

# Indemnity Agreements and Liability Insurance



## Protection From Claims Brought by Third Parties

An individual or organization's risk of being held liable for personal injury or property damage may be shifted to another party who agrees to accept the risk and who holds liability insurance or sufficient assets to back up the acceptance of the risk. A release agreement guards against a successful lawsuit by the person signing the release; an indemnity agreement, in contrast, ensures that if some other person sues, the indemnifying party will be responsible for handling the claim.

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costs of future risks that may arise from the relationship, or in connection with the land. Risks of liability arising from ownership or rights of use of real property are sometimes referred to as premises liability. A primary example of premises liability is the risk of injury to third parties. Whenever a person is permitted to enter, use, or occupy the property of another, there is a risk that, if the person is injured, a claim will be asserted that the condition of the property somehow caused, or contributed to, the injury.

## No Agreement as to Premises Liability

If a contract obligates neither party to the contract to maintain the premises and if it does not delegate the risk of future claims to one party or the other, then (by default) each party will bear, independent of the other, their respective share of premises liability risk.

*Example.* A landowner grants an easement for access over a driveway to their neighbor. The granting document says nothing about who is responsible for the condition of the driveway or the safety of persons who may use the driveway. If a claim for injury is asserted by someone using the driveway, each person sued will bear, on their own, the cost of defending and, perhaps, paying the claim.

In some instances, statutes modify the default rule to advance public policy.<sup>2</sup> For example, the Recreational Use of Land and Water Act ("RULWA") limits liability associated with outdoor recreational activities to encourage

## Contract Provisions Addressing Liability Risks

Parties to a contract or a document<sup>1</sup> granting an interest in or right to use land (for example, a conservation easement, trail or other access easement, or lease) may include an understanding about who will, or will not, bear the

private landowners to make land available for recreational use. RULWA is more fully discussed in the guide [\*Pennsylvania's Recreational Use of Land and Water Act\*](#) published by WeConservePA.

*Example.* A trail group holds a trail easement on a property owned by a private individual. The granting document does not allocate risk or responsibility between the trail group and landowner. If a claim for injury is asserted by someone using the trail, the trail group and landowner have only the statutory immunity afforded under RULWA for protection against premises liability claims.

## Release of Liability

Parties to a contract may agree to limit their liability to one another for risks or harms arising in connection with the contract (typically injury<sup>3</sup> to persons or property). The contract provision aimed at this result is typically called a release.<sup>4</sup> Releases, assumption of risk agreements and covenants not to sue are discussed in the guide [\*Release of Liability\*](#) published by WeConservePA with an accompanying [\*Model Release Agreement\*](#). When a party signs a release in favor of another person, they are giving up the right to hold that person legally accountable for harms they may suffer.

*Example.* The owner of a piece of forested land desires to allow others to enter to cull the deer population. The owner's attorney prepares a release agreement, and owner requires hunters to execute a copy prior to entering the land.

The landowner has the ability to prohibit or allow activity on the land; thus, the landowner has the opportunity to obtain, as a condition of permitting the activity, release agreements protecting the landowner from liability for injuries sustained by an activity participant on the premises. But what if the risk isn't that the hunter will be injured but that someone else will be injured by the hunter? A release doesn't protect the organization from being sued by someone else.

Releases are very effective but only to bar a claim *by the releasing party*. No one can waive or release someone else's rights to a fair trial and due process of law.

## Indemnity Agreements

Indemnity is the tool by which one party to a contract (the "Indemnitor") promises to protect the other (the "Indemnitee") from risks and losses suffered not only by the Indemnitor, but by third parties as well.

*Example.* Rocky outcroppings on a landowner's property are well suited for recreational rock-climbing. A rock-climbing club asks the landowner to make the area available for rock-climbers. The club proposes that it will release the owner from liability and will carry \$1,000,000 in insurance coverage.

### Without Indemnity

The club's release protects the landowner from claims asserted *by the club* but will have no effect at all on the legal rights of club members (or anyone else for that matter) to assert a claim for rock-climbing or other injuries sustained on the premises. The owner may have valid defenses to such claims, including RULWA, but it cannot look to the club to bear the risks of defending, and perhaps paying, third-party claims.

What about the liability insurance coverage carried by the club in the above example? Doesn't that provide coverage for the owner? Unfortunately for the owner, absent an indemnity, or a change to the insurance policy adding the organization as an additional insured, the club's promise to maintain insurance may afford no protection for the owner, as discussed in the "Indemnity and Insurance" section of this guide.

### With Indemnity

If the club goes further with an agreement to indemnify, defend<sup>5</sup> and hold the organization harmless<sup>6</sup> from injuries arising from the activity, then the club (and possibly, as discussed below, the club's liability insurance carrier) will be responsible to defend and, as needed, pay claims for

injuries included within the scope of the indemnity provision.<sup>7</sup>

Note that indemnity provisions and contracts come in many shapes and sizes and can become quite lengthy to clearly define the rights and responsibilities of the parties. For example, exactly what risks are covered? Are there limits on the obligations of the Indemnitor? If a claim arises, does Indemnatee have the right to retain its own attorney? If so, does Indemnitor need to pay for the legal fees?

## Indemnity in Various Contexts

Allowing others to access one's property raises the risk of premises liability. Because many conservation transactions involve permissions, these and other risks must be thoughtfully addressed in each instance.

### Premesis Liability on Eased Land

Organizations holding conservation easements on privately-owned land accept certain rights and responsibilities with respect to the land, principally to block activity on the land that is contrary to the conservation objectives of the easement. It is not typical or advisable for a conservation easement to burden the holder with responsibility for identifying or eliminating hazardous conditions on the property, or the safety of any person or group that enters the land. Still, there remains some risk that an injured party could name the holder in a lawsuit seeking damages for an injury occurring on the eased land.

*Example.* A person visiting a conserved property is injured by a falling tree branch. Counsel for the injured person finds the grant of conservation easement in the deed records, concludes that perhaps the easement holder may be at least partially to blame for the injury, and names the organization in a personal injury complaint.

The *Model Grant of Conservation Easement and Declaration of Covenants* published by WeConservePA

anticipates this type of risk and includes an indemnity protecting the easement holder from claims for injury occurring on or about the conserved property.<sup>8</sup>

## Facilitating Public Access on Land of Another

An easement for public access is a familiar example of access granted in connection with a conservation project, whether the access easement is granted by separate document or embedded within a grant of conservation easement. To incentivize a private landowner to enable an organization to allow public access, the organization may agree to indemnify the landowner for risks related to doing so. Examples of indemnity provisions in this context are contained in WeConservePA's *Model Trail Easement Agreement* and the commentary to the *Model Grant of Conservation Easement and Declaration of Covenants*.

*Example:* A landowner grants a trail easement to an organization to create a recreational hiking trail across the property that will be open to the public. The grant of trail easement includes an indemnity provision whereby the organization promises to indemnify the owner for liability arising as a result of the public access, to the extent that such liability exceeds immunity afforded to the landowner by RUWLA or other applicable law.

## Access Afforded to Recreational User Groups

Landowners may choose to grant rights of access to recreational or sporting groups such as clubs organized for hiking, snowmobiling, bird watching, hunting, or fishing, if the club takes responsibility for injury to (or caused by) its members by obtaining releases and offering an indemnity backed up by insurance coverage.

*Example:* A group of hunters wishes to hunt on a property, but the landowner is uncomfortable relying solely on RULWA's protections from liability. The group offers to deliver releases from all its members, to

indemnify the landowner, and to carry not less than \$250,000 in liability insurance to protect the landowner from claims should anyone be injured on account of their hunting activities on the property. The additional protections afforded by releases, indemnity, and insurance persuade the landowner that the risks of liability are low, and it allows the group access.

## Access Afforded for Conservation Projects

Landowners may be willing to allow entry to their property to an organization for improving wildlife habitat, planting riparian buffers, remediating abandoned mine drainage and other projects related to the management or enhancement of natural, scenic, or recreational resources. Indemnity provisions (accompanied by releases and insurance coverage) assure the landowners that they will be protected should an employee of the organization, contractor to the organization, or any other person entering the land at the organization's invitation, be injured on the property. Under appropriate circumstances, the indemnified risk may also include claims asserted by project contractors and suppliers for payment for labor and materials furnished to the project site.

## Special Events

An organization may desire to raise revenues (and develop goodwill with the public) by allowing use of property it owns for special events such as weddings, conferences, and recreational or athletic events. Sometimes an organization's supporters are willing to make properties they own available for a special event such as a fundraiser or other celebration sponsored by the organization. The parties to a reservation or other agreement pertaining to a special event, whether the landowners or the event sponsors, are well advised to delineate responsibilities carefully and review risk management provisions with insurance carriers.

## Other Contracts

Indemnity provisions are found in almost any kind of contract pertaining to a commercial transaction: broker's agreements, construction contracts, agreements of

purchase and sale, service contracts, and so on. Often there is resistance to change any wording in the "standard form" but, even so, it is important to review the indemnity provision to see whether the indemnifying party is being asked to indemnify the other party for an occurrence that may, in whole or in part, be the fault of the indemnified party or someone for whom the indemnified party is responsible. If so, an appropriate exclusion should be appended to the boilerplate indemnity provision.

## Indemnity and Insurance

Insurance policies are contracts of indemnity. The insurer agrees to take responsibility for certain losses that may be sustained by the insured. Liability policies insure against claims for personal injury or property damage alleged to have resulted from the *action or inaction of the insured*, subject to the details and limitations of that particular policy.

When one party indemnifies another, it is promising to take action, legal or otherwise, to protect the indemnified party from liability. This promise can become costly.

*Example.* A landowner grants permission for an organization to enter their property to implement a habitat restoration project, provided that the organization indemnifies the owner for liability resulting from the project. An employee of an engineering firm contracted by the organization steps in a hole and is injured, and names both the landowner and the organization as defendants in a lawsuit seeking damages. The organization, by virtue of the indemnity it provided to the owner, is responsible for any costs the owner incurs defending the action.

Unless an indemnifying party has sufficient assets to defend against a claim and potentially pay out on the claim, it will need to extend the protection of its liability insurance to the indemnified party if it is to make good on its indemnification.

## Certificates of Insurance

An indemnity is only as valuable as the indemnifying party's ability to stand behind it. To ensure that the indemnifying party has the means to indemnify the indemnified party, the indemnified party may seek a commitment from the indemnifying party to carry liability insurance coverage (with protection for the indemnified party as discussed below) in a certain minimum amount. A certificate of insurance is a document issued by the insurance company that verifies the existence of certain insurance coverage and the limits of liability for each type of coverage.

*Example.* The contract between a snowmobiling club and landowner includes an indemnity provision covering claims of injury suffered by club members on the premises. The contract requires, at the beginning of each season, delivery of a certificate of insurance providing evidence of liability insurance covering the club and its members with limits of not less than \$500,000 per incident and \$1,000,000 in the aggregate. The certificate must evidence that the policy remains in effect for the entire snowmobiling season and includes contractual liability coverage (discussed below).

A certificate of insurance is a snapshot of coverage at a point in time. Receipt of a certificate cannot guarantee that the policy holder will continue to pay premiums on time or otherwise comply with insurer requirements.

## Two Methods to Extend Liability Coverage to the Indemnified Party

There are two ways to extend the protection of the indemnifying party's liability insurance to the indemnified party.

- The indemnifying party<sup>9</sup> may be afforded coverage by endorsing the policy to add the indemnified party as an **additional insured**.
- When the insured is an indemnifying party under an indemnity provision, the protection afforded by liability insurance can be extended to cover risks

resulting from the *negligence of the indemnified parties*<sup>10</sup> if the policy includes **contractual liability coverage** as discussed below.

### Additional Insured

Liability policies insure against injury resulting from the alleged actions or inactions of the insured; thus, adding additional persons as insureds affords them the same coverage as the original insured.

#### *Reasons to Include as Additional Insured (Or Not)*

An indemnified party may seek additional insured status because, if the indemnity proves unenforceable for some reason, the indemnified party may still be covered under the policy as an insured. Another reason is that the indemnified party may, if agreed by the insurer, receive notice of cancellation of the policy.

On the other hand, there are risks when the parties adopt this method to back an indemnity with insurance. Insurers may or may not agree to add others as insureds to an existing policy and, if they do, they may charge an additional premium for doing so. Coverage is not automatic; each indemnified party must be specifically named in a special endorsement issued by the liability insurer who must issue a separate certificate of insurance to each person added to the policy. Persons included in an indemnity by title or relationship to the primary indemnified party (for example, by including "its officers, directors, contractors, agents, and volunteers") will not be covered as additional insureds unless specifically named.

As discussed in more detail below, there may not be perfect alignment between the risks addressed in an indemnity agreement and the risks covered by the insurance policy.

#### *Balancing Pros and Cons*

The time and, perhaps, expense to obtain policy endorsements and certificates of insurance evidencing additional insured status must be balanced against the length of the contract and the risks undertaken by the indemnifying party. A landlord under a long-term lease reasonably expects to be named as insured on a tenant's liability policy.

Landowners who make their property available for an event at which alcoholic beverages will be served may reasonably insist on being named as insureds on the event sponsor's policy including liquor liability. On the other hand, liability insurers are becoming increasingly cautious about issuing policies and policy endorsements. Indemnifying parties that are loosely organized (as some recreational user groups are) and lack a long relationship with an insurer may find it difficult to obtain such policy endorsements quickly or inexpensively (if at all).

### **Contractual Liability Coverage**

A liability insurance policy only insures the policy holder and those named as additional insureds. By default, insurance policies exclude coverage for liabilities assumed under contracts of the insured. However, coverage for that risk can be added by endorsement (called a contractual liability endorsement) to the policy at the time of issuance with little or no additional charge.

#### *Broad Coverage*

Contractual liability coverage is, in insurance terminology, *broad*. There is no need to identify on the policy or by endorsement specific indemnity provisions or particular indemnified parties. The coverage extends to all losses occurring during the term of the policy covered by indemnity provisions entered into by the insured and extends to all indemnified parties under such indemnity provisions.

## **Scope of Indemnity Exceeds Insurance Coverage**

The risks covered by indemnity provisions and the risks covered by liability insurance typically overlap but the parties to indemnity provisions must consider instances when the scope of the indemnity exceeds insurance coverage for the risk.

### **Claims Exceeding Policy Limits**

One reason that a claim may not be adequately covered is that it simply exceeds the insurance limits under the

policy. Parties to an indemnity provision negotiate the terms based upon their evaluation of claims reasonably expected to occur and insurance limits reasonably expected to cover those claims. But what if the loss exceeds available insurance proceeds? Charitable organizations, such as a nonprofit organization, may resist furnishing any indemnity at all due to a concern that their charitable assets may be exposed to cover a claim against the indemnified party. An indemnity limited to insurance proceeds available to pay the claim may be useful in this circumstance.

*Example.* Eagle View Inc., a nonprofit charitable organization, seeks to lease a section of Eagle View Mountain for bird watching activities. The landowner is happy to have the income from the lease but insists on an indemnity provision. Eagle View carries a liability policy with \$500,000 limits of coverage. It is willing to commit to obtaining releases from its members and maintaining its existing insurance coverage but cannot afford to pay higher premiums for more coverage. The policy of Eagle View is not to jeopardize its charitable endowment by any contractual commitments. The landowner and Eagle View agree to limit the indemnity provision to such proceeds as are available for defending and paying the claim under Eagle View's liability insurance policy.

## **Claims Not Covered By Liability Insurance**

A prospective indemnifying party must consider whether the scope of the requested indemnity provision includes risks not covered by liability insurance.

### **Non-Compliance With Contract Terms**

The party to be indemnified may seek to have losses arising from breach of contract terms included in the indemnity provision.

*Example.* Landowner seeks to include in the indemnity provision under the lease with Eagle View described above "losses suffered by landowner arising from a breach of the terms of the contract on the part of the indemnifying party."

The party being asked to indemnify may reject such a request for good reason:

1. Damages arising from breach of contract are not covered by liability insurance; thus, any liability on this indemnity provision will be funded out of the indemnifying party's own resources.
2. In general, the law of contracts seeks to resolve conflicts in a way that fairly compensates the parties for their respective share of the loss. An indemnity from one contract party to the other for future losses arising from as yet unknown circumstances will change, in unforeseen and perhaps unfair ways, the remedies available to both parties.

*Example.* Eagle View agrees to indemnify the landowner for losses incurred as a result of a breach of the lease. The landlord later sues Eagle View for breach of the lease terms and is awarded \$5000 in damages. Eagle View asserts in the same action that the breach was not entirely its fault due to landlord's violation of the lease. Eagle View is awarded \$3500 in damages. Absent the indemnity, or a decision by the court to assess damages to one or the other, each would pay their own costs and expenses of litigation. Instead, the indemnity shifts to Eagle View 100% of the landowner's litigation and other costs *even though the landowner was partly at fault for the contract dispute.*

It is generally impossible to know ahead of time who will or will not be wholly or partly responsible for a contract dispute; thus, it is generally unreasonable to decide that one party, and not the other, should bear entirely the risk of loss arising from as yet unknown circumstances.

### Non-Compliance With Applicable Laws

The indemnified party may seek to have losses arising from non-compliance with applicable law included in the indemnity provision. Losses arising from non-compliance with laws are not covered by liability insurance. Nevertheless, this indemnity provision may or may not be reasonable depending upon which party has control over

the premises, the duty to care for the premises, and the responsibility for non-compliance with applicable laws.

### Unreasonable Indemnity

*Example.* Landowner seeks to include in the indemnity provision under the lease with Eagle View described above "damages, losses, fines and penalties suffered by landowner arising from the failure of the premises to comply with applicable laws." The lease is for a one-year term. Eagle View will not be constructing any improvements and is required by the lease only to comply with laws applicable to its activities.

The requested indemnity is unreasonable. If it is included in the lease, the landowner may seek from Eagle View the burden of responding to hazardous substances illegally dumped on the property even if Eagle View had nothing to do with the violation of the environmental laws.

### Reasonable Indemnity

*Example.* In the *Model Grant of Conservation Easement and Declaration of Covenants*, the landowners agree to indemnify the easement holder against violations of applicable law (including environmental laws).

The requested indemnity is appropriate in this case because the easement holder has no rights to access the property for illegal purposes (such as dumping hazardous substances) and the landowners are always responsible for compliance with laws applicable to their property ownership; thus, their burden is the same whether they are taking actions only for themselves or to protect the easement holder as well.

## Conclusion

Effective risk management requires the evaluation of potential risks and the management of those risks using a number of tools—statutory immunity under RULWA, release agreements, indemnity provisions and liability insurance coverage.



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<sup>1</sup> Whether contractual or land-based, the document is referred to in this guide as the “contract” for the sake of brevity.

<sup>2</sup> See the Rails-to-Trails Act, Equine Immunity Act and other statutes noted in the WeConservePA guide [\*Reducing Liability Associated With Public Access\*](#).

<sup>3</sup> Injury or damage to persons or property, including bodily injury and death, is referred to in this guide as “injury” for the sake of brevity.

<sup>4</sup> Releases, assumption of risk agreements, and covenants not to sue are discussed in the WeConservePA guide [\*Release of Liability\*](#) and accompanied by the [\*Model Release of Liability\*](#).

<sup>5</sup> Indemnified parties must check the indemnity provision to see that it includes the important word “defend.” If defense is not included in the liabilities assumed by the indemnifying party, then the insurance company is not obligated to become involved in the claim unless, and until, judgment is entered against the indemnified party.

*Example:* Landowners allow a hiking club access to their property free of charge but require the club to indemnify them, without including the word “defend,” from claims for personal injury asserted by club members. A club member files a suit against the landowners, which, after much time and expense, results in a determination of no liability on the part of the landowners.

In this example, the club owes nothing to the landowners because the injured club member’s claim amounted to nothing. Although they may owe nothing to the injured club member, landowners will bear, without contribution from the club or the club’s insurance, all of the attorneys’ fees and court costs incurred to achieve that result.

<sup>6</sup> An agreement to indemnify, defend and hold harmless will be referred to in this guide as an “indemnity provision”. Although often used interchangeably with the word “indemnify,” courts have found that the phrase “hold harmless” expands the obligation to include not only out-of-pocket losses but liabilities that have not been finally adjudicated as a loss. The agreement to hold harmless has also been described as a promise by the indemnifying party not to seek reimbursement from the indemnified party.

<sup>7</sup> Indemnity provisions require careful drafting and review to see that the scope is neither too narrow nor too broad. Using the rock-

climbing access as an example, the club may seek to narrow the indemnity to injuries sustained by club members in connection with the rock-climbing activity. This makes sense for the club for several reasons: (1) the club can obtain pre-injury releases from its participating members; and (2) the scope of the indemnity will coincide with the club’s liability insurance coverage of injuries to its members. But does that scope of indemnity cover the organization’s risks of liability arising from that activity? What if someone other than a club member, seeing the activity, joins in and is injured? Should the club be responsible for anyone injured in rock-climbing activities? What if the injury occurs when the club isn’t conducting its sponsored activities? Indemnity provisions tend to be the subject of much negotiation between the parties because of the wide range of conceivable scenarios.

<sup>8</sup> The easement holder is not responsible for inspecting the property for safety issues and has no authority to maintain the property for public safety purposes. The landowners are solely responsible for the condition of the property. Thus, there is no reason for the easement holder to provide a reciprocal indemnity to protect landowners from claims of injury occurring on or about the conserved property. The model language does, however, except from the indemnity injuries for which holder is actually at fault through wrongful or negligent actions it takes on the land.

<sup>9</sup> Careful consideration must be given to who should be, or be included in, the phrase “indemnifying party.” The indemnity provision will not afford protection to the indemnified party under the liability policy covering the premises if the indemnifying party is not an insured under the policy. Also consider the creditworthiness of the indemnifying party if the proceeds of insurance may not be adequate to cover indemnified claims.

<sup>10</sup> The phrase “indemnified party” may be defined expansively in an indemnity provision to include a wide range of persons who may be at risk for covered claims; for example, individuals may want to include their personal representatives, successors, and assigns. Corporations may want to protect their officers, directors, employees, and perhaps volunteers.