

# General Contract Clauses: Indemnification (Unilateral; Pro-Indemnified Party) (OH)

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Unilateral indemnification and defense provisions for a sale of goods or services transaction under Ohio law. These Standard Clauses are drafted in favor of the indemnified party and address the duty to compensate, defend, and hold harmless for losses incurred, notice of claims, control of defense, and settlement of claims procedures. Consistent with most supply of goods and services agreements using unilateral indemnification provisions, these Standard Clauses assume that the agreement's buyer or customer is the indemnified party. Parties, however, can modify these Standard Clauses to make any other party (including the seller, supplier, or service provider) the indemnified party. These Standard Clauses have integrated notes with important explanations and drafting and negotiating tips.

## DRAFTING NOTE: READ THIS BEFORE USING DOCUMENT

Indemnification is an undertaking by a party (the indemnifying party) to compensate the other party (the indemnified party) for certain costs and expenses, typically regarding third-party claims. Under Ohio law, a right to indemnification arises from contract, and the nature of an indemnity relationship is determined by the intent of the parties as expressed by the language used (*Worth v. Aetna Cas. & Sur. Co.*, 513 N.E. 2d 253, 256 (1987)).

Indemnification provisions vary based on factors such as:

- The type of transaction.
- The predicted nature of potential third-party claims.

- The balance of the parties' bargaining power.
- Industry norms.

## UNILATERAL VERSUS MUTUAL INDEMNIFICATION PROVISIONS

Indemnification provisions can be:

- **Unilateral.** Under unilateral indemnification provisions, one party indemnifies the other without reciprocation. For a list of circumstances under which parties commonly use unilateral indemnification provisions, see Common Rationales for Unilateral Indemnification.

- **Mutual and equal.** Under mutual and equal indemnification provisions, each party indemnifies the other to an equal extent. This approach is most appropriate where:
  - the parties' respective bargaining powers are fairly equal;
  - the nature and extent of the parties' respective contributions under the agreement are fairly similar; or
  - the parties shoulder similar burdens or reap similar rewards.
- **Mutual and unequal.** Under mutual and unequal provisions, each party indemnifies the other, but the parties' indemnification obligations differ in scope or substance. The parties generally use this approach where:
  - the parties have unequal bargaining power;
  - the nature or extent of the parties' contributions under the agreement are different; or
  - the parties shoulder dissimilar burdens or reap dissimilar rewards.

These Standard Clauses are unilateral indemnification clause under Ohio law. Like most supply of goods and services agreements, the seller, supplier, or service provider is the indemnifying party and the buyer or customer is the indemnified party. However, the parties can revise these Standard Clauses to customize the parties' roles.

For sample mutual indemnification clauses, see Standard Clauses, General Contract Clauses: Indemnification (OH) ([w-000-1141](#)). For more information on indemnification generally, see Practice Note, Indemnification Clauses in Commercial Contracts (OH) ([w-006-3791](#)).

#### Common Rationales for Unilateral Indemnification

The parties typically use unilateral indemnification provisions where the indemnifying party (often the seller, supplier, or service provider):

- Has better knowledge of and is in a better position to mitigate the covered losses and liabilities. For example, in many manufacturing agreements, while

the buyer's performance obligations are limited to payment, the manufacturer's include designing and manufacturing the goods. In this case, third parties are more likely to be harmed by the manufacturer's acts or omissions than the buyer's acts or omissions.

- Has less bargaining power than the indemnified party.
- Wants to attract customers. For example, a buyer in a sale of goods agreement may:
  - be more likely to purchase goods or services from a seller if the seller offers an indemnity; and
  - interpret a seller's reluctance to give an indemnity as a lack of confidence in its products or that it can adequately manage its liabilities.
- Views indemnification liability as a cost of doing business and builds that cost into its pricing.

#### ENFORCEABILITY

While indemnification agreements are generally enforceable in Ohio, statutory or common law restrictions may limit the enforceability of an indemnity. The nature of any indemnity relationship is determined by the intent of the parties as expressed by the language used (*Worth v. Aetna Cas. & Sur. Co.*, 513 N.E.2d 253, 256 (1987)). Ohio courts mostly strictly construe contracts of indemnity, and give them no greater scope than the language of the agreement clearly and unequivocally expresses (*Palmer v. David R. Pheils, Jr. & Assoc.*, 6th Dist. Wood No. WD-01-010, 2002 WL 1436030, ¶ 39). Ohio courts give those words their ordinary and popular meaning (*Portsmouth Ins. Agency v. Med. Mut. of Ohio*, 4th Dist. No. 08CA3218, 934 N.E.2d 940, 944, ¶ 18).

States' laws vary, however, on how they interpret or enforce agreements for indemnification. While Ohio law governs these Standard Clauses, parties should become familiar with any laws that potentially govern the agreement before drafting an indemnification clause (see Practice Note, Choice of Law and Choice of Forum: Key Issues ([7-509-6876](#))). The parties should examine the degree to which courts in the applicable jurisdiction enforce:

- Provisions that require a party to indemnify another for all claims, regardless of who is at fault (see *Glaspell v. Ohio Edison Co.*, 505 N.E.2d 264, 267 (1987)). In *Glaspell*, the court refused to strictly construe against the drafter the phrase “any loss” to exclude claims arising from a party’s own alleged negligence, where the parties were commercial enterprises of sufficient size and quality as to presumably possess high degree of sophistication in matters of contract. In other situations, however, courts apply a heightened level of scrutiny whenever a party attempts to indemnify against its own negligence (*Toth v. Toledo Speedway*, 583 N.E.2d 357, 358 (6th Dist. 1989)). In either case, the best practice is to expressly mention negligence.
- Indemnities providing for tort-based damages like punitive damages. Ohio law generally disfavors insurance against punitive damages resulting from the insured’s own torts, but has carved out exceptions (see, for example, *The Corinthian v. Hartford Fire Ins. Co.*, 758 N.E.2d 218, 223 (8th Dist. 2001)).
- Indemnities given by protected classes like:
  - construction-related contracts (see R.C. 2305.31);
  - workers’ compensation benefits (see R.C. 4123.82); and
  - consumers (see the Consumer Sales Practices Act, R.C. 1345.01 et seq., where Ohio courts have adopted a liberal approach to ensure protection for consumers) (*Price v. KNL Custom Homes, Inc.*, 28 N.E.3d 640, ¶ 15 (2015)).

Therefore, the indemnified party should consider specifying the causes of action and set out the requisite level of causation that would create an obligation to indemnify.

### ASSUMPTIONS

These Standard Clauses assume that:

- **The agreement is governed by Ohio law.** If the law of another state applies, these terms may have to be modified to comply with the laws of the applicable jurisdiction.

- **There are only two parties to the agreement.** The parties should adjust the agreement as necessary if additional parties, like a party’s affiliates, should also have rights or obligations under the agreement. If there are multiple parties on one side of the transaction, these parties should consider entering into a separate contribution agreement to allocate responsibility for complying with these Standard Clauses.
- **The parties intend to use unilateral and not mutual clauses.** For a sample mutual indemnification clause, see Standard Clauses, General Contract Clauses: Indemnification (OH) ([w-000-1141](#)).
- **The parties to the agreement are US entities and the transaction takes place in the US.** If any party is organized or operates in, or any part of the transaction takes place in a foreign jurisdiction, these terms may have to be modified to comply with applicable laws in the relevant foreign jurisdiction.
- **These terms are being used in a business-to-business transaction.** These Standard Clauses should not be used in a consumer contract, which may involve legal and regulatory requirements and practical considerations that are beyond the scope of this resource.
- **These terms are not industry- or transaction-specific.** These Standard Clauses do not account for any industry-specific laws, rules, or regulations that may apply to certain transactions, products, or services. The parties should adjust the terms as necessary to address transaction-specific details.
- **Intellectual property indemnification, if any, is handled in a separate provision.** These Standard Clauses do not cover intellectual property claims, which 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](#)).

- **Capitalized terms are defined elsewhere in the agreement.** Certain terms are capitalized but not defined in these Standard Clauses because they are defined elsewhere in the agreement (for example, Agreement, Buyer, Customer, Personnel, Seller, Service Provider, and Supplier).

## BRACKETED ITEMS

Bracketed items in ALL CAPS should be completed with the facts of the transaction. Bracketed items in sentence case are either optional provisions or include alternative language choices, to be selected, added, or deleted at the drafting party's discretion.

## General Contract Clauses: Indemnification (Unilateral; Pro-Indemnified Party)

### 1. Indemnification.

#### DRAFTING NOTE: INDEMNIFICATION

These Standard Clauses cover:

- Substantive indemnification rights and obligations (see Indemnification Rights and Obligations).
- Indemnification procedures (see Indemnification Procedures).

#### INDEMNIFICATION RIGHTS AND OBLIGATIONS

The general obligation to indemnify may apply to:

- **Direct (first-party) claims.** These are claims that an indemnified party has against an indemnifying party. Typically, commercial contract indemnification provisions do not cover direct claims. A federal court applying Ohio law, however, held that an indemnity provision applies to both third-party and direct claims unless otherwise limited in the contract (*Battelle Mem. Institute v. Nowasco Pipeline Services, Inc.*, 56 F. Supp. 2d 944, 951-52 (S.D. Ohio 1999)). While not typically covered in commercial contract indemnification provisions, parties may be subject to increased risk of liability or dispute if they overlook or fail to address direct claims (see Indemnification: Avoiding Common Pitfalls: Overlooking or Failing to Adequately Address Direct Claims ([6-538-5805](#))). An indemnification provision for direct claims often 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 an indemnified party, which parties most commonly use indemnification to cover.

This indemnification provision:

- Covers third-party claims, not direct claims. If the parties want to cover direct claims, they must revise this provision. For more information on direct versus third-party claims, see Practice Note, Indemnification Clauses in Commercial Contracts (OH): Direct Versus Third-Party Claims ([w-006-3791](#)).
- Consistent with most indemnification provisions, requires the indemnifying party to indemnify, defend, and hold the indemnified party harmless from losses. Where the indemnifying party has significant leverage, the indemnified party should expect the indemnifying party to negotiate to omit one or more of these obligations.

#### Indemnify

Indemnification requires the indemnifying party to:

- Reimburse for covered **paid costs and expenses** (losses). Ohio courts require reimbursement for all costs and expenses associated with defending suits against the indemnified party in litigation covered by the indemnity clause where either:
  - a statutory duty requires it;
  - the contract provides for it;

- the indemnifying party acted in bad faith; or
- the indemnifying party would be unjustly enriched.

(*Krasny-Kaplan Corp. v. Flo-Tork, Inc.*, 609 N.E.2d 152, 154 (1993).)

- Where the indemnifying party wrongfully refuses to defend, Ohio law includes recovery of litigation costs, including attorneys' fees and expenses, as part of the indemnification claim, even if the provision does not expressly cover such costs (*Allen v. Std. Oil Co.*, 443 N.E.2d 497, 500 (1982)).
- 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. The indemnity obligation in this Standard Clause covers unpaid costs and expenses because it includes the term "liabilities" under recoverable damages.

For a discussion of losses versus liabilities, see Practice Note, Indemnification Clauses in Commercial Contracts (OH): Defining the Recoverable Damages ([w-006-3791](#)).

### Defend

Consistent with most commercial contracts, these Standard Clauses include the obligation to defend. In Ohio, the duty to defend is separate and distinct from the duty to indemnify (*Ohio Government Risk Mgt. Plan v. Harrison*, 874 N.E.2d 1155, ¶ 19 (Ohio 2007)). The obligation to defend is also usually broader than the obligation to indemnify because it may apply whether or not the third-party claim has merit (*Ward v. United Foundries, Inc.*, 951 N.E.2d 770, ¶ 19 (Ohio 2011)). For an example, see Practice Note, Indemnification Clauses in Commercial Contracts (OH): Defense is Often Broader than Indemnification: An Example ([w-006-3791](#)).

The obligation to defend arises before any duty to indemnify and requires an indemnifying party to:

- Reimburse for covered **paid costs and expenses** (losses) comprised of defense costs and expenses.

- Advance payment for covered **unpaid costs and expenses** (like liabilities) comprised of defense costs and expenses.
- Control the defense, subject to a control of defense provision (see Section 1.3).

An indemnification provision must expressly include any obligation to defend as Ohio courts do not otherwise assume this obligation. For example, even where an agreement requires one party to reimburse another party for legal expenses incurred in defending itself as part of its indemnification obligation, Ohio courts do not require that party to also assume the burden of providing a defense unless the language of the agreement imposes an express duty to defend (see *Rayco Mfg., Inc. v. Beard Equip. Co.*, 9th Dist. Wayne No. 11CA0057, 2014-Ohio-970, ¶ 22).

### Hold Harmless

Like most indemnification provisions, this Standard Clause requires the indemnifying party to hold the indemnified party harmless. Depending on the jurisdiction, the phrase "hold harmless" may have one or more meanings. For example, a court may interpret the term "hold harmless" to be synonymous with indemnification (see Indemnify). In Ohio, the term is used interchangeably with the term "indemnification" (see *Office of Attorney General, State of Ohio, Opinion No. 96-060*, 1996 Ohio Op. Atty. Gen. 2-233 (Ohio A.G.), 1996 Ohio Op. Atty. Gen. No. 96-060, 1996 WL 708356)).

Although unlikely in Ohio, if used together with the term "indemnify," a court may give the term "hold harmless" meaning above and beyond indemnification, such as requiring the indemnifying party to:

- Advance payment for covered **unpaid costs and expenses** (like liabilities) as they are incurred, even if the recoverable damages under the indemnification provision do **not** cover liabilities, claims, or causes of action (see Mellinkoff's Dictionary of American Legal Usage 286 (1992); see also discussion in Bryan A. Garner, U, 15 Green Bag 2d 17, 22-24 (2011)). Under this interpretation, courts construe "hold harmless" to protect another against the risk of loss as well as actual loss whereas "indemnify" means "reimburse for any damage," a narrower meaning than that of hold harmless.

- Release the indemnified party (see, for example, *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 507-08 (Tex. 1993)).

Therefore, the term “hold harmless” is bracketed to give the parties the option to strike this term and avoid confusion or undesirable interpretation.

For more information on indemnification versus hold harmless, see Practice Note, *Indemnification Clauses in Commercial Contracts (OH): Indemnification versus Hold Harmless Provisions* ([w-006-3791](#)).

### INDEMNIFICATION PROCEDURES

The optional provisions under these Standard Clauses favor the indemnified party and set out procedures regarding:

- Notice requirements (see Section 1.2).
- Control of defense (see Section 1.3).
- Settlement of claims (see Section 1.4).

When deciding whether to include one or more of these optional provisions, the indemnified party should consider its:

- **Negotiating strategy.** For example, adding these optional provisions may prompt the indemnifying party to negotiate for its rights to be similarly expanded, which may extend or complicate negotiations.

- **Priorities in relation to its transactional risks and rewards.** For example, the indemnified party may choose to include a control of defense provision if it highly values the right to select and direct legal counsel when facing a third-party claim, especially if the indemnified party is unsure of whether the indemnifying party can provide a timely and adequate defense (see *Defend*). This is particularly important in cases where potential legal liabilities cannot be entirely remedied by monetary payment (for example, where there is a risk of damage to reputation or the indemnified party requires injunctive relief). In this case, the indemnified party should also consider requiring the indemnifying party to:

- obtain a minimum amount of representation and warranty insurance; or
- set aside a portion of the purchase price in escrow to satisfy any future indemnification claims (see Practice Note, *Indemnification Clauses in Commercial Contracts (OH): Representation and Warranty Insurance and Escrow* ([w-006-3791](#))).

- Note that, if representation by the same counsel presents a genuine conflict of interest between the parties, Ohio law may grant the indemnified party the right to select counsel (see *Star Rent-A-Car, Inc. v. Campbell*, 2nd Dist. Montgomery No. 20083, 2004 WL 541140, ¶¶ 13, 14).

1.1 [Seller/Supplier/Service Provider/[PARTY NAME]] Indemnification. [Subject to the terms and conditions set forth in [Section 1.2] [, / and] [Section 1.3] [and] [Section 1.4],] [Seller/Supplier/Service Provider/[PARTY NAME]] (as “**Indemnifying Party**”) shall indemnify[, hold harmless,] and defend [Buyer/Customer/[OTHER PARTY NAME]] and its officers, directors, employees, agents, affiliates, successors, and permitted assigns (collectively, “**Indemnified Party**”) against any and all losses, damages, liabilities, deficiencies, claims, actions, judgments, settlements, interest, awards, penalties, fines, costs, or expenses of whatever kind, including [reasonable] attorneys’ fees, that are incurred by Indemnified Party (collectively, “**Losses**”), arising out of or related to any third-party claim alleging:

- (a) breach or non-fulfillment of any provision of this Agreement by Indemnifying Party or Indemnifying Party’s Personnel;
- (b) any negligent or more culpable act or omission of Indemnifying Party or its Personnel (including any reckless or willful misconduct) in connection with the performance of its obligations under this Agreement;
- (c) any bodily injury, death of any person, or damage to real or tangible personal property caused by the negligent or more culpable acts or omissions of Indemnifying Party or its Personnel (including any reckless or willful misconduct); or

(d) any failure by Indemnifying Party or its Personnel to comply with any applicable federal, state, or local laws, regulations, or codes in the performance of its obligations under this Agreement.

### DRAFTING NOTE: SELLER/SUPPLIER OR SERVICE PROVIDER INDEMNIFICATION

The indemnified party should adjust the scope of this indemnity provision as necessary to fit its needs and objectives, for example, by:

- Ensuring that the definition of “Indemnified Party” includes all relevant parties (see Multiple Indemnified Parties). For example, in addition to those entities listed in this Standard Clause, the indemnified party may want to include its:
  - corporate parent; and
  - partners, managers, members, or shareholders, or all three (including all three may be preferable for the indemnified party to take into account a potential future reorganization).
- Including a right to obtain reimbursement for costs and expenses associated with:
  - enforcing any right to indemnification under the agreement;
  - pursuing any insurance providers; and
  - taxes imposed on the indemnity payment (see Standard Clauses, General Contract Clauses: Indemnification (OH): Section 2.5 ([w-000-1141](#))).

#### MULTIPLE INDEMNIFIED PARTIES

If the defined term “Indemnified Party” covers more than just the other party to the agreement, then the indemnified party must consider including several provisions addressing those other parties.

#### Defining Affiliate

“Affiliate” should be included as a defined term in the agreement’s definition section to help clarify the parties eligible for indemnification. For example:

“‘**Affiliate**’ of a Person means any other Person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, such Person. The term ‘control’ (including the terms ‘controlled

by’ and ‘under common control with’) means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract, or otherwise.”

If the parties use this definition, they must define the term “Person” elsewhere in the agreement.

#### Third-Party Beneficiaries Provision

A third-party beneficiaries provision should be included to give affiliates the right to enforce their indemnity rights under the agreement. For a sample third-party beneficiaries provision, see Standard Clauses, General Contract Clauses: Third-Party Beneficiaries ([6-519-7630](#)).

#### Temporal Modifiers

Depending on its priorities, the agreement’s governing law, and the nature of the transaction, the indemnified party may want the definition of “Indemnified Party” to expressly cover its past, present, and future affiliates, employees, agents, and other parties. For example, a New York court held that use of the term “affiliates” in a contract includes only those affiliates in existence when the contract was executed, absent clear and unambiguous language indicating that the parties intended to bind other affiliated parties to the underlying contractual obligations (*Ellington v. EMI Music, Inc.*, 997 N.Y.S.2d 339, 343 (2014)).

If the parties include temporal modifiers, then they should consider whether:

- To include a temporal modifier in other provisions of the agreement.
- The definition of “Indemnified Party” or “Indemnifying Party” is appropriately used throughout the agreement in light of this modification.

## INDEMNIFYING PARTY'S MITIGATION APPROACHES

The indemnified party should expect the indemnifying party to try to:

- Make the indemnification mutual (see Make the Indemnification Mutual).
- Limit its indemnification obligation (see Limit the Seller's Indemnification Obligation).
- Make the indemnification provision the buyer's sole and exclusive remedy (see Use Sole and Exclusive Remedy Provisions).

For a sample unilateral pro-indemnifying party provision, see Standard Clauses, General Contract Clauses: Indemnification (Unilateral; Pro-Indemnifying Party) (OH) ([w-006-9859](#)).

### Make the Indemnification Mutual

Depending on the facts and the parties' respective negotiating leverage, the indemnifying party may insist on including a mutual indemnification. For example, sellers often insist that the buyer indemnify them based on:

- **The buyer's use of goods or services.** The buyer is generally in the best position to mitigate losses and liabilities related to its use of the purchased goods or services.
- **The buyer provided items or information.** To make the product, the seller may need to rely on items or information provided by the buyer (for example, when the seller builds to the buyer's specifications or incorporates a buyer-provided part into the product). Therefore, the seller may require the buyer to indemnify it for any harm arising from its use of the items or information.
- **The interaction of the goods with any product, material, or equipment that the seller did not supply.** Unless the seller authorizes the interaction, the seller may require the buyer to indemnify it if the harm could be avoided by using the goods without the interaction.
- **The buyer's hosting of the seller at its site.** Where the seller must enter the buyer's site to deliver goods or perform services, the buyer is generally in the best position to mitigate losses and liabilities related to the safety and security of its own site.

**The buyer's intellectual property.** The seller may require the buyer to indemnify it against third-party claims based on the buyer's intellectual property, for example, where the seller manufactures products based on the buyer's specifications or designs.

For a sample mutual indemnification provision, see Standard Clauses, General Contract Clauses: Indemnification (OH) ([w-000-1141](#)).

### Limit the Indemnifying Party's Indemnification Obligation

The indemnified party should expect the indemnifying party to try to limit its indemnity obligation by:

- Negotiating to qualify certain provisions, for example, by using:
  - materiality to qualify the indemnifying party's breach of the agreement or failure to comply with law (see Standard Clauses, General Contract Clauses: Indemnification (OH): Drafting Note: Materiality Qualifiers ([w-000-1141](#)));
  - reasonableness to qualify attorneys' fees;
  - a limited scope of activity (for example, "negligent work" or standard of negligence, whether "gross negligence" (in Ohio defined as "failure to exercise any or very slight care;" see *Hall v. Kosta's Night Club*, 2016-Ohio-5003 ¶ 27) or "sole negligence" to qualify the indemnifying party's acts and omissions; or
  - all of the above.
- Limiting payment to losses that are finally adjudicated.
- Limiting the indemnity obligation to cover only claims arising in certain jurisdictions.
- Limiting the definition of indemnified party. For example, sellers often refuse to include the buyer's customers as indemnified parties, since the losses and liabilities suffered by the customers are often only partly attributable to the seller's actions.
- Limiting the indemnity obligation to losses and liabilities that are not covered by:
  - insurance proceeds received by the indemnified party (see Standard

Clauses, General Contract Clauses: Indemnification (OH): Section 2.4 ([w-000-1141](#)); and

- tax benefits received by the indemnified party (see Standard Clauses, General Contract Clauses: Indemnification (OH): Section 2.5 ([w-000-1141](#))).
- Limiting its indemnification-related liability under a limitation of liability clause, which could contain either or both:
  - a liability cap or basket (see Standard Clauses, General Contract Clauses: Indemnification (OH): Section 2.2 ([w-000-1141](#)) and Section 2.3 ([w-000-1141](#))); or
  - a consequential damages waiver (see Standard Clauses, General Contract Clauses: Limitation of Liability (OH): Section 1.1 ([w-000-1141](#))).
- Replacing the nexus phrase “arising out of or related to” with the narrower:
  - “caused by”;
  - “resulting from”;
  - “solely resulting from”; or
  - “to the extent they arise out of.”

For more on nexus phrases, see Practice Note, Indemnification Clauses in Commercial Contracts (OH): Choosing the Right Nexus Phrase ([w-006-3791](#)).

#### Use Sole and Exclusive Remedy Provisions

The indemnified party should expect the indemnifying party to try to:

- Make the indemnification provision the indemnified party’s exclusive remedy for the covered claims. For a sample sole and exclusive remedy clause to use in an indemnification provision, see Standard Clauses, General Contract Clauses: Indemnification (OH): Section 2.6 ([w-000-1141](#)); see also Practice Note, Indemnification Clauses in Commercial Contracts (OH): Maximum Liability (Limitation of Liability) ([w-006-3791](#)).
- Include a clause stating that the indemnification does not apply to any claim (whether direct or indirect) for which a sole and exclusive remedy is provided under another section of this agreement (see the last sentence of Standard Clauses, General Contract

Clauses: Indemnification (OH): Section 1.1 ([w-000-1141](#))).

### INTERPLAY OF INDEMNIFICATION AND OTHER CONTRACT PROVISIONS

#### Be Mindful of Indemnity When Negotiating Other Provisions

When negotiating the representations, warranties, and covenants in an agreement, the parties should carefully consider the scope of the indemnification provision. For example, if the parties remove or dilute the indemnifying party’s covenant to comply with applicable law, the indemnified party may want to cover damages for breach of law in the indemnification provision (see Section 1.1(d)).

For information on the relationship between indemnification and representations, warranties, and covenants, see Practice Note, Relationship between Representations, Warranties, Covenants, Rights, and Conditions ([7-519-8870](#)).

#### Be Internally Consistent

When negotiating the indemnification provision, the indemnifying party should carefully consider the impact on and implications of other contractual remedies, such as contractual statutes of limitations (see Standard Clauses, General Contract Clauses: Contractual Statute of limitations (OH) ([w-000-1142](#))).

For additional information on this issue, see Interaction Between Indemnification and Other Contractual Remedy Provisions Checklist ([7-520-6530](#)).

To avoid conflict and confusion, if the indemnified party wishes the indemnity to cover specific types of third-party claims, such as a third-party claim based on breach of law (see Section 1.1(d)), then it should either:

- Ensure any broad provision covering breach of the agreement is broad enough to cover the specific third-party claim.
- If the broad provision does not exist or does not cover the specific claim, include the specific claim under the indemnification clause, and make sure that it is consistent with:
  - any broader indemnification provision covering breach of the agreement; and

- the rest of the agreement, including the limitation of liability provision. For a sample limitation of liability provision, see Standard Clauses, General Contract Clauses: Limitation of Liability (OH) ([w-000-1253](#)).

### Sandbagging Provisions

While used more frequently in M&A transactions, parties may find sandbagging provisions useful in certain commercial transactions.

Under these provisions, the indemnified party reserves its right to bring indemnification claims against the indemnifying party for breach of a representation, warranty, or covenant even if it knew about the breach before the closing and proceeded to close the transaction. For an example of a sandbagging provision, see Standard Document, Stock Purchase

Agreement (Pro-Buyer Long Form): Section 8.08 ([4-382-9882](#)).

Anti-sandbagging provisions ensure the indemnified party cannot bring an indemnification claim based on an inaccuracy or breach of a representation that it knew about before the closing if it chooses to proceed and close the transaction despite the inaccuracy or breach of the representation. For an example of an anti-sandbagging provision, see Standard Document, Stock Purchase Agreement (Auction Form): Section 7.04(g) ([3-502-5305](#)).

For more information on indemnity for breach of the agreement and other covered claims, see Practice Note, Indemnification Clauses in Commercial Contracts (OH): Indemnities for Breach of the Agreement ([w-006-3791](#)).

1.2 [Notice of Third-Party Claims. Indemnified Party shall give notice to Indemnifying Party (a “**Claim Notice**”) within [ten/[NUMBER]] days after obtaining knowledge of any Losses or discovery of facts on which Indemnified Party intends to base a request for indemnification under Section 1.1. Indemnified Party’s failure to provide a Claim Notice to Indemnifying Party under this Section 1.2 does not relieve Indemnifying Party of any liability that Indemnifying Party may have to Indemnified Party, but in no event shall Indemnifying Party be liable for any Losses that result directly from a delay in providing a Claim Notice, which delay [materially] prejudices the defense of the related third-party claim. Indemnifying Party’s duty to defend applies immediately, regardless of whether Indemnified Party has paid any sums or incurred any detriment arising out of or relating, directly or indirectly, to any third-party claim.]

### DRAFTING NOTE: NOTICE OF THIRD-PARTY CLAIMS

This provision is more favorable to the indemnified party as compared to notice provisions in many other indemnification provisions because it does not require the indemnified party to give notice in writing.

It also, in the second sentence, states that the indemnified party’s failure to provide a timely claim notice does not relieve the indemnifying party from indemnification-related liability, except to the extent that any delay materially prejudices the defense of the related third-party claim. However, the indemnified party should expect the indemnifying party to

negotiate to delete this sentence in its entirety or remove the word “materially.”

Note that Ohio courts generally agree that “prompt, written notice” is a condition precedent to indemnification rights (see *Bank One, N.A. v. Echo Acceptance Corp.*, 522 F. Supp. 2d 959, 966 (S.D. Ohio 2007)). In addition, if an indemnified party voluntarily settles a third-party claim before seeking indemnification, Ohio courts require that the indemnified party give the indemnifying party “proper and timely notice” of the third-party matter (the settlement must also

be fair and reasonable) (see *Thompson v. Smarthands Tech*, 2014 WL 12709960, at \*2-3 (Ohio Com.Pl.)).

The indemnified party should also expect the indemnifying party to require it to set out the claim and the basis for indemnification in detail in the claim notice.

For an indemnification-related notice provision that includes provisions that are more favorable to the indemnifying party, see Standard Clauses, General Contract Clauses: Indemnification (Unilateral; Pro-Indemnifying Party) (OH): Section 3 ([w-006-9859](#)).

1.3 [Indemnified Party Control of Defense. Notwithstanding anything to the contrary in this Section 1, Indemnified Party may select its own legal counsel to represent its interests, and Indemnifying Party shall:

- (a) reimburse Indemnified Party for its costs and attorneys' fees immediately upon request as they are incurred; and
- (b) remain responsible to Indemnified Party for any Losses indemnified under Section 1.1.]

#### DRAFTING NOTE: INDEMNIFIED PARTY CONTROL OF DEFENSE

This optional provision recognizes control of defense as a right, because by controlling the defense, a party can better regulate its own costs, expenses, reputation, and liabilities. Without this control of defense provision, the indemnifying party has the right to control the defense. The indemnified party should include this provision if it highly values having control over the defense in light of the circumstances. For example, if the buyer determines that most potential indemnifiable claims are likely to lead to an injunction or other equitable relief, the buyer may insist on selecting its legal counsel and controlling its own defense. If representation by the same counsel presents a genuine conflict of interest between the parties, however, Ohio law may grant the indemnified party the right to select counsel (see *Star Rent-A-Car, Inc. v. Campbell*, 2nd Dist. Montgomery No. 20083, 2004 WL 541140, ¶¶ 13, 14).

If the indemnified party includes this provision, it should expect the

indemnifying party as the paying party to insist on:

- Making the provision mutual. For a sample indemnifying party control of defense provision and related obligations of the indemnified party, see Standard Clauses, General Contract Clauses: Indemnification (OH): Section 3.2 ([w-000-1141](#)) and Section 3.3 ([w-000-1141](#)).
- Capping its defense-related liability. For a sample maximum liability provision in an indemnification clause, see Standard Clauses, General Contract Clauses: Indemnification (OH): Section 2.3 ([w-000-1141](#)).

For more information about control of defense, see Practice Note, Indemnification Clauses in Commercial Contracts (OH): Control of Defense Provisions ([w-006-3791](#)) and Legal Update, Indemnification: Avoiding Common Pitfalls: Control of Defense Provisions ([6-538-5805](#)).

1.4 [Settlement of Indemnified Claims by Indemnifying Party. Indemnifying Party shall give prompt written notice to Indemnified Party of any proposed settlement of a claim that is indemnifiable under Section 1.1. Indemnifying Party may not, without Indemnified Party's prior written consent, settle or compromise any claim or consent to the entry of any judgment regarding which indemnification is being sought hereunder.]

**DRAFTING NOTE: SETTLEMENT OF INDEMNIFIED CLAIMS BY INDEMNIFYING PARTY**

Most parties resolve their claims by entering into a settlement agreement either

- Instead of litigating.
- After commencing litigation but before judgment.

(See Standard Document, Settlement Agreement and Release (OH) ([w-000-6189](#).)

Therefore, the indemnified party should consider including Section 1.4, especially if the indemnified party wants to review any settlement to ensure that:

- The indemnified party is released from all liability arising out of that claim.
- The settlement agreement omits any admission or statement suggesting any wrongdoing or liability on the indemnified party's behalf.
- The settlement agreement omits any equitable order, judgment, or term that affects, restrains, or interferes with the indemnified party's business.

If including this provision, the indemnified party should expect the indemnifying party to balk at having to get the indemnified party's permission to settle a claim for which it is financially responsible. Therefore, the indemnifying party may insist on one of the following:

- The right to settle a claim without the indemnified party's consent if it:
  - releases the indemnified party from liability;
  - omits statements suggesting wrongdoing or liability on the indemnified party's behalf; or
  - omits an equitable order, judgment, or term that affects, restrains, or interferes with the indemnified party's business.
- Making this provision mutual, especially if the parties have agreed to also include Section 1.3.
- Including "(not to be unreasonably withheld or delayed)" after the term "consent."
- A cap on potential liability and additional costs.

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