Indemnity is compensation given to make another whole from a loss already sustained. It generally contemplates reimbursement by one person or entity of the entire amount of the loss or damage sustained by another. Indemnity takes two forms: common law and contractual.

This survey is limited to considerations of contractual indemnity, but note that, historically, many states looked to the law relating to common law indemnity in developing their respective jurisprudence on contractual indemnity. Common law indemnity is the shifting of responsibility for damage or injury from one tortfeasor to another tortfeasor. It has been referred to as “an extreme form of contribution,” which reflects that common law indemnity initially arose as a judicial means of avoiding the harsh result of the now substantially abrogated rule prohibiting contribution among joint tortfeasors. The circumstances under which common law indemnity exists vary widely depending upon the applicable state law.

Contractual indemnity, on the other hand, is that which is voluntarily given to a person or entity, as security or protection to prevent his or her suffering damage. As benefiting its name, contractual indemnity is created by express contract and is a promise to safeguard another from existing or future loss or liability, or both. This form of indemnity may arise where one or both of the indemnitor and indemnitee are culpable, but the parties have agreed that the risk of such culpability will be borne entirely by just one of them. In this way, contractual indemnity may result from the agreement of one to answer for a legal obligation that would otherwise rest with another. This contractually created indemnity is the subject of this survey because of its potential implications on another important form of contractual indemnity: the liability insurance policy. The existence and application of an agreement by one to indemnify another where a policy of liability insurance potentially covers a loss implicates many issues, two of which are paramount relative to this survey.

The first issue arises where a person or entity obtains for its benefit a liability insurance policy that will indemnify the insured for its liability for damages, and the insured in turn agrees to indemnify a third party for the third party’s liability for damages. What is the effect on the insurer’s agreement to indemnify the insured pursuant to the liability insurance policy? Must the insurer indemnify the insured for its indemnification of the third party?

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4. A survey of the differing standards and application of common law indemnity is beyond the scope of this survey.
Introduction

The standard Commercial General Liability Policy contains an exclusion for contractually assumed liability, but coverage is restored by an exception for liability assumed in an “insured contract,” a defined term under the policy. Included within the definition of “insured contract” is “that part of any ... contract or agreement under which [the insured] assume[s] the tort liability of another.” If an insured’s agreement to indemnify a third party constitutes the assumption of the third party’s tort liability, then loss or damage flowing from this assumed obligation is not excluded from coverage.

Whether the insured’s agreement to indemnify is enforceable is critical, no matter the perspective. If the insured’s indemnity obligation is unenforceable under applicable law, then the insured has no obligation and the insurer likely has no risk of loss. But even where an insured agrees to an otherwise unenforceable indemnity, if the agreement envisions the purchase of insurance for the loss, then the indemnity may be upheld and the presence of insurance saves the otherwise void indemnity.

Additionally, an insured may agree to indemnify a third party for loss or damage and include the indemnitee as an additional insured under the very liability policy arguably bound to cover the insured for its indemnity obligation. Under these circumstances, because the insurer is obligated directly to the indemnitee/third party (as an additional insured) to the extent of the coverage, whether the “insured contract” exception to the exclusion for contractually assumed liability applies may become secondary. What happens, however, if the insured’s indemnity obligation applies only in limited circumstances or only up to a certain dollar limit and the liability policy’s coverage is greater? Is the insurer’s obligation to the third party/indemnitee/additional insured limited to the amount of the insured’s obligation to indemnify, or is the insurer exposed to the full extent of the dollar amount of coverage stated in the policy?

The second important manner in which the presence of an indemnity may implicate an insurer’s ultimate risk arises where a person or entity obtains for its own benefit a liability insurance policy and the insured is the beneficiary of an agreement by a third party to indemnify the insured for its liability for damages. The indemnity flowing from a third party to the insured is significant: The insurer could attempt to recoup its payments under

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7. See ISO Forms CG 00 01 11 85; CG 00 02 11 85; CG 00 02 02 86; CG 00 01 11 88; CG 00 02 11 88; CG 00 01 10 93; CG 00 02 10 93; CG 00 01 01 96; CG 00 02 01 96; CG 00 01 07 98; CG 00 02 07 98; CG 00 01 10 01; CG 00 02 10 01; CG 00 01 12 04; CG 00 02 12 04; CG 00 01 12 07; CG 00 01 12 07; CG 00 01 04 13.

8. The exclusion reads: “This insurance does not apply to ... Bodily injury or 'property damage' for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement....”

9. In the 1985 and 1986 ISO Forms, the exception provides: “This exclusion does not apply to liability for damages: (1) Assumed in a contract or agreement that is an ‘insured contract;’ or (2) That the insured would have in the absence of the contract or agreement.” (Exclusion b(1) and (2)). In the 1988 and 1993 ISO Forms, the exception provides: “This exclusion does not apply to liability for damages: (1) Assumed in a contract or agreement that is an ‘insured contract, provided the ‘bodily injury’ or ‘property damage’ occurs subsequent to the execution of the contract or agreement; or (2) That the insured would have in the absence of the contract or agreement.” (Exclusion b(1) and (2)). In the 1996, 1998, 2001, 2004, 2007, and 2013 ISO Forms, subsections b(1) and b(2) are inverted, but are otherwise the same.

10. In the 1985 and 1986 ISO Forms, “Insured Contract” means, among other things, “[t]hat part of any other contract or agreement pertaining to your business under which you assume the tort liability of another to pay damages because of 'bodily injury' or 'property damage' to a third person or organization, if the contract or agreement is made prior to the 'bodily injury' or 'property damage.'” Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

In the 1988, 1993, 1996, 2001, 2004, 2007, and 2013 ISO Forms, “Insured Contract” means, among other things, “[t]hat part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for 'bodily injury' or 'property damage' to a third person or organization.” Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

The parenthetical reference in the 1988 Form appears as a separate item in the definition of “insured contract” in the 1985 Form.

11. See fn. 10, supra.
Introduction

The ultimate question, then, is whether the indemnity agreement is enforceable and what impact it has on the insurance obligation. This is the context of this survey. A uniform format is followed in each of the state summaries:

- **Section 1 – General Rules of Contractual Indemnity**: A preliminary discussion of indemnity agreements.
- **Section 2 – Exceptions to General Rules of Contractual Indemnity**: Identifies statutory or judicially created exceptions to the general rules applicable to contracts of indemnity.
- **Section 3 – Indemnity Agreements as Insured Contracts**: Addresses the extent to which an insured’s agreement to indemnify a third party constitutes an “insured contract” under the state law, negating the exclusion for contractually assumed liability to the extent of the indemnity.
- **Section 4 – Operation of an Agreement to Indemnify Referring to or Requiring Insurance**: Addresses the interplay between an insured’s agreement to indemnify a third party, which is combined with a reference to first- or third-party insurance.

While this is principally a survey of the intersection between general liability insurance and an insured’s separate agreement to indemnify, the discussion of relevant case law is not always limited to general liability policies where discussion and analysis of other coverage is relevant to the subject matter of this survey.

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12. An insurer may also potentially recover on a theory of contribution or indemnity in the absence of a written indemnity, but such actions are typically limited to the applicable state's law regarding joint tortfeasor liability.