

# Indemnification Clauses in Commercial Contracts (GA)

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A Practice Note discussing indemnification and defense provisions in commercial contracts under Georgia law. This Note defines indemnification and explains how parties often use indemnification to allocate risk. It discusses key issues including statutory and common law barriers to enforcement, defining the scope of the indemnity, limiting liability, and alternatives to indemnification. This resource includes drafting and negotiating tips.

Nearly every commercial contract has an indemnification provision. Parties include these provisions for a variety of reasons. For example, the parties to an equipment lease might include an indemnification provision to:

- Allocate risk between the parties that:
  - defects in the equipment injure the lessee or third parties like sublessees;
  - the lessee's use of the equipment infringes third-party intellectual property rights;
  - the lessor fails to timely deliver the equipment;
  - the equipment does not adhere to specifications; or
  - the lessor does not obtain all of the tax benefits associated with being the tax owner of the equipment.
- Allow an aggrieved party to pursue certain rights, like the right to attorneys' fees, which may otherwise not be available in a common law cause of action.
- Provide predictability and certainty of recourse.
- Show a court the parties' intent regarding risk allocation.
- Increase the odds of settlement based on the parties' intent.

If the contract does not contain a properly drafted indemnification provision:

- The **non-breaching party** may:
  - have to rely on uncertain common law causes of action; and
  - not be able to obtain certain types of reimbursement, for example, attorneys' fees.
- The **breaching party** may not be able to adequately:
  - cap its liability;
  - reduce its liability by incorporating materiality qualifiers; or
  - reduce its liability by incorporating liability caps or deductibles like thresholds or baskets.

Although commonly used, indemnity provisions can be complex. If used improperly, an indemnification provision can subject a party to continuing liability for circumstances outside of its control. If used correctly, an indemnification provision can shield a party from lawsuits and damages. This Note discusses the meaning and benefits of indemnity under Georgia law, and helps parties to correctly draft and negotiate an indemnification provision that effectively manages risk.

## DEFINITION OF INDEMNIFICATION

Generally, indemnification (or indemnity) is an undertaking by one party to compensate the other party for certain costs and expenses. Indemnity is imposed either by law or contract in Georgia (*District Owners Ass'n, Inc. v. AMEC Environmental & Infrastructure, Inc.*, 322 Ga. App. 713, 715-16 (2013)).

## INDEMNITY IMPLIED BY GEORGIA LAW

State law indemnity is a remedy implied under common law or statute and arises out of obligations imposed through a preexisting relationship (O.C.G.A. § 11-2-312(3), for example; see also, *District Owners Ass'n*, 322 Ga. App. at 715-16 (recognizing common law indemnity arising out of a vicarious liability relationship such as between principals and agents and employers and employees)). The extent to which this obligation is imposed depends on:

- Applicable state law.
- The nature of the transaction.
- The nature of the relationship.

Generally, courts impose an implied indemnity on a contractual relationship only in the absence of an indemnification provision. For example, in Georgia, a claim for common law indemnification exists when a party is vicariously liable for the tort committed by another and is compelled to pay damages because of negligence imputed to him or her as a result (see *District Owners Ass'n*, 322 Ga. App. at 715-16; see also *U.S. Lawns, Inc. v. Cutting Edge Landscaping, LLC*, 311 Ga. App. 674, 676 (2011)). Parties relying on implied contractual indemnity generally face unpredictable outcomes and may not be able to obtain certain types of reimbursement, for example, attorneys' fees. To avoid any uncertainty, the parties to an express indemnity provision may choose to include a disclaimer of the right to implied indemnity.

### CONTRACTUAL INDEMNITY

Parties to a contract use a contractual indemnity provision to customize risk allocation. Under Georgia law, the nature of an indemnity relationship is determined by the intent of the parties as expressed by the language of the contract (*Service Merchandise Co. v. Hunter Fan Co.*, 274 Ga. App. 290, 292 (2005)).

Georgia courts interpret indemnification agreements in the same manner as other contracts. Specifically:

- The indemnity agreement will be enforced according to its terms if the language is clear and unambiguous.
- If the language of the indemnity agreement is ambiguous, courts:
  - strictly construe the language against the indemnified party with every presumption against an intention to indemnify; and
  - construe any ambiguities against the drafter.

(*Viad Corp v. United States Steel Corp.*, 343 Ga. App. 609, 614 (2017).)

Indemnification clauses vary widely, but in a typical indemnification provision, the indemnifying party promises to reimburse the indemnified party from and against "losses, liabilities, claims, and causes of action" (recoverable damages) incurred by the indemnified party that "are caused by," "arise from," or are "related to" (nexus phrase) the specified events giving rise to the indemnity obligation (covered events).

For more information on recoverable damages, nexus phrases, and covered events, see *Defining the Recoverable Damages, Choosing the Right Nexus Phrase, and Defining the Covered Events of the Indemnity*, respectively.

An insurance policy is a classic example of a contractual indemnity, in which the insurer agrees to indemnify and defend the insured against specified recoverable damages incurred as a result of specified events. For an example of an indemnification provision for use in a broader commercial contract, see *Standard Clauses, General Contract Clauses: Indemnification (GA)* ([W-000-1089](#)).

In many cases, parties negotiating an indemnity clause also negotiate a defense clause (see *Obligation to Defend*). In a defense clause, the indemnifying party promises to defend the indemnified party against third-party claims, for example, litigation or arbitration, caused by or arising from:

- The indemnifying party's breach of contract.
- The indemnifying party's acts or omissions, even if the acts or omissions are not breaches.

### OBLIGATION TO INDEMNIFY DISTINGUISHED FROM OBLIGATION TO DEFEND

Under Georgia law, the obligation to indemnify for damages and the obligation to defend against third-party suits are separate and distinct (see *Nationwide Mut. Fire Ins. Co. v. Somers*, 264 Ga. App. 421, 424 (2003); *Ashton Park Trace Apartments, LLC v. City of Decatur*, 2015 WL 11618243 at \*5 (N.D. Ga. Oct. 21, 2015); *George L. Smith II Georgia World Cong. Ctr. Auth. v. Miller Brewing Co.*, 255 Ga. App. 643, 643-44 (2002) (stating that the duty to indemnify is a legally separate duty from the duty to defend)).

While the duty to defend arises if the facts as alleged in the complaint "even arguably" are within the coverage of the indemnification provision, the duty to indemnify arises only if liability actually exists under the indemnification language (see *Nationwide Mut. Fire Ins. Co.*, 264 Ga. App. at 425-427; see also *Ashton Park Trace Apartments LLC*, 2015 WL 11618243 at \*4-5).

#### Obligation to Indemnify

Under an indemnity provision, the indemnifying party agrees to compensate the indemnified party for direct claims (by the indemnified party against the indemnifying party), third-party claims, or both. For a more detailed discussion of indemnity for direct versus third-party claims, see *Direct Versus Third-Party Claims*.

Indemnification requires the indemnifying party to:

- Reimburse for covered **paid costs and expenses** (losses). Georgia courts require reimbursement for all paid losses pursuant to the parties' contract (see, for example, *Deep Six, Inc. v. Abernathy*, 246 Ga. App. 71, 73 (2000)).
- Advance payment for covered **unpaid costs and expenses** (like liabilities) as they are incurred but only if the recoverable damages under the indemnity include liabilities, claims, or causes of action. In Georgia, a judgment fixing legal liability is not a condition precedent to recovery under an indemnity clause (O.C.G.A. § 51-12-32(c) (pertaining specifically to joint tortfeasors); see also *Doss & Associates v. First Am. Title Ins. Co., Inc.*, 325 Ga. App. 448, 465-66 (2013)). For more information on losses versus liabilities, see *Defining the Recoverable Damages*.

#### Obligation to Defend

The obligation to defend is usually broader than the obligation to indemnify because it may apply whether or not the third-party claim has merit (see *S. Guar. Ins. Co. v. Dowse*, 278 Ga. 674, 676 (2004) and *Cantrell v. Allstate Ins. Co.*, 202 Ga. App. 859, 859 (1992); see also *Ashton Park Trace Apartments LLC*, 2015 WL 11618243 at \*4-6). The obligation to defend is both:

- **An obligation.** The indemnifying party must:
  - reimburse for covered **paid costs and expenses** (losses) comprised of defense costs and expenses, which may include the cost and expense of appeals and counterclaims and losses on resolution of the dispute; and
  - advance payment for covered **unpaid costs and expenses** (like liabilities) comprised of defense costs and expenses.
- **A right.** The indemnifying party has the right to assume and control the defense, subject to applicable agreements (such as control of defense provisions (see *Control of Defense Provisions*)) and the law.

An indemnified party always wants the indemnification provision to expressly include the duty to defend because it otherwise risks having the indemnifying party only offering to pay for actual damages or judgments resulting from the claims made.

The obligation to defend is generally held to exist:

- In the context of third-party claims.
- If the defense provision arguably covers allegations in the complaint and there is no applicable exclusion (see *Nationwide Mut. Fire Ins. Co.*, 264 Ga. App. at 425; see also *Ashton Park Trace Apartments, LLC*, 2015 WL 11618243 at \*5 and *JNJ Foundation Specialists, Inc. v. D.R. Horton, Inc.*, 311 Ga. App. 269, 271 (2011)).

The allegations asserted in the suit, not the ultimate merits of the action, give rise to the obligation to defend. For an example, see *Defense is Often Broader than Indemnification: An Example*. Therefore, a party may have to defend the other party even if the court ultimately finds the underlying claim to be without merit.

For a detailed discussion of the triggers to and scope of the obligation to defend, see Practice Note, Commercial General Liability Insurance Policies: Property Damage and Bodily Injury Coverage (Coverage A) ([9-507-2539](#)).

#### Defense is Often Broader than Indemnification: An Example

Consider an indemnification provision that requires the indemnifying party to:

- Indemnify against third-party claims for damages and losses arising out of the indemnifying party's negligence.
- Defend against third-party suits raising claims covered by the indemnity.

The indemnified party sues the indemnifying party under the provision for losses and damages suffered. The court absolves the indemnifying party of negligence. In this case, the court:

- Also absolves the indemnifying party of any indemnity liability. Because the indemnifying party is absolved of negligence, the indemnifying party has no obligation to indemnify for its own negligence.
- May require the indemnifying party to defend the indemnified party. The indemnifying party's defense obligation is triggered by suits raising claims covered by the indemnity, not whether the conditions of indemnity were, or were not, later established. In this case, some courts have upheld the defense obligation regardless of the merits of the obligation to indemnify. (See, for example, *Great American Ins. Co. v. McKemie*, 244 Ga. 84, 85 (1979).)

For information about the scope of defense obligations under insurance contracts, see Practice Note, Commercial General Liability Insurance Policies: Property Damage and Bodily Injury Coverage (Coverage A): The Duty to Defend Is Broader than the Duty to Indemnify ([9-507-2539](#)).

#### INDEMNIFICATION VERSUS HOLD HARMLESS PROVISIONS

Most indemnification provisions require the indemnifying party to "indemnify and hold harmless" the indemnified party for specified liabilities or losses. In practice, these terms are typically paired and interpreted as a unit to mean "indemnity." Black's Law Dictionary

takes this approach, an authority that Georgia courts cite to in discussing these terms (see, for example, *Lanier At McEver, L.P. v. Planners And Engineers Collaborative, Inc.*, 284 Ga. 204, 209-10 (2008) (dissent) and *Parker v. Puckett*, 129 Ga. App. 265, 267 (1973)).

However, some commentators have drawn a distinction between the two terms. For example, they construe "hold harmless" to protect another against the risk of loss as well as actual loss and define "indemnify" to mean "reimburse for any damage," a narrower meaning than that of "hold harmless" (see Mellinkoff's Dictionary of American Legal Usage 286 (1992); see also discussion in Bryan A. Garner, 15 Green Bag 2d 17, 22-24 (2011)).

#### Obligation to Hold Harmless

Similar to the obligation to indemnify (see *Obligation to Indemnify*), in states or courts that recognize a distinction, under the obligation to hold harmless the indemnifying party must:

- Reimburse for covered **paid costs and expenses** (losses).
- Advance payment for covered **unpaid costs and expenses** (like liabilities) as they are incurred.

However, unlike the indemnity obligation, in states and courts that recognize a distinction, the hold harmless obligation may require the indemnifying party to advance payment for covered unpaid costs and expenses even when the defined recoverable damages are limited to losses and do not include liabilities, claims, and causes of action (see *Obligation to Indemnify and Defining the Recoverable Damages*).

Additionally, although unlikely in Georgia, "hold harmless" may release the indemnified party from any related claim or cause of action by the indemnifying party.

To avoid "hold harmless" being given meaning above and beyond indemnification or otherwise causing confusion, the indemnifying party should consider:

- Excluding "hold harmless" from the indemnification provision. However, if the contract includes the obligation to defend, the indemnifying party will likely in any event have to compensate the indemnified party for both paid and unpaid costs and expenses (see *Obligation to Defend*).
- Clarifying that payments will be made only for actual losses and in the form of reimbursement.

For more information, see Standard Clauses, General Contract Clauses: Indemnification (GA): Drafting Note: Hold Harmless ([W-000-1089](#)).

#### STATUTORY AND COMMON LAW BARRIERS TO ENFORCEMENT

Statutory or common law restrictions may limit the enforceability of an indemnity. While there is no specific statute that generally governs the enforceability of all indemnification provisions in Georgia, parties should review any applicable Georgia law specific to their circumstances that may restrict or establish rules regarding aspects of the indemnity provision. For example, certain types of indemnities are vulnerable to challenge under state law or public policy that:

- Require a party to indemnify another for all claims, regardless of who is at fault. In Georgia, when a party seeking to indemnify for

its own negligence does so in unequivocal terms, courts give effect to those provisions. However, Georgia courts:

- strictly construe these types of indemnification provisions against the indemnified party (see *Service Merchandise Co.*, 274 Ga. App. at 296; see also *Firmani v. Dar-Court Builders, LLC*, 339 Ga. App. 413, 425 (2016));
  - do not give effect to any terms by implication where the language is not otherwise clear (see *Seaboard Coast Line R. Co. v. Dockery*, 135 Ga. App. 540, 545 (1975)); and
  - have held that an agreement by one party to indemnify another against “any and all claims” does not clearly and unequivocally evidence the indemnifying party’s intent to indemnify for the indemnitee’s own negligence (see *Park Pride Atlanta, Inc. v. City of Atlanta*, 246 Ga. App. 689, 690-91 (2000)).
- Georgia courts, however, have enforced less than explicit language to require indemnification for damages resulting from the combination of the indemnified and indemnifying parties’ negligence (see, for example, *Lawyers Title Ins. Corp. v. New Freedom Mortgage Corp.*, 285 Ga. App. 22, 30 (2007)). Nevertheless, best practice is to expressly mention negligence
  - Provide for tort-based damages like punitive damages (in Georgia, public policy does not bar insurance coverage for punitive damages (see *Fed. Ins. Co. v. Nat’l Distrib. Co., Inc.*, 203 Ga. App. 763, 768 (1992)).
  - Are not conspicuously set out in the contract (see, for example, Legal Update, Tenth Circuit: Inconspicuous Indemnification Clause is Unenforceable ([2-591-9145](#))). While Georgia does not require an indemnification provision to be conspicuous, courts may disfavor provisions buried in an agreement, especially where the provision might be viewed as disfavored or otherwise meriting greater conspicuousness (for example, protecting an indemnitee against its own negligence).
  - Are given by protected classes like those involved in or relating to:
    - construction-related contracts (O.C.G.A. § 13-8-2(b)) (indemnification against party’s own negligence is void);
    - engineering, architectural, or land surveying services (O.C.G.A. § 13-8-2(c)) (indemnification agreements void except for the indemnification for damages resulting from the negligence, recklessness, or intentionally wrongful conduct of the indemnifying party or its representatives);
    - motor carrier transportation contracts (O.C.G.A. § 40-1-113) (indemnification in a transportation contract against party’s own negligence or intentional acts is void); and
    - leases (O.C.G.A. § 11-2A-504) (indemnification for the loss of tax benefits or damage to landlord’s interest must be reasonable).

## IDENTIFYING THE INDEMNIFIED PARTIES

Either or both parties to the agreement may be indemnified parties, depending on whether the indemnification clause is structured as a unilateral indemnification or a mutual indemnification (for more on mutual indemnification, see Mutual Indemnities). Some contracts include officers, directors, managers, members, employees, agents, subcontractors, and affiliates as indemnified parties.

If parties include certain terms, for example, affiliates, they may need to add temporal modifiers to expressly indicate whether they intend the term to include both existing and future affiliates. In the absence of defining or modifying the term, Georgia courts look to the language of the contract as a whole to determine the intention of the parties (see *Service Merch.*, 274 Ga. App. at 292 (the language the parties have used will be looked to for the purpose of finding the parties’ intent, and all ambiguities are construed against the drafter); see also *Ellington v. EMI Music, Inc.*, 997 N.Y.S.2d 339, 343-44 (2014) (use of the term “affiliates” in a contract includes only those affiliates in existence at the time the contract was executed, absent clear and unambiguous language indicating that the parties intended to bind other affiliated parties to the underlying contractual obligations)).

When identifying the indemnified parties, parties should consider the impact of other provisions in the agreement:

- **Third-party beneficiaries provisions.** The parties can use a third-party beneficiaries provision to give a third-party indemnified party the ability to enforce its rights under the agreement. For a sample third-party beneficiaries provision, see Standard Clauses, General Contract Clauses: Third-Party Beneficiaries ([6-519-7630](#)).
- **Assignment provisions.** An assignment provision can change or expand the list of future indemnified parties (see Assignment Rights).

For more information, see Standard Clauses, General Contract Clauses: Indemnification (GA): Drafting Note: Who is the Indemnifying Party? ([W-000-1089](#)).

## DEFINING THE SCOPE OF THE INDEMNITY

Parties can manage risk expectations and avoid interpretation, enforceability, and other disputes if the covered events and related damages under the indemnity are appropriate in nature and scope. To do this, a party should:

- Carefully consider its needs and negotiating position within the given context.
- Assess transaction-related risk in terms of events and consequences, and the likelihood that those events or consequences will occur.

In defining the scope of the indemnity, the parties should consider how broadly or narrowly they will:

- Define the recoverable damages (see Defining the Recoverable Damages).
- Define the nexus phrase (see Choosing the Right Nexus Phrase).
- Define the covered events of the indemnity (see Defining the Covered Events of the Indemnity).
- Limit the scope of the indemnity (see Limitation of Liability Approaches).

## DEFINING THE RECOVERABLE DAMAGES

Although seemingly redundant, each word in the phrase “losses, liabilities, claims, and causes of action” has an individual meaning and serves a specific purpose. Since Georgia courts strictly construe indemnification provisions against the indemnified party, the parties

should include language covering all types of damages intended to be covered (see, for example, *Service Merch.*, 274 Ga. App. at 292). The terms are listed below in order of increasing breadth:

- **Losses.** This includes any covered judgments, settlements, fees, costs, and expenses. The indemnifying party becomes responsible for a loss only after the indemnified party pays. (See, for example, *Auto-Owners Ins. Co. v. Anderson*, 252 Ga. App. 361, 364 (2001).)
- **Liabilities.** This includes debts and other legal obligations. The indemnifying party becomes responsible for a liability when the liability is legally imposed, but before the money is paid. (See, for example, *Doss & Associates*, 325 Ga. App. at 466.)
- **Claims.** This includes damages resulting from a third-party lawsuit. The indemnifying party becomes responsible for a claim at the moment when a party, including any third party, files a lawsuit.
- **Causes of action.** This includes damages resulting from a right to seek relief. The indemnifying party becomes responsible for a cause of action when the indemnified party's or a third party's right to seek relief, as the case may be, accrues.

The above list of standard covered items is not exhaustive. Additionally, "losses, liabilities, claims, or causes of action" can be narrowly tailored, for example, to cover one or more of the following:

- Personal injury and death.
- Real and personal property damage. Parties may specify "tangible property damage" if they want to distinguish the term from indemnification for claims relating to intangible property (such as claims for intellectual property infringement).
- Infringement of intellectual property. However, intellectual property claims are often covered in a separate provision because intellectual property indemnification generally has different:
  - remedies: and
  - limitations of liability.
- For an example of an intellectual property indemnification provision, see Standard Document, Professional Services Agreement: Section 11.2 ([9-500-2928](#)).
- Breach of confidentiality.
- Violation of law.

### Direct Versus Third-Party Claims

The obligation to compensate an indemnified party may apply to:

- **Direct claims.** These are claims that the indemnified party has against the indemnifying party. Commercial contract indemnification provisions typically do not cover direct claims. These provisions will only cover third-party claims unless the language clearly reflects the intent to cover direct claims also. Therefore, absent specific language, parties cannot rely on a general indemnity clause to recover costs from legal action against one other. (See *SRG Consulting, Inc. v. Eagle Hosp. Physicians, LLC*, 282 Ga. App. 842, 844-45 (2006).) Parties, however, may be subject to increased risk of liability or dispute if they overlook or fail to address direct claims (see Practice Note, Indemnification: Avoiding Common Pitfalls: Direct Claims ([W-015-5317](#))). An indemnification provision for direct claims typically covers damages relating to the indemnifying party's acts, omissions, or breach of the agreement.

- **Third-party claims.** These are claims that a third party has against the indemnified party, which parties most commonly use indemnification to cover.

In many commercial transactions, parties limit indemnification to cover only third-party claims and address liability for direct damages elsewhere in the agreement, for example, in the limitation of liability clause. If the indemnification clause covers direct claims and breach of the agreement, the parties should consider whether the indemnification obligation should be included in the limitation of liability. For a sample limitation of liability clause, see Standard Clauses, General Contract Clauses: Limitation of Liability (GA) ([W-000-1148](#)).

### Attorneys' Fees

Under Georgia law, unless a statute provides otherwise or an indemnification clause includes a duty to defend or express language requiring the payment of attorneys' fees, an indemnified party is not entitled to recover attorneys' fees and legal costs incurred as a result of suits brought against it relating to matters for which the party is entitled to be indemnified (see *George L. Smith II*, 255 Ga. App. at 644).

Similarly, attorneys' fees incurred in establishing the right to indemnification are not permitted unless there is a clear and unambiguous contractual provision or a statutory right providing for such fees and costs (see, for example, *SRG Consulting*, 282 Ga. App. at 844-45; but see *PIC Group, Inc. v. LandCoast Insulation, Inc.*, 795 F. Supp. 2d 459, 461-63 (S.D. Miss. 2011) (applying Georgia law to hold that the broad language of an indemnity agreement covering "costs" and "expenses" which are "in connection with" breach of the agreement allowed recovery of attorneys' fees incurred in enforcing the agreement)).

Therefore, parties should expressly address attorneys' fees in the indemnity provision, and if relevant, identify whether they are limited to reasonable or out-of-pocket expenses. Attorneys' fees are implicitly included in an obligation to defend.

### CHOOSING THE RIGHT NEXUS PHRASE

This Note uses the term **nexus phrase** to describe the series of words that link the list of recoverable damages (for example, losses or liabilities) to the covered events (for example, breach of the agreement or the indemnifying party's negligence). Nexus phrases dictate the degree to which the event giving rise to the indemnity and the indemnified party's damages need to be related for the event to qualify for recovery. The nexus phrase therefore helps shape the scope of indemnity and directly impacts the amount of recoverable damages.

Usually, the **indemnified party** wants the indemnity to include a broad nexus phrase, for example, "related to." A broad nexus phrase helps to expand the indemnity's scope of coverage.

Usually, the **indemnifying party** wants the indemnity to include a narrow nexus phrase. A narrow nexus phrase excludes damages unrelated to the indemnifying party's own acts or omissions. To narrow indemnity coverage, parties can use:

- "Caused by."
- "Result from."

- “Solely result from.”
- “To the extent they arise out of.”

While these examples are more narrow than “related to” language, courts may construe some of these more broadly than others. For example, Georgia subscribes to the general rule that indemnity agreements containing language such as “arising out of” should be read broadly (see *Fayette County Nursing Home, LLC v. PRI X-Ray, LLC*, 342 Ga. App. 143, 146-47 (2017) and *Viad Corp.*, 343 Ga. App. at 615-16).

### DEFINING THE COVERED EVENTS OF THE INDEMNITY

Covered events generally arise from or relate to:

- The indemnifying party’s breach of the agreement (see Indemnities for Breach of the Agreement ([2-519-9438](#))).
- The indemnifying party’s acts or omissions, even if the acts or omissions are not breaches (see Occurrence-Based Indemnities ([W-000-1089](#))).

Covered events include two broad categories:

- Direct claims.
- Third-party claims.

### Indemnities for Breach of the Agreement

An indemnity for breach of some or all of the agreement may appear unnecessary because a breaching party can almost always be sued for the direct loss under contract theory. However, parties commonly include an indemnity for breach as a way to:

- Change (usually extend) the indemnified party’s right to recover damages, particularly regarding legal costs and expenses.
- Recover loss suffered as a result of third-party claims that result from the breach.

Indemnity based on breach of the agreement can be limited by:

- **Common law.** Common law rules relating to breach of the agreement, such as the foreseeability rule in *Hadley v. Baxendale*, may similarly modify indemnity coverage of breach ((1854) 156 Eng. Rep. 145). Under *Hadley*, a plaintiff may not recover damages that are improbable and unforeseeable unless the defendant had special knowledge of the circumstance. Georgia courts have not definitively determined whether *Hadley’s* foreseeability rule would apply to an indemnity claim based on breach of the agreement. Therefore, if appropriate, parties should include “reasonably foreseeable” language in the indemnity provision to ensure that the common law rule of reasonableness applies.
- **Limitations in the underlying contract language.** The scope, depth, and duration of the indemnifying party’s representations, warranties, and covenants impact the indemnified party’s indemnification rights for breach of the agreement. For example, the seller of a business often makes a series of representations about its business and the enforceability of the agreement to induce the buyer to enter into the transaction. If a statement is untrue when made, then the seller has breached the agreement, and the buyer may have an indemnification claim on this basis. If the statement is true when made, but becomes untrue some time later, then the seller has not breached the agreement, and the buyer does not have an indemnification claim (unless the seller breaches a corresponding covenant). To the extent that a

representation is qualified, the indemnification for breach of that representation will also be correspondingly limited. For sample representations and warranties, see Standard Clauses, General Contract Clauses: Representations and Warranties ([2-519-9438](#)).

For more information on indemnity for breach of the agreement, see Standard Clauses, General Contract Clauses: Indemnification (GA) ([W-000-1089](#)).

### Occurrence-Based Indemnities

Indemnity clauses frequently cover liabilities based on specific occurrences. A broad occurrence-based indemnity obligation may, for example, cover all negligent acts or omissions of the indemnifying party. In some instances, parties may agree to forgo a non-infringement representation and warranty, but protect the indemnified party with an indemnity obligation covering third-party intellectual property infringement claims. In this case, the third-party claim does not arise from a breach, but is indemnified regardless.

Occurrence-based indemnities can be narrowed, including by:

- Limiting coverage to specific claims or liabilities. The claims may be known or unknown, contingent or non-contingent, or cover a specific subject matter, such as:
  - environmental harms;
  - claims arising in a specific jurisdiction; or
  - losses associated with specific pending litigation.
- Limiting the scope of activities and qualifying the standard of care, for example, by replacing “negligent acts or omissions” with “negligent work” or limiting the indemnification obligation to apply only when the indemnifying party is solely negligent.

### LIMITATION OF LIABILITY APPROACHES

Parties should customize indemnity coverage to be reasonably consistent with the transaction-related risk and the parties’ negotiating posture. Parties can control the impact of the indemnity by:

- Carefully tailoring the language, by negotiating, for example:
  - exceptions to the indemnifying party’s obligation to indemnify (see Exceptions to Indemnification);
  - the degree to which either party has the right or the obligation to control the defense of an indemnified claim (see Control of Defense Provisions);
  - the degree to which the indemnified party has the obligation to notify the indemnifying party of third-party claims (see Notice of Third-Party Claims);
  - indemnification deductibles (see Liability Baskets);
  - an indemnification cap (see Maximum Liability (Limitation of Liability)); and
  - materiality and other indemnification qualifiers (see Materiality and Other Qualifiers).
- Integrating the language with the agreement’s other risk allocation provisions, for example:
  - waiver of consequential damages (see Waiver of Incidental and Consequential Damages);
  - sole remedy provisions (see Sole Remedy Provisions); and
  - assignment rights (see Assignment Rights).

## EXCEPTIONS TO INDEMNIFICATION

Indemnity coverage commonly excludes circumstances where the indemnified party's own actions cause or contribute to, in whole or in part, the harm triggering indemnification. For example, an indemnification provision may exclude the indemnified party's:

- Negligent or grossly negligent acts or omissions, or willful misconduct.
- Use or alteration of the products that does not conform with the specifications.
- Bad faith failure to comply with the agreement.

A party with significant negotiating leverage may request indemnification for its own plain or ordinary negligence, including only gross negligence as an exception to indemnification. With certain exceptions, Georgia public policy generally does not prohibit indemnifying a party for its own negligence if the parties' agreement explicitly and unequivocally states that intent (see *Park Pride Atlanta*, 246 Ga. App. at 690-91).

Requesting indemnification for one's own negligence is unusual and typically associated with specific industries and may be subject to statutory restrictions. For example, under Georgia law:

- Construction and motor carrier contracts are statutorily prohibited from indemnifying a party for its own negligence (O.C.G.A. §§ 13-8-2(b) and 40-1-113).
- Indemnification clauses in engineering, architectural, or land surveying services contracts are prohibited, except for damages resulting from the negligence, recklessness, or intentionally wrongful conduct of the indemnifying party or its representatives (O.C.G.A. § 13-8-2(c)).

Such requests are uncommon in the broad commercial context. A party seeking indemnification for its own negligence should consider:

- Whether such requests are accepted practice in the relevant industry.
- Whether applicable state laws or industry-specific regulations allow or prohibit such indemnification.
- Whether the nature and scope of the risk sufficiently outweighs the bargained-for consideration in the transaction.
- The potential negative effect of the request on negotiations of the overall transaction.

In Georgia, provisions indemnifying a party for its own negligence are strictly construed against the indemnified party (see *Service Merch.*, 274 Ga. App. at 296.) In doing so, courts do not give effect to any terms by implication where the language is not otherwise clear (*Seaboard Coast Line R. Co.*, 135 Ga. App. at 545).

Further, since Georgia public policy never implies an agreement to indemnify a party for its own negligence in the absence of express language, courts are unlikely to extend indemnity provisions covering a party's own negligence to cover a party's own gross negligence or intentional conduct absent express terms (see, for example, *Ryder Integrated Logistics Inc. v. BellSouth Telecommunications, Inc.*, 281 Ga. 736, 737-38 (2007); see also *Holmes v. Clear Channel Outdoor, Inc.*, 284 Ga. App. 474, 477 (2007) (holding that exculpatory clauses relieving liability for acts of gross negligence or willful or wanton conduct are void as against public policy)).

For an example of an exceptions clause in an indemnity provision, see Standard Clauses, General Contract Clauses: Indemnification (GA): Section 2.1 ([W-000-1089](#)). For common indemnity exclusions found in the loan agreement context, see Practice Note, Loan Agreement: Expenses and Indemnification: Exceptions to Expense Reimbursement Obligation ([4-502-0802](#)).

## WAIVER OF INCIDENTAL AND CONSEQUENTIAL DAMAGES

This waiver, which often disclaims a host of non-direct damages including indirect, consequential, incidental, punitive, and special, limits the indemnifying party's liability to certain actual and direct damages and reduces the amount the party may otherwise be liable to pay. For definitions of certain of these damages, see Practice Note, Damages for Breach of Commercial Contracts ([W-012-6210](#)). For a sample waiver of incidental and consequential damages, see Standard Clauses, General Contract Clauses: Limitation of Liability (GA) ([W-000-1148](#)).

When drafting and negotiating an indemnification provision, parties should understand whether and how this type of waiver impacts the indemnification provision. For example, if the indemnity for third-party claims is not excluded from the waiver, the indemnifying party generally is not required to pay for indirect and consequential damages stemming from third-party claims even though these damages are caused by its own bad acts. If parties intend for the indemnity to cover **all** liabilities (including indirect and consequential damages) arising from third-party claims, then the parties should exclude indemnification for third-party claims from the waiver.

## CONTROL OF DEFENSE PROVISIONS

With an obligation to defend, the indemnifying party has the right to control the defense, unless the agreement states otherwise. Georgia courts uphold the parties' right to allocate the control of defense to the indemnifying party (see, for example, *Tuzman v. Leventhal*, 174 Ga. App. 297, 299-300 (1985)). As the paying party, the indemnifying party wants to control the defense to better regulate its expenses and liabilities. However, the indemnified party, as defendant, may want to control the defense to protect its own legal status, reputation, and liability.

If representation by the same counsel presents a genuine conflict of interest between the parties, Georgia law may grant the indemnified party the right to select counsel, subject to certain conditions (see, for example, *Am. Family Life Assur. Co. of Columbus, Ga. v. U.S. Fire Co.*, 885 F.2d 826, 831-32 (11th Cir. 1989)). However, for more certain protection and control over its liabilities, an indemnified party can seek contractual rights, such as the right to:

- Assume the defense, either outright or based on certain contingencies (for example, conflict of interest or inaction of the indemnifying party).
- Consent to settling the claim or entry of a judgment, either outright or based on certain contingencies (for example, if the judgment will have an adverse impact on the indemnified party's financial interest or reputation).
- Consent to counsel selection.
- Participate in the defense (possibly at its own expense).

For an example of a Control of Defense Provision, see Standard Clauses, General Contract Clauses: Indemnification (GA): Section 3 ([W-000-1089](#)).

### NOTICE OF THIRD-PARTY CLAIMS

The indemnifying party is usually better able to limit its liability if:

- It has prompt notice of a covered third-party claim. Georgia courts generally agree that prompt, written notice provisions are conditions precedent to indemnification rights (see *Progressive Mountain Ins. Co. v. Bishop*, 338 Ga. App. 115, 117-18 (2016); see also *Artrac Corp. v. Austin Kelley Advertising, Inc.*, 197 Ga. App. 772, 776 (1990)).
- The indemnified party agrees to cooperate throughout the disposition of the claim.

However, under common law, the indemnified party's failure to give the indemnifying party notice of covered claims does not relieve the indemnifying party from its indemnity obligations. Therefore, an indemnifying party may want to insist in the contract on prompt notice of a third-party claim.

The main point of contention regarding notice typically relates to whether the indemnified party's late or defective notice excuses or limits the indemnifying party's obligation to indemnify. To avoid this potential conflict, the parties should specify whether indemnification:

- Is conditioned on notice.
- Covers litigation expenses that were incurred before notice.

The parties may agree that an indemnified party's failure to provide proper notice will excuse the indemnity obligation only to the extent the indemnifying party's ability to defend is adversely affected, such as if the lack of notice causes the indemnifying party to miss a filing deadline.

### LIABILITY BASKETS

Liability baskets are common in corporate transactions like asset and stock purchase transactions, but uncommon in commercial transactions like the sale of goods and services. However, sellers that engage in multiple transactions with individual buyers should consider including this provision, as the cost of indemnifying a relatively small third-party claim could greatly exceed the value of the commercial agreement.

Generally, a basket shields the indemnifying party from having to indemnify an otherwise covered claim unless and until the amount of losses resulting from covered claims exceeds a defined amount. The parties can structure the basket as either a:

- Threshold, so that once the agreed amount is reached, the indemnifying party is liable for the total amount of losses (sometimes referred to as a "tipping," "dollar one," or "first dollar" basket).
- Deductible, so that once the agreed amount is reached, the indemnifying party is only liable for the amount of losses in excess of the agreed amount (sometimes referred to as an "excess liability" basket).

For an example of a liability basket provision, see Standard Clauses, General Contract Clauses: Indemnification (GA): Section 2.2 ([W-000-1089](#)) and the accompanying Drafting Note, which also

discusses the possibility of structuring the liability basket as hybrid threshold/deductible basket or a mini-basket. A party could even establish a "mini-basket," where an individual loss must exceed a certain dollar threshold to be applied to the basket itself.

### The Implications of a Liability Basket on the Obligation to Defend

Parties may choose to limit an obligation to defend using a liability basket. In this case, the obligation to defend may arise before the liability basket threshold has been reached. Parties should consider clarifying the parties' rights and responsibilities by obligating the indemnified party to reimburse the indemnifying party for all non-covered amounts in this event.

### MAXIMUM LIABILITY (LIMITATION OF LIABILITY)

An indemnifying party with negotiating leverage may insist on a monetary cap on indemnity. As with other types of liability caps, the indemnifying party should ensure that this provision:

- Caps its potential liability to a fixed amount.
- Limits the maximum aggregate liability for all potential claims that may arise under the agreement, not just for individual claims.

The indemnification cap may appear in a general limitation of liability clause covering all contract liabilities (including indemnity) or as part of the indemnification provision (see, for example, *WESI, LLC v. Compass Environmental, Inc.*, 509 F. Supp. 2d 1353, 1356 (2007)). A limitation of liability covering all contract liabilities will affect the indemnity provision, unless indemnification is explicitly excluded from the cap.

For an example of a maximum liability clause, see Standard Clauses, General Contract Clauses: Indemnification (GA): Section 2.3 ([W-000-1089](#)).

If the agreement includes a cap on the maximum liability for indemnification, the parties should ensure that the agreement does not contain any other provisions that potentially conflict with the stated limit.

### Implications of Maximum Liability on the Obligation to Defend

Parties may choose to limit an obligation to defend using a liability cap. In this case, the obligation to defend may continue after the liability cap has been reached. Parties should consider clarifying the parties' rights and responsibilities by obligating:

- The indemnifying party to continue the defense.
- The indemnified party to reimburse the indemnifying party for all non-covered amounts in this event.

### SOLE REMEDY PROVISIONS

A sole remedy provision prohibits the indemnified party from recovering damages for covered claims beyond the terms set out in the indemnification provision. With a sole remedy provision, the indemnified party can look only to the indemnification provision for recourse on covered claims (see, for example, *WESI, LLC*, 509 F. Supp. 2d at 1356 (referring to an "exclusive remedy" provision)). Without a sole remedy provision, the indemnified party may be able to use a non-indemnity related contractual remedy or remedy at law to recover more than what the indemnifying party thought the parties had originally bargained for.



In addition, the indemnifying party should ensure that the agreement does not contain a cumulative remedies clause that could conflict with this provision and, as a result, provide the aggrieved party an opportunity to seek damages or remedies beyond the scope of what is provided in the indemnification clause. Parties should, if appropriate, exclude the indemnification clause from the cumulative remedies provision.

For an example of a sole remedy provision, see Standard Clauses, General Contract Clauses: Indemnification (GA): Section 2.6 ([W-000-1089](#)).

### MUTUAL INDEMNITIES

Commercial contracts often include mutual indemnification provisions. Under a mutual indemnification provision, each party indemnifies the other. While mutual, each indemnity obligation is not necessarily identical or proportional to the other. The extent to which the provision is balanced depends on the allocation of risk and negotiating power between the parties. Each indemnifying party should strive to tailor the indemnity to cover only the risk it has agreed to shoulder.

The mutuality of an indemnity can serve to mitigate risk for either or both parties by:

- Reducing the likelihood of litigation between the parties.
- Strengthening the contractual relationship.
- Establishing certainty regarding future potential liability.

### MATERIALITY AND OTHER QUALIFIERS

Often, the representations and warranties in the agreement are subject to materiality or other qualifiers. For example, a warranty may state: “Seller represents and warrants that products are free from **material** defects in material and workmanship.”

These qualifiers prohibit the non-breaching party from recovering damages for the breach unless it can prove that the nature or the subject matter of the breach, as the case may be, was material. In Georgia, a breach is material if it both:

- Goes to the matter or essence of the contract and renders substantial performance of its terms impossible.
- Is so substantial and fundamental so as to defeat the object of the contract.

(*Forsyth Cty. v. Waterscape Servs., LLC*, 303 Ga. App. 623, 633 (2010) and *Lanier Home Center v. Underwood*, 252 Ga. App. 745, 746 (2001).)

Indemnity for breach of a contract provision does not negate the qualification placed on that provision, and so to this extent the unqualified indemnification is similarly diluted, unless the contract has an express statement to the contrary.

Sometimes, the parties agree to qualify the indemnification provision with materiality. The parties should consider the consequences of qualifying the indemnification provision with materiality because:

- It introduces a second layer of materiality if the underlying representation is already qualified by materiality. In this case the indemnifying party indemnifies only if it materially breaches a provision that may already be qualified by materiality. This is sometimes called double materiality.

- It introduces a new layer of materiality to representations that the indemnifying party may have negotiated without qualification. This is sometimes called back-door materiality.
- The indemnifying party may already have negotiated protective qualifiers like indemnification baskets, which act as a kind of materiality qualifier (see Liability Baskets).

### INSURANCE AND ESCROW

Like most other contractual obligations, indemnification is only valuable if the indemnifying party stands behind its promise. If an indemnifying party is a significant credit risk, then the indemnified party should consider requiring the indemnifying party to obtain a minimum level of insurance coverage. Parties commonly use insurance contracts to:

- Supplement, or even substitute, indemnity obligations.
- Induce counterparties to enter into the transaction.

The insurance policy can usually be tailored to correspond to the transaction at hand. Different kinds of coverage may apply to different aspects of the agreement, such as representation and warranty insurance; but the parties should carefully consider whether the types and amounts of insurance required are adequate to cover all indemnification obligations.

Similarly, a party may seek a portion of the purchase price or service fees to be held in escrow to satisfy the other party's indemnification obligations. These funds are often held in escrow for the duration of the indemnity survival period.

Both insurance and escrows for indemnification obligations are more commonly used in M&A transactions but less frequently relied on in commercial contracts. For more information on insurance, see Insurance Policies and Coverage Toolkit ([4-506-1171](#)).

### ASSIGNMENT RIGHTS

Assignment of the agreement could unexpectedly alter the risk allocation in the transaction. For example, the indemnifying party may assign the contract to a third party that cannot honor the indemnity obligations. Absent language to the contrary, Georgia common law applies and permits assignment in most cases (see *In re Terry*, 245 B.R. 422, 426 (Bankr. N.D. Ga. 2000); see also *Dennard v. Freeport Minerals Co.*, 250 Ga. 330 (1982)). Parties should therefore consider seeking assignment limitations, such as consent requirements, if appropriate.

However, under Georgia law, anti-assignment provisions are interpreted narrowly. Absent express terms, where an anti-assignment provision prohibits the assignment of rights under a contract, violation of the anti-assignment provision gives the non-breaching party a right to damages for breach of contract but does not render the assignment ineffective unless the assignment would materially reduce the value of the contract. (*Spears Mattress Company, Inc. v. Innovative Mattress Solutions, LLC*, 2015 WL 13307074 at \*4 (N.D. Ga. July 7, 2015); *Singer Asset Finance Co. v. CGU Life Ins. of America*, 275 Ga. 328, 329-30 (2002).)

For more information on assignment limitations in Georgia, see Standard Clauses, General Contract Clauses: Assignment and Delegation (GA) ([W-000-0989](#)). For information on assignability of

commercial contracts, see Practice Note, Assignability of Commercial Contracts (GA) ([W-013-8962](#)).

## DURATION OF INDEMNITY

Indemnifying parties often impose time limitations on indemnity and related provisions to control liability. Absent an agreement to the contrary, Georgia law statutes of limitations dictate the length of time that a party has to raise a claim, including an indemnity claim (State Q&A, Statutes of Limitations: Georgia ([1-559-8625](#))).

Under Georgia law, a claim for contractual indemnification arising out of a simple contract must be brought within six years after the claim accrues (O.C.G.A. § 9-3-24; see also *Saiia Const., LLC v. Terracon Consultants, Inc.*, 310 Ga. App. 713, 716 (2011); but see *Suntrust Bank v. Venable*, 299 Ga. 655, 657 (2016) (holding that the Uniform Commercial Code's four year limitations period applies to breaches of contracts involving the sale of goods)). However, time limitations on indemnity claims may vary depending on whether the claim is a:

- **Direct claim.** The statute of limitations clock starts once the underlying indemnity accrues, which is when the indemnified party pays the settlement or judgement (see *Auto-Owners Ins. Co.*, 252 Ga. App. at 364). The length of time the indemnified party has to file the claim depends on the type of claim. Parties often limit the duration and survivability of contract terms, for example, to have the representations survive the deal closing but expire 30 days after the contract effective date (see, for example, *Encompass Ins. Co. of America v. Friedman*, 299 Ga. App. 429, 431 (2009) (limiting the period of time that a party has to bring a claim under the contract)). For an example of a survival provision, see Standard Clause, General Contract Clauses: Survival (GA) ([W-003-9726](#)). For a direct claim such as this, the contractual time limitations supersede the statute of limitations.
- **Third-party claim.** Absent an agreement to the contrary, the statute of limitations limits:
  - the amount of time the third party has to bring a claim against the indemnified party (the statute of limitations clock starts from the time the claim accrues); and
  - the amount of time the indemnified party has to bring an indemnity claim against the indemnifying party. A typical statute of limitations clock for an indemnity claim starts when the indemnified party has been served with process in the underlying lawsuit, or when the party knew or should have known of any act or omission giving rise to the cause of action for indemnity, whichever period expires later.

Ideally, the duration of the indemnity gives the indemnified party a reasonable amount of time to discover any covered breach or third-party claim. Parties should consider customizing indemnity duration in the agreement after:

- Analyzing each potential claim and its related statute of limitations.
- Coordinating the time limitations of each of the covered claims and the term and survival period of the contractual indemnity.

For a sample contractual statute of limitations clause, see Standard Clauses, General Contract Clauses: Contractual Statute of Limitations (GA) ([W-000-1090](#)). For a discussion of indemnity

duration in the context of acquisition agreements, see Practice Note, What's Market: Indemnification Provisions in Acquisition Agreements ([3-504-8533](#)).

## ALTERNATIVES TO INDEMNIFICATION

Indemnification is often a highly negotiated provision, and sometimes the benefits are not worth the battle. With this in mind, parties should consider alternatives to indemnity, including:

- Relying on Georgia common law or statute for recourse (for example, bringing a lawsuit for breach of warranty, breach of contract, or fraud).
- Conditioning the purchase price on fulfillment of certain conditions.
- Using a right of offset by escrowing a part of the consideration with a third party.
- Deferring payment so that the indemnified party can deduct potential indemnity payments from future payments.
- If you are the buyer, using your own subsidiary to purchase the seller or the seller's assets to confine the transaction-related risk to that subsidiary.
- Providing contractual work-arounds for anticipated problems (for example, requiring the infringing party to provide a non-infringing replacement in the event of intellectual property infringement).
- Using other risk allocation provisions to limit overall risk (see Practice Notes, Risk Allocation in Commercial Contracts ([4-519-5496](#)) and Remedies: Adequate Liability Coverage ([0-553-7425](#))).

Excluding an indemnification provision may increase the likelihood of dispute. Therefore, parties should make sure the agreement contains a strong dispute resolution provision if they choose not to include an indemnity clause. For a sample dispute resolution clause, see Standard Clauses, General Contract Clauses, Alternative Dispute Resolution (Multi-Tiered) (GA) ([W-008-2627](#)).

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