

Indemnification Clauses in Emergency Medicine Contracts

An Information Paper

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Why Indemnification Clauses Are Inappropriate in Medical Contracts

Indemnification is a legal event in which one party to a business relationship is either legally forced to or contractually agrees to reimburse another party for losses or damages. Typically, indemnification is available as a legal remedy only when one party is without fault and seeks reimbursement for expenses that it has had to pay in order to settle a lawsuit. For example, in one ruling, the Florida Supreme Court stated that “weighing ... relative fault of [different defendants] has no place in the concept of indemnity [since] the one seeking indemnity must be without fault.” *Houdaille Industries, Inc. v. Edwards*, 374 So. 2D 490 (Fla., 1979), see also *Uniroyal Chemical Co. v. American Vanguard Corp.*, 203 Cal.App.3d 285 (Cal., 1988). Indemnification should be contrasted with another legal term called *contribution*. If multiple defendants in a lawsuit are each found to have acted negligently in some way, a *contribution action* may be filed by one defendant against another defendant seeking reimbursement for disproportionate payments it has made to a plaintiff.

Insurance policies are a good example of indemnification. Policyholders purchase an insurance policy protecting them against some risk. Under the terms of the policy, an insurance company then agrees to reimburse the policyholders for any covered losses. While the insurance company did not actually cause damages sustained by the policyholder, by virtue of the contract, the company nevertheless becomes legally responsible to the policyholder for all losses covered under the policy.

In a contract between a physician and a hospital or contract management group, the intent of an indemnification agreement is to protect the interests of the employer which is often named as a co-defendant in a malpractice lawsuit against a physician. However, if a hospital or group was also negligent, a contractual indemnification agreement may provide the negligent employer more recourse than would otherwise be available to it in common law or statute. Recall that common-law indemnification is only available when the party demanding compensation is *without fault*. Negligent employers would ordinarily have no common law right to indemnification from physicians and would therefore be forced to bring a contribution action against a co-defendant physician in order to apportion damage payments based upon relative negligence. By agreeing to contractual indemnification, a physician agrees to provide *full* reimbursement to an employer – whose negligence may have been the cause of the patient's injuries.

A typical indemnification clause might state that the contracting physician agrees to defend, indemnify, and hold harmless [the hospital] and its affiliates from any and all damages, liability, and expense (including legal costs, other expenses, and attorney's fees) in any way related to physician's provision of medical care, even if caused in whole or part by the negligence, gross negligence, or other fault of [the hospital] or its affiliates.

Broadly worded indemnification clauses are legally dangerous. Any adverse events that occur while the physician is working will in some way be “related to” the physician's provision of medical care. For example, a physician who assists a security guard in restraining a combative head-injured patient might be required to reimburse the hospital for all expenses if the hospital is later named as a defendant in a legal action brought by the patient. Actions the government takes against a hospital for an EMTALA violation when an on-call physician does not respond to calls from the emergency department could end up being

solely the contracting physician's responsibility. The physician could also be personally responsible for expenses incurred by the hospital if the hospital is named in a medical malpractice suit. Even if a nurse, who is a hospital employee, kills a patient with a medication overdose, a physician who agrees to indemnify the hospital could be held liable for all the hospital's damages if the hospital can show that the overdose was "related to" the physician's provision of medical care – even though the nurse was negligent for administering the overdose.

Finally, indemnification clauses may negate a physician's malpractice insurance coverage. Liabilities relating to indemnification clauses are not created out of the provision of medical care but rather are created out of a contractual agreement. Malpractice insurance policies generally cover only damages resulting from "diagnosis of, treatment for, or medical care for a patient's medical condition." Because a contractual agreement to reimburse a hospital does not meet any of those requirements, malpractice insurance companies have no duty to defend or pay for expenses related to an indemnification agreement. A physician who agrees to an indemnification clause may give a malpractice insurer the means to deny coverage for a malpractice claim against a physician.

In some cases, courts have held that indemnification clauses which attempt to shift liability from a company to a private individual are so unconscionable that they are invalid as a matter of law. In *Yang v. Voyagaire Houseboats, Inc.*, 701 N.W. 2d. 783, the Minnesota Supreme Court held that an indemnification clause in a houseboat rental agreement that was being enforced against an individual who had rented the houseboat was void as a matter of public policy. In *Vicksburg Partners, LP v. Stephens*, 911 So. 2d 507, the Mississippi Supreme Court held that indemnification clauses in contracts where one party has minimal bargaining power were "unilaterally oppressive," "substantive[ly] unconscionab[le]," and therefore unenforceable.

If a physician's actions may have caused damage to either a group or a hospital, the physician can be sued for negligence, breach of contract, or contribution. Indemnification agreements are a dangerous and unfair means for employers to recover those damages. Do not commit to them.

Indemnification Clauses Between Hospitals and Contract Management Groups

While physician employment contracts should not contain indemnification clauses, some contract management groups may elect to enter into indemnification agreements with hospitals. Aside from issues related to recourse noted above, indemnification clauses within service provider agreements are a bad idea for several other reasons. Hospitals that seek to enforce indemnification agreements against groups or physicians may find that their legal strategies backfire.

Suppose that a hospital has entered into a broadly-worded mutual indemnification agreement with its emergency department management group. Now suppose that the hospital is seeking indemnification from the group for a payment in a malpractice case related to a patient's emergency department care. In response, it is likely that the group would allege some negligent act on the hospital's part and would exercise its right to seek indemnification from the hospital. After all, wouldn't an indemnification payment made by a group be a "loss" or a "cost" for which the group could seek reimbursement based upon the negligence of a hospital employee? I would certainly argue so if I were providing legal representation to the group. In the ensuing litigation, each party would then attempt to prove how the other party's shortcomings were responsible for the damages sustained. Meanwhile, both parties' "dirty laundry" would potentially be incorporated into court filings for the public and the media to review.

Consider the New York case of *Freeman v. Mercy Medical Center* (2008 NY Slip Op 31337(U)). A patient sued a county medical center after alleging that her pregnancy was mismanaged by an obstetrical resident, causing premature delivery at 23 weeks gestational age and resulting in profound brain damage to her

child. The obstetrical resident managing the patient was employed by the County, but was supervised by Medical Center attending physicians. Alleging that the attending physicians were ultimately responsible for the care rendered to the patient, both the resident and the County sought indemnification under the mutual indemnification clause in the contract between the County and the Medical Center. The medical center also sought indemnification under the mutual indemnification clause and hired expert witnesses to testify that the resident provided substandard care, that the resident withheld relevant information about the plaintiff from the attending physicians, and that the resident was practicing independently within the clinic. All of these allegations, including the names of the physicians, were made part of legal documents and were incorporated into an appellate opinion that will be forever memorialized in legal databases. By encouraging the defendants in the case to point fingers at each other's faults, the mutual indemnification clause also made the plaintiff attorney's job much easier.

As another example, consider a mutual indemnification clause in which a hospital seeks indemnity for payments it made to a patient who alleged that a physician was negligent in restraining the patient while the patient was attempting to assault staff. The physician might then seek indemnification from the hospital alleging that the hospital was negligent for failing to have sufficient security, for inadequately training its nurses in patient restraint, for violating JCAHO regulations regarding patient restraint, and, in the case of physician employees, for potentially violating OSHA regulations. Discovery would likely involve inquiry into previous injuries sustained by hospital staff, and the hospital's response to such injuries or lack thereof. The allegations in the case may even precipitate investigations by multiple federal agencies.

Mutual indemnification clauses between hospital and providers serve only to increase the amount of litigation in which malpractice defendants must engage and assure that parties with intimate knowledge of each other's business practices will publicly disclose shortcomings in those business practices in attempts to absolve themselves from liability.

Finally, a hospital that chooses to enforce an indemnification clause against its physicians may significantly damage any goodwill the hospital has created with its medical staff. Staff physicians who learn that their hospital sought damages from another member of the medical staff may consider leaving the medical staff or curtailing their medical staff privileges to protect themselves from similar actions should the hospital decide to file a similar claim against them. A December 2008 article in American Medical News showed that 73.9% of patients choose a hospital based on where the physician chooses to perform a procedure. Another 14.5% of patients choose a hospital based on the recommendation from another doctor. A hospital that alienates medical staff by perpetuating litigation against staff physicians or medical groups will not only diminish the hospital's goodwill, but is also likely to diminish some medical staff members' willingness to refer future patients to the facility.

Limiting the Breadth of Indemnification Agreements

While indemnification agreements should never be a part of a physician-hospital or physician-group agreement, some contract management groups may choose to enter into indemnification agreements with hospitals. If choosing to take such a precarious step, groups would be wise to take additional measures to limit the breadth of such agreements.

If broad indemnification clauses are contained in a service provider agreement, such indemnification must be mutual. While mutual indemnification agreements will guarantee substantial additional litigation expenses and allegations of negligence if enforced, a broad unilateral indemnification agreement applying to only one party is never contractually appropriate.

If indemnification is created, a condition of the indemnification should be that it is nonassignable to other parties. Any attempts at assignment of indemnification should immediately void the agreement. In *Caglioti v. District Hosp. Partners*, (933 A.2d 800 (DC, 2007)), a wheelchair manufacturer settled claims with a plaintiff who was injured due to a malfunctioning wheelchair. As part the settlement agreement, the wheelchair manufacturer assigned the plaintiff its indemnification claim against the medical providers. The assignment of rights also required the plaintiff to pay the wheelchair manufacturer 25% of any recovery he obtained. The remaining defendants in the underlying lawsuit filed motions in attempts to invalidate assignment of the indemnification, but the appellate court permitted the assignment, stating that such assignment was “supported by ... the law in this jurisdiction ... and is not counter to any public policy.”

Those groups choosing to enter into indemnification agreements would also be wise to contractually assure that the party asserting indemnification will fully cooperate in defending any claims and that the indemnifying party has complete control of the defense and/or settlement of any claims relating to the indemnification. Without such language, a hospital could retain multiple partners at the most expensive law firm in the state, agree to a multimillion dollar settlement with the plaintiff, and then seek indemnification from the group for those potentially inappropriate litigation decisions.

Conclusion

Indemnification clauses are not appropriate in medical contracts. State laws provide alternate means for any defendant to seek reimbursement for the negligent acts of other defendants through contribution actions. Adding a contractual indemnification to a service provider agreement will unnecessarily complicate medical malpractice litigation and may result in additional liability when undesirable facts about both parties are disclosed during litigation.

Physicians should seek alternate employment when indemnification or any other contractual shift of liability is contained in a potential employment agreement. Medical industry standards are heavily against having indemnification clauses in physician contracts, contractual indemnification may void medical malpractice insurance coverage, and indemnification clauses provide an unacceptable potential for physicians to incur significant personal financial losses.

The best indemnification clause is a deleted indemnification clause.

*Created by members of ACEPs Medical Legal Committee
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