



PLUNKETT COONEY
ATTORNEYS & COUNSELORS AT LAW

LATERALING YOUR LIABILITY

Indemnification & Tendering of Defense


Presented by
Rick Szymczak
Bob Marzano

Today's Presenters



Rick Szymczak
(810) 342-7007
rszymczak@plunkettcooney.com

Bob Marzano
(248) 594-63578
rmarzano@plunkettcooney.com



LATERALING YOUR LIABILITY

PLUNKETT COONEY
DETERMINED. DISTINCTIVE. FEARLESS.®

What is Indemnification?

- Method of shifting risk of potential, future event from one party to another.
- Method of protection from possible future events that may occur based upon a relationship formed with another person or entity, such as by way of contract.
- Method of defining, at beginning of business relationship, each party's duties to other party arising out of relationship.



LATERALING YOUR LIABILITY

PLUNKETT  COONEY
DETERMINED. DISTINCTIVE. FEARLESS.®

Types of Indemnification in Mich.

- Express contractual indemnification
- Implied contractual indemnification
- Common law indemnification



LATERALING YOUR LIABILITY

PLUNKETT  COONEY
DETERMINED. DISTINCTIVE. FEARLESS.®

Express Contractual Indemnification

- Rights and obligations of each party are defined by written agreement.
- Typical language includes duty to defend, indemnify and hold harmless.
- Apart from a few narrow exceptions, a party can contractually require another party to defend and indemnify that party for its own negligence.



LATERALING YOUR LIABILITY

PLUNKETT  COONEY
DETERMINED. DISTINCTIVE. FEARLESS.®

Implied Contractual Indemnification

- Implied contract of indemnity arises in favor of person who without any fault on his part is exposed to liability and compelled to pay damages on account of negligence or tortious act of another.
- Party paying damages has right of action against person or company that engaged in negligent conduct.
- Usually, it involves a special relationship between parties or course of conduct where one party agrees to perform certain service and impliedly assures indemnification.

Continued



LATERALING YOUR LIABILITY

PLUNKETT  COONEY
DETERMINED. DISTINCTIVE. FEARLESS.®

Implied Contractual Indemnification

- Must be free from active negligence.
- Usually must have allegations of vicarious or derivative liability in primary complaint
- Injuries caused solely and proximately by another party



LATERALING YOUR LIABILITY

PLUNKETT  COONEY
DETERMINED. DISTINCTIVE. FEARLESS.®

Common Law Indemnification

- Common law indemnity is one that arises essentially in absence of contract.
- A predicate for common law indemnity is that indemnitee has been paid or could be made to pay a third-party because of a wrongful act of by indemnitor.
- One of the conditions for common law indemnity is that indemnitee be free from acts of negligence or act of fault.

Continued



LATERALING YOUR LIABILITY

PLUNKETT  COONEY
DETERMINED. DISTINCTIVE. FEARLESS.®

Common Law Indemnification

- Classic example is automobile owner who is responsible under statute for negligent acts of driver at time of accident. Again, purpose of indemnity in this instance is to shift the burden of loss on equitable grounds when liability arises only vicariously or by operation of law. *Langley v Harris Corp.*, 321 N. W. 2d 662 (1982)

Continued



LATERALING YOUR LIABILITY

PLUNKETT COONEY
DETERMINED. DISTINCTIVE. FEARLESS.®

Common Law Indemnification

- Common law indemnification, in part, rests on allegations in complaint. If allegations in complaint assert acts of negligence on part of potential indemnitee, he is barred from actual indemnification on a common law basis.
- Because common law indemnity is by operation of law or by statute, attorney fees are generally not recoverable under a common law indemnity circumstance.



LATERALING YOUR LIABILITY

PLUNKETT COONEY
DETERMINED. DISTINCTIVE. FEARLESS.®

Tender of Defense

- Tender of defense should be a written demand to assume defense and indemnification of requesting party.
- As a matter of practice, tender should cite basis for tender, including both claims to be defended and basis, contractual or otherwise, for tender being made.

Continued



LATERALING YOUR LIABILITY

PLUNKETT  COONEY
DETERMINED. DISTINCTIVE. FEARLESS.®

Tender of Defense

- Costs and expenses, including attorney fees, cannot generally be assessed to insurer under Michigan law prior to tender. Delay in making tender amounts to partial waiver of fees and expenses incurred prior to tender (*Fireman's Fund Ins. Cos. v Ex-Cello Corp.* 790 F Supp 1318 (E.D. Mich 1991)).

Continued



LATERALING YOUR LIABILITY

PLUNKETT  COONEY
DETERMINED. DISTINCTIVE. FEARLESS.®

Tender of Defense

- Proof of delivery of tender is, likewise, advantageous. As tenders are occasionally completely ignored, it may be necessary to demonstrate that a reasonable time elapsed without response from party to whom tender was addressed before litigation was filed.

Continued



LATERALING YOUR LIABILITY

PLUNKETT COONEY
DETERMINED. DISTINCTIVE. FEARLESS.®

Tender of Defense

- On the other hand, when contract, itself, does not provide notice of tender of defense requirement, recovery of fees and costs associated with defending underlying litigation may be without limitation and even pre-tender costs and fees may be recovered. *Ajax Paving Industries, Inc. v Vanopdenbosh Const. Co.*, 289 Mich App 639, 797 N. W. 2d 704 (2010).

Continued



LATERALING YOUR LIABILITY

PLUNKETT COONEY
DETERMINED. DISTINCTIVE. FEARLESS.®

Tender of Defense

- In context of an insured's notice to an insurer, formal tender is not required in addition to notice of claim which in itself may give rise to a duty to defend.



LATERALING YOUR LIABILITY

PLUNKETT  COONEY
DETERMINED. DISTINCTIVE. FEARLESS.®

Cross-Claims & Third-Party Claims

- If tender of defense fails, next option is to file cross-claim or third-party claim.
- Cross-claim or third-party claim must be filed with your initial responsive pleadings. Otherwise, leave of court is required.
- Nature of cross-claim/third-party claim



LATERALING YOUR LIABILITY

PLUNKETT  COONEY
DETERMINED. DISTINCTIVE. FEARLESS.®

What do Your Indemnity Contracts Look Like?

- What are usual relationships which give rise to indemnity?
- Are you being indemnified or are you being required to indemnify?
- Does language in your current agreement adequately protect you?

Continued



What do Your Indemnity Contracts Look Like?

- If you are party who is to be indemnified, are you also an additional named insured on other party's commercial general liability policy?
- If you are party who has to indemnify other party, are you properly and adequately insured in the event this obligation ever occurs? Often times, there is no limit to your potential exposure.
- Is indemnity obligation an "insured contract" under your policy



Additional Insured Status

- Being additional insured on another party's insurance policy provides separate basis for claim.
- Generally, it arises out of a contractual term requiring a party, like vendor or contractor, to obtain insurance and name other contracting party as additional insured on insurance policy.
- Instead of just demanding indemnity from contracting party, indemnitee may seek direct coverage from party's insurance carrier.

Continued



LATERALING YOUR LIABILITY

PLUNKETT COONEY
DETERMINED. DISTINCTIVE. FEARLESS.®

Additional Insured Status

- Should determine if contract indicates policy will be primary.
- Certificate of insurance versus endorsement under policy
- Request policy and make sure insured is defined to include additional insureds.



LATERALING YOUR LIABILITY

PLUNKETT COONEY
DETERMINED. DISTINCTIVE. FEARLESS.®

Key Takeaways

- Indemnity is usually a matter of contract – review contracts early.
- Relationship—vendor, subcontractor, etc.
- Insurance—additional named insured agreements as a second means of indemnification
- Early tender of defense
- Fall back to cross and third party claims if tender fails.



LATERALING YOUR LIABILITY

PLUNKETT  COONEY
DETERMINED. DISTINCTIVE. FEARLESS.®

Your To-Do List

- Study complaint/claim for allegations that may trigger indemnity.
- Analyze contracts for indemnity and insurance clauses.
- Evaluate business relationships of parties for potential leverage.
- Analyze situation as a whole (i.e., clients reaction to making the tender).
- Draft comprehensive tender letter.



LATERALING YOUR LIABILITY

PLUNKETT  COONEY
DETERMINED. DISTINCTIVE. FEARLESS.®

Questions?



Rick Szymczak
(810) 342-7007
rszymczak@plunkettcooney.com



Bob Marzano
(248) 594-63578
rmarzano@plunkettcooney.com



Surveys



**We want to
hear from you!**



Blog Zone – Litigation Defenders

Litigation Defenders

Risk management resources and insights

Social Media can Derail Defense of Your Premises Liability Case

POSTED BY CHRISTOPHER J. SCOTT
MAY 8, 2018

You could feel like a sad face emoji if comments found on your own social media accounts bolster a plaintiff's premises liability claim. [Continue Reading](#)

TAGS: COMMERCIAL REAL ESTATE, PREMISES LIABILITY, REAL ESTATE

Comments 7 Questions for this Author [Share](#)

The Down and Dirty on Manufacturing Clean Foods, Using Clean Labeling

POSTED BY MELISSA M. CARD
MARCH 12, 2018

If food manufacturers produce clean food or use clean labels, then they should steer clear of business risks arising from claims of false advertising and product adulteration.

PLUNKETT COONEY
DETERMINED. DISTINCTIVE. FEARLESS.™

[Print Page](#)

SUBSCRIBE VIA

[Plunkett Cooney Twitter Page](#)

TOPICS

- [Auto Liability](#)
- [Bankruptcy](#)
- [Business Risk Management](#)
- [Commercial Real Estate](#)
- [Constructive Notice](#)

LATERALING YOUR LIABILITY

Today's Webinar

SEMINARS & EVENTS

REGISTER NOW - INDEMNIFICATION & TENDERING DEFENSES

Lateralizing Your Liability
November 7, 2018
[GoToWebinar](#) [Share](#)

[Ready to Register? Click Here](#)

Attorneys Speaking

- Robert A. Marzano
- Richard G. Szymczak

Related Practices

- Torts & Litigation

Webinar: Nov. 7 | Noon to 1 p.m. | Cost: Complimentary

LATERALING YOUR LIABILITY

Have a Good Day!



LATERALING YOUR LIABILITY

PLUNKETT COONEY
DETERMINED. DISTINCTIVE. FEARLESS.®