PARTICIPATING PROVIDER CONTRACTS

REMOVE OR REVISE THE INDEMNITY CLAUSE

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Contractual Indemnity clauses have no place in participating provider contracts. This is not news. Managed Care / Health Law continuing legal education presentations, position statements, and blog posts have been warning providers about this issue for decades.

For example, this February 10, 2012 Position Statement of American Academy of Emergency Physicians ("AAEM"):

Indemnification Clause in Emergency Medicine

Emergency physician contracts should not include indemnification or "hold harmless" agreements regarding the hospital or practice site. These agreements unfairly shift risk to emergency physicians and this risk is not generally insurable.

https://www.aaem.org/resources/statements/position/indemnification-clause-in-emergency-medicine

Liability Coverage Policies exclude CONTRACTUAL Indemnity obligations.

The "not generally insurable" phrase in the AAEM's 2012 position statement reflects the fact that medical malpractice coverage policies expressly exclude coverage for **contractual** indemnity clauses. In discussions about this exclusion, liability carriers indicated that the exclusion does not apply to indemnity obligations enforced by common law (rather than under a contractual indemnity clause), so long as the coverage applied to the activity.

Not many years ago, managed care payors fully understood this issue facing providers and routinely deleted or allowed edits to the indemnity clause in their participation agreements upon request. Increasingly, however, payors react with horror and disbelief if the provider requests removal of contractual indemnity clauses. This growing reluctance appears to be because payors believe "indemnity" is a synonym for "damages" in a future breach of contract dispute. This belief is uninformed.

Indemnity does NOT mean damages for breach of contract.

If a party breaches its obligations outlined under a contract, courts assess damages for that breach of contract. This means that if a provider breaches a term in a participating provider contract, the payor may seek monetary or other relief for the damages to the payor resulting from the breach. This rule applies regardless of whether the contract includes an obligation for the provider to indemnify the payor.

Independent actors should remain responsible for their own actions or omissions.

Participation agreements are neither agency nor employment agreements (and most of these agreements affirmatively so declare). Rather, these agreements require each party to meet its own obligations and responsibilities.

The common law of indemnity generally applies when parties are in unique relationships such as agent and principle, joint venturers, or employer and employee. The common law of indemnity does not apply to arrangements, where independent parties each have their own obligations. Participation agreements do not create the unique relationships where common law of indemnity routinely applies. In fact, those agreements routinely declare the providers to be independent contractors of, and not the agent of, the payor.

Public policy favors not shifting risk from one actor to another in circumstances when each party has its own obligations; each party will thus endure the consequences of failure to correctly perform its obligations. If a participating provider agreement obligates the provider to indemnify the payor, that means the provider essentially insures the payor's risk for the payor's own wrongful actions or omissions. Liability policies rightfully exclude contractual indemnity provisions to avoid covering the wrongful actions of a third party the carrier has never met and vetted.

Note, mutual indemnity clauses typically create, without clearly resolving, confusion between which party is actually assuming a given risk. A typical indemnity clause in a participation agreement likely will broadly obligate the provider to indemnify the payor for losses related to the provider's "actions or omissions." (Notably, this common language holds the provider responsible for any action or omission without regard to whether or not the action or omission is otherwise wrongful or negligent). Whether or not the contract also requires the **payor** to indemnify the **provider** for the payor's actions or omissions, the provider's liability coverage policy's exclusion clause still applies. Furthermore, adding a mutual indemnity clause in these types of agreements – where each party has its own tasks under the contract and neither is agent of the other – leaves many questions as to how to apply the indemnity clause to shift risk between independent contractors.

Possible Tools.

Commentary and articles consulted in the preparation of this article are unanimous in alerting providers to the unreasonable risk of contractual indemnity clauses. However, the several payors with these clauses in their participation agreements remain unconcerned (or unconvinced). Many payors claim (maybe correctly) that thousands of providers in North Carolina have voiced no objection to the clauses. Thus, if an informed provider requests complete deletion of the clause, the payor may accuse the provider of being an unreasonable, uninformed outlier.

Alternative approaches may be more effective. The provider could request his or her med-mal carrier to review and provide a statement to the carrier outlining the unreasonable risk to the provider for contractual indemnity clauses. Alternative language deleting the indemnity clause, while stating that each party is responsible for its own actions or omissions may be accepted by the payor, especially if followed by a provision that states that either party may seek indemnification as available under North Carolina law.

Conclusion.

Expenses and liability related to contractual indemnity clauses are expressly excluded in liability insurance policies such as medical malpractice coverage. This means attorneys' fees and damages must be paid out of the provider's own assets in the event of a dispute under contractual indemnity clause in a participating provider agreement.

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