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Managing Indemnification Provisions in Contracts

Podcast Transcript

Prevention and Protection

a United Educators Risk Management Podcast

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JARED: Hello and welcome to *Prevention and Protection*, the United Educators (UE) risk management podcast. I'm Jared Costanzo, litigation prevention intern. We're going to discuss indemnity provisions and why institutions should be careful when they enter into contracts through which they assume liability for claims they neither caused nor can control. Joining us on this podcast is Michael Krackov, senior claims counsel here at UE. Welcome, Mike.

MIKE: Thank you, Jared.

JARED: Before we begin, I would like to let listeners know that in addition to this topic, you can find more podcasts and other risk management resources on **EduRiskSolutions**.

Mike, can you explain what indemnity provisions are?

MIKE: Most contracts include language that addresses how the parties to the agreement will share responsibility for claims or losses arising out of that agreement. This language is often referred to as indemnification provision.

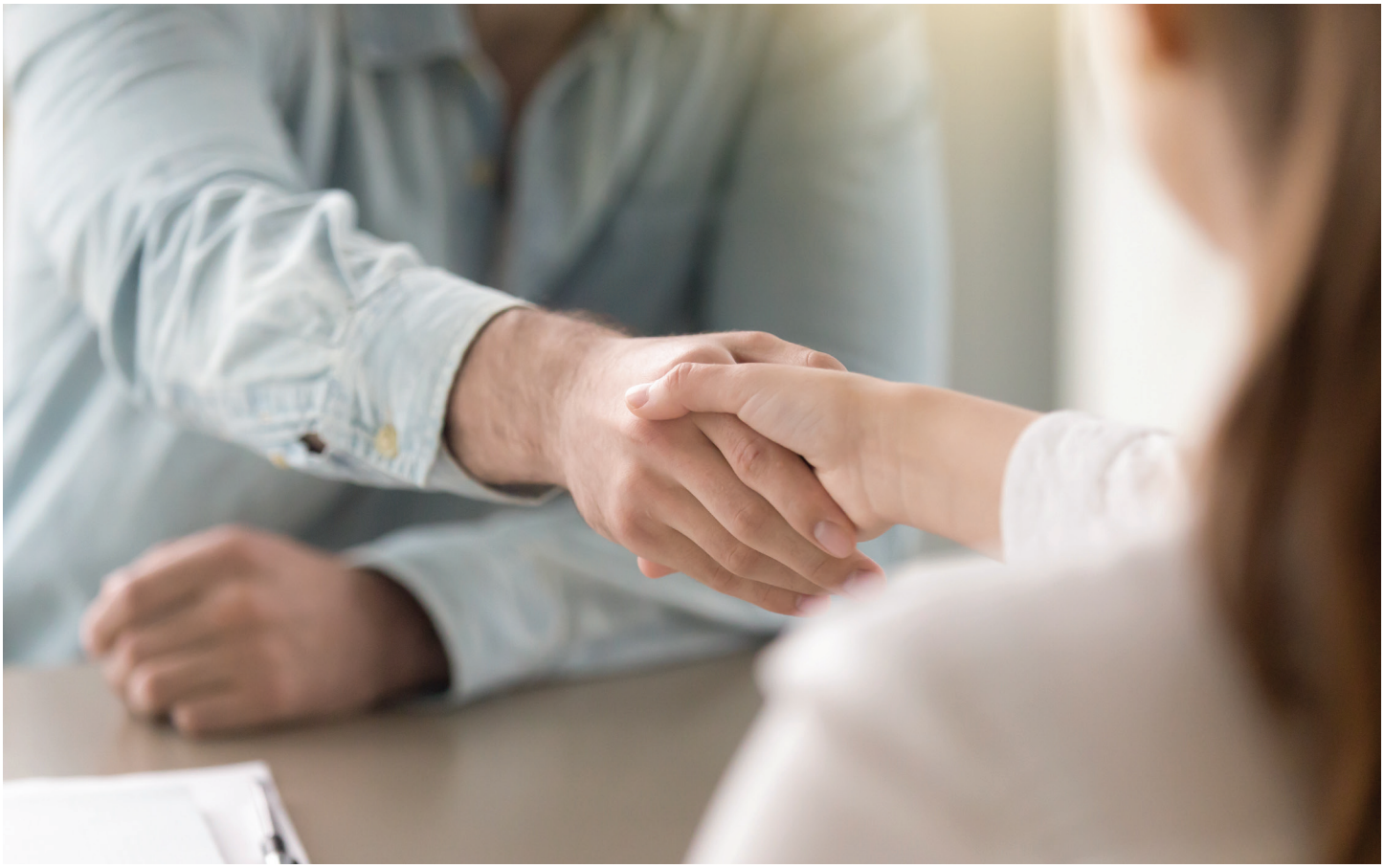
JARED: So, indemnity provisions are essentially a way to transfer the risk of litigation and other losses from one party to another. Where are institutions running into trouble in regard to indemnity provisions?

MIKE: UE claims have shown that if an indemnification provision is unfavorable, the institution may assume responsibility for losses caused by the other party's negligence or incur legal fees when it tries to clarify the original intent of that provision.

JARED: That is interesting. What makes an indemnification provision unfavorable?

MIKE: Two common unfavorable indemnity provisions are provisions that either are one sided or ambiguous.

JARED: What is a one-sided indemnity provision?



MIKE: One-sided language in indemnity provisions usually results in an institution assuming all responsibility for its negligent acts and the negligent acts of the other party, even when the other party is solely responsible for the loss. An example of this language is the educational institution agrees to defend and indemnify party X for all claims and losses arising out of the contract. We commonly see these provisions when an institution is entering a short-term lease to use another entity's property, such as the city stadium, arena, or concert hall. These leases occur frequently when an institution expects a crowd for a sporting event, graduation, or concert that is too big to accommodate on campus.

In these cases, the city or other property owner often has strong bargaining power and may try to force one-sided indemnity language on the renter. In one of our claims, the allegation was that the stairs in the concert hall were not sufficiently marked, thereby causing an elderly guest to fall. From the institution's viewpoint, the accident was caused by an inherent defect of the property that was completely outside of its control. From the venue's perspective, the one-sided indemnity language made no distinction for whether the venue was completely at fault. We ended up indemnifying the concert hall for that loss.

JARED: What about ambiguous language in indemnity provisions?

MIKE: Often contract language is so unclear that the institution cannot tell what responsibility it assumes for losses arising out of the agreement. When a claim arises, institutions cannot rely on the indemnity provision to protect them. Instead, they incur legal fees trying to determine the intent of the indemnity provision and persuading the other party or court to pay the appropriate share of their losses. An example of ambiguous language is each party promises to indemnify each other for claims or losses. Any indemnity provision should make clear how the parties will allocate responsibility. We unfortunately see this kind of weak indemnity language in all sorts of contracts where the institution should have the leverage to negotiate something much stronger.

When a vendor is coming onto campus to provide a service, such as security contractors, meal services, etc., or the vendor is coming on campus to do construction or equipment installation, there should be blanket indemnification coverage that runs from the vendor to the institution. It's important to remember the claimants will always include the institution in a lawsuit as the deep pocket, and we've seen too often that claimants will tactically decide not to sue the vendor whose employee actually caused the injury. The ambiguous contract language that I read before gives the institution a little ability to bring a third-party claim against the vendor, since the lawsuit as drafted only alleges the negligence of the institution.

JARED: Thank you, Mike. As we can see, unfavorable indemnity provisions are a common and preventable source of liability claims. By implementing a few key practices, institutions can avoid these harmful indemnity provisions in their contracts.

One key practice that institutions should begin implementing is to review indemnity provisions before finalizing any contract.

MIKE: Ideally, that's right. You'd love it if every contract to which the institution is a party receives a thorough review before it is signed. But that often doesn't happen for a variety of reasons. For example, there are too many contracts and not enough trained people to review them, or sometimes the person entering the institution into an agreement doesn't even realize they've bound the institution to a contract. Or sometimes there is no written contract; it's just a handshake agreement.

JARED: Before we conclude, Mike, do you have any other practices you can highlight that institutions can use to manage risks?

MIKE: Another key practice is to draft model indemnity language. Institutions should consult with legal counsel and the risk manager to draft model indemnity language to include in written contracts. A third key practice is to make sure that there is a separate insurance provision in the contract that requires the vendor to obtain insurance for the operations on campus, to provide broad coverage, and to name the institution as an additional insured. In some jurisdictions, the indemnity language is not of much use unless you can force the vendor's insurance carrier to defend the institution. Also, UE recommends that the institutions publicize and educate relevant people about the contracting process and ensure that all staff or independent contractors who are authorized to negotiate, review, or sign contracts understand the institution's campus contracting policy, model indemnity language, and the significance of indemnification provisions.

JARED: Well, we're about out of time, but I want our listeners to know that if you would like more information about indemnity provisions or contracts, UE has a few resources on **EduRiskSolutions**. Some resources include an *Insights* blog, **"Avoid Unfavorable Indemnity Provisions in Institution Contracts,"** along with a guide for reviewing contracts, **"A Layperson's Guide to Understanding Contract Basics."** I encourage you to go to our website and check it out if you have a chance.