents, employees, or visitors.

Certainly sounds like the office building might need to indemnify, defend, and hold harmless the law firm in this case. So now what?

First, you’ll want to send a letter on the firm’s behalf to the landlord as your “tender of defense” in the lawsuit. In that letter, you’ll clearly ask the landlord to accept the firm’s tender of defense in the case. Then you’ll articulate exactly why you believe indemnity is required. You’ll point to the fact that the estate alleges the employee was electrocuted and ultimately died because the maintenance supervisor negligently left a live wire uncovered. You’ll point out that, because the maintenance supervisor is the landlord’s agent or employee, the landlord has contractually agreed to “indemnify, defend, and hold harmless” the firm from third-party claims, liability, and costs—all of which, you’ll argue, it must do in this case.

But what if you didn’t send that letter? Thankfully, it may not matter. In *Ajax Paving Indus v Vanopdenbosch Constr Co*, for example, the defendant argued that the plaintiff waived contractual-indemnity protections by failing to identify them in the principal lawsuit.²⁴ The Court of Appeals rejected that argument: “[T]here is no contractual provision in this matter requiring that defendant be put on notice of an underlying lawsuit or that there be a tender of defense for the indemnification provision to apply.”²⁵ “Because the contract itself contains no notice or tender-of-defense requirement and expressly



provides for the recovery of all fees and costs associated with defending the underlying litigation, without limitation,” the Court continued, “plaintiff is entitled to recover the entirety of those fees and costs.”²⁶

You may need to file a cross-complaint against the landlord, too. In that complaint, you’ll walk through the factual background like we did above, analyze the indemnity clause’s language, praise yourself for sending the tender-of-defense letter, and ask the court to enter a judgment in favor of the firm. The desired result is the court’s ordering the landlord to indemnify, defend, and hold harmless the firm from any and all claims, liability, and costs alleged by the estate as well as costs, attorney fees, and interest that the firm (wrongfully) incurred in the case.

However, filing the cross-complaint alone isn’t the end of the road, and it’s rarely as easy as a simple dispositive motion. Were any of the firm’s employees around the uncovered live wire before or after the maintenance supervisor? What if the supervisor testifies that he specifically recalled covering that wire? Does the firm, the landlord, or the outside company have any maintenance records that might tell us when the wire actually became uncovered? Questions like these are all factual issues you may have to resolve before filing a motion for summary disposition. It will likely prove necessary to send and answer some interrogatories and requests to admit, take the office manager’s and maintenance supervisor’s depositions, and so on. The answers to those questions could have a big impact on your next move.

The way both parties handle a tender-of-defense letter can have even more consequences if the primary lawsuit settles. For example, “if an indemnitee settles a claim against it before seeking the approval of, or tendering the defense to, the indemnitor, then the indemnitee must prove its *actual* liability to the claimant to recover from the indemnitor.”²⁷ Conversely, “the indemnitee who has settled a claim need show only *potential* liability if the indemnitor had notice of the claim and refused to defend.”²⁸ Considering the likelihood of settlements today, this distinction can frequently make or break an indemnity claim.

Conclusion

We’ve only dipped our toe in the indemnity-law pool in this article. In reality, the pool can seem more like the Pacific Ocean. This article could go on and on, asking and trying to answer endless questions. What happens when a contract provides for the landlord to indemnify the tenant but common-law indemnity requires the tenant to indemnify the landlord? How does tort reform affect this analysis? What’s the difference between indemnity and contribution? What happens when the tables are turned and you get the tender-of-defense letter? Hopefully, once you poke holes in the opposing party’s claim *and* figure out whether indemnity plays a role, you can dive headfirst into these questions as well. ■



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ENDNOTES

1. *St Luke’s Hosp v Giertz*, 458 Mich 448, 453; 581 NW2d 665 (1998).
2. *Id.*
3. *Goldman v Ecco-Phoenix Electric Corp*, 62 Cal 2d 40, 44; 396 P2d 377 (1964).
4. E.g., compare *Vanden Bosch v Consumers Power Co*, 394 Mich 428; 230 NW2d 271 (1975), with *Fireman’s Fund American Ins Co v Gen Electric Co*, 74 Mich App 318, 323–324; 253 NW2d 748 (1977).
5. *Reed v St Clair Rubber Co*, 118 Mich App 1, 8; 324 NW2d 512 (1982).
6. *Sherman v DeMaria Bldg Co*, 203 Mich App 593, 596; 513 NW2d 187 (1994).
7. *Lakeside Oakland Dev v H & J Beef Co*, 249 Mich App 517, 531; 644 NW2d 765 (2002).
8. *Portland v Citizens’ Telephone Co*, 206 Mich 632, 636; 173 NW 382 (1919) and *Williams v Unit Handling Sys Div of Litton Sys*, 433 Mich 755, 760; 449 NW2d 669 (1989).
9. *Hill v Sullivan Equip Co*, 86 Mich App 693, 696; 273 NW2d 527 (1978).
10. *Id.* at 696–697.
11. *Id.* at 697.
12. *Parliament Constr Co v Beer Precast Concrete Ltd*, 114 Mich App 607, 613; 319 NW2d 374 (1982).
13. *Provençal v Parker*, 66 Mich App 431, 438–439; 239 NW2d 623 (1976).
14. *Tahash v Flint Dodge Co*, 399 Mich 421, 425–428; 249 NW2d 110 (1976).
15. *Bennett v Russell*, 322 Mich App 638, 643–644; 913 NW2d 364 (2018).
16. *Hill*, 86 Mich App at 693.
17. *Id.* at 695.
18. *Id.* at 696.
19. *Id.* at 696–697.
20. *Id.* at 697, citing *Dale v Whiteman*, 388 Mich 698, 705; 202 NW2d 797 (1972).
21. *Id.*
22. *Id.* at 698.
23. *Hadley v Trio Tool Co*, 143 Mich App 319, 330–331; 372 NW2d 537 (1985) and *Lawrence v Group Admin Agency*, 467 Mich 884; 651 NW2d 392 (2002).
24. *Ajax Paving Indus v Vanopdenbosch Constr Co*, 289 Mich App 639, 648; 797 NW2d 704 (2010).
25. *Id.* at 649.
26. *Id.*
27. *Grand Trunk Western R v Auto Warehousing Co*, 262 Mich App 345, 354–355; 686 NW2d 756 (2004).
28. *Id.* at 355.