



Hidden Power and Dangers of Indemnification Clauses

Swipe to discover how these critical contract provisions can protect your business, mitigate risk and give you a competitive edge.

By: Alex Chizhik, Esq.

ac@femida.us

www.femida.us

Risk Allocation: The Business Lifeline

Universally Used

Present in virtually every commercial transaction and partnership agreement.

Strategic Importance

Among the most intensively negotiated terms due to their financial impact but also is one of most misunderstood and misapplied.

These provisions distribute financial responsibility and risk between business partners, helping organizations manage liability exposure.



The Indemnification Parties

1

Indemnitor

The party assuming financial responsibility for specified losses.

2

Indemnatee

The protected party receiving compensation for covered losses.



Strategic Business Applications

Risk Identification - VERY, VERY IMPORTANT!!!

Tailor liability exposure based on transaction-specific risks. Everyone must understand the essence of the transaction and all of the moving parts, plus any applicable laws and regulations.

Who Should Carry the Risks

Assigns responsibility to the party best positioned to prevent expected and unexpected losses.

Enhanced Recovery

Enables compensation beyond standard legal remedies.

What do you get from Indemnification?



Compensation

Reimbursed expenses and advance funding for liabilities.



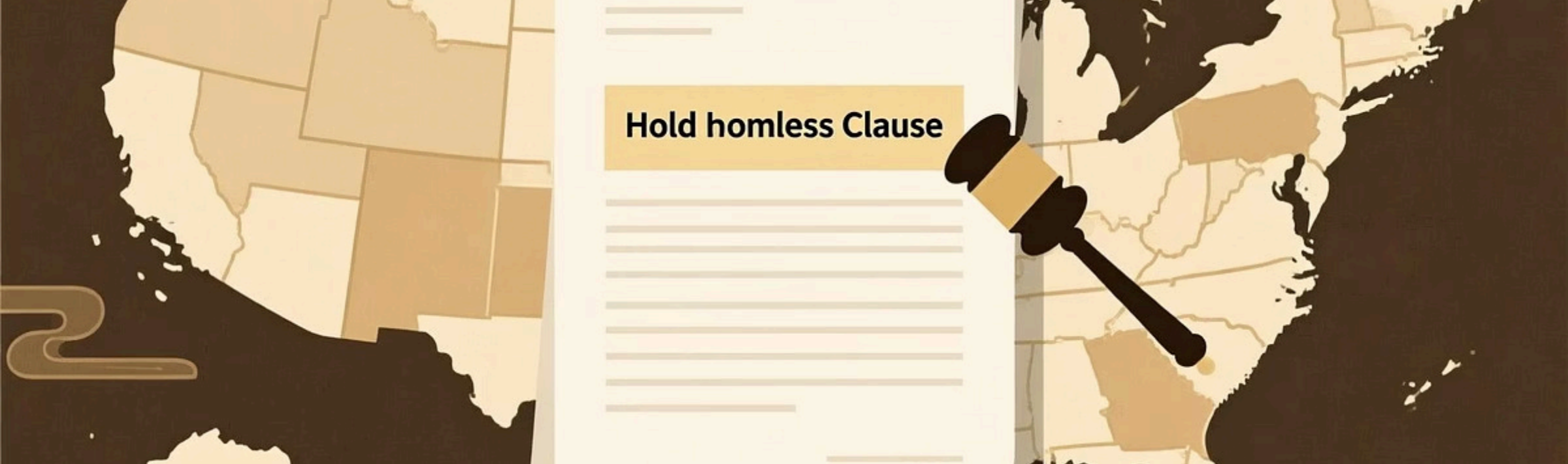
Defense

Paid for legal proceedings, including attorney's fees, costs and case management.



Control

Defending party typically manages legal strategy and proceedings, but it could be the Indemnifying Party.



"Hold Harmless" Provisions are Often Included in Indemnification

This is when one party agrees not to hold the other party responsible for specified injury, damage, or loss. In other words, it's a promise not to sue.

Contrast:

Indemnification = reimbursement for losses incurred for specified risks.

Hold Harmless = a promise not to sue for specified risks.

Agreements Should Include Triggering Events for Indemnification and Processes



Occurrence of Covered Events

Examples: Lawsuit/claim from a 3rd party, certain contract breaches, certain negligence, regulatory violations, and personal injury incidents. If one party should not carry an identified risk, it should be identified and specified as a triggering event.



So, What Do You Get by Invoking Indemnification Provisions

\$\$\$ for Losses (paid), liabilities (unpaid), claims (third-party), and handling the lawsuits or other claims.

Include the Desired Process

If you are the likely Indemnitor, you want: early notice, right to settle, right to defend, right to choose counsel.

If you are the likely Indemnitee, you want: clear description of coverage triggers, right to participate in defense, rights to approve settlement, rights to approve counsel.



Common Exclusions & Limitations

Negligence Exceptions

Protection may not apply when the Indemnitee's own negligence contributes to harm. If you caused it (or contributed to it) you shouldn't be able to gain the benefit.

Misconduct Exclusions

Bad faith actions and willful violations typically excluded from coverage. If you did it on purposes, you definitely shouldn't be able to gain the benefit.

Leverage Indemnification for Business Success

Understanding these provisions gives you a competitive edge in negotiations and better protects your business interests.

Evaluate your risk tolerance, use these terms to make smarter go/no-go decisions, and consult legal counsel for complex situations.

Tag a business owner who needs this information or share with your network to help others navigate these critical contract terms!

Every contract is an allocation of risk and money. Don't take on risk that you are not getting paid to take on.

Alexander Chizhik,
Esq.

ac@femida.us

