



Rethinking Indemnification

A financial matter disguised in legalese

By **Phil** Josephson

“Indemnify - To save harmless; to secure against loss or damage; to give security for the reimbursement of a person in case of an anticipated loss falling upon [the person]. Also to make good; to compensate; to make reimbursement to one of a loss already incurred by [the person].” – Black’s Law Dictionary

“Literature is the effort of man to indemnify himself for the wrongs of his condition.” – Ralph Waldo Emerson

Indemnification is a contractual obligation used to shift risk from one legally responsible party to another party. In essence, an Indemnifying party promises an insurance policy to the Indemnified party for losses, damages or liabilities that may be incurred in certain circumstances. This is why parties should not consider an Indemnification clause as merely a clause for “the

legal department” to review and approve. Rather, Indemnification clauses are a financial matter, and there is a potential cost (risk allocation amount) to each word contained in an Indemnification clause.

The use of Indemnification clauses in agreements has its pros and cons. The use of Indemnification clauses may be essential or useful to close a deal as the

Easton Distributor Program

Come Grow with Us!

Easton Telecom has been a full service business-to-business telecommunications supplier since our inception in 1992. Easton's product portfolio includes voice, data, internet, and conferencing services. Easton is a reseller, which means our services are carried over the networks of 28+ carriers allowing us to offer numerous product choices at competitive prices. This makes Easton a great fit for multi-location accounts since all services and locations are billed on one invoice.

Easton's services are marketed through a nationwide network of independent distributors. Service and support is provided by Easton, from its Richfield, Ohio headquarters. Easton is staffed by telecom professionals with the average employee having over ten years of telecom experience.

Program Highlights

- > Most services offered at a BUY Rate - YOU control the commission
- > 27 Years in business selling through agents only - no channel conflicts
- > 28+ underlying carriers with 20+ services - ALL billed on one invoice
- > Customized, user-friendly invoice
- > Extensive quoting and analysis assistance for all potential end users
- > Provisioning - be involved as little or as much as you want
- > Insight into commissions, which are always paid on time
- > 24/7 Customer Service - Always answered by a live voice
- > Customer service expertise - on average, our reps have 10+ years industry experience

Products & Services

Voice

SIP Trunks
Hosted PBX
SIP PRI
Business Lines
TDM PRI
Integrated T-1

Internet/Data

MPLS
SD-WAN
VPN
Dedicated Broadband
DSL
Coax
Fixed Mobile Broadband
Wireless Back-up
Collocation Services

Wireless

Voice | Text | Data

Audio & Web Conferencing



Become a Partner Today!
Contact Scott Minor, Channel Manager
Voice: 800-222-8122
sminor@eastontelecom.com

clause provides reasonable protection from risk, and without such a clause, the agreement may put one or both parties at higher risk of liability. In addition, the use of Indemnification may increase the level of trust in the relationship as a party is willing to pay the other party's losses. On the other hand, there may be too many factors out of a party's

ment may be detrimental. Absence of such a clause reduces the legal jargon in the agreement which makes it easier to read and understand, but potential risks remain unaddressed so that if something unfortunate or unforeseen occurs, the wrong party may end up bearing the costs involved.

Indemnification clauses look simi-

First, the scope of the Indemnification obligations resides in the beginning of the clause and uses the words "indemnify," "defend," or "hold harmless." The meaning and importance of these words are provided in Box A.

The second observation in the review of an Indemnification clause pertains to who is covered by the In-

Box A – Scope of Indemnification

Indemnify	The Indemnifying party will compensate the Indemnified party for a loss.
Defend	The Indemnifying party will provide the Indemnified party with a legal defense.
Hold Harmless	The Indemnifying party will release the Indemnified party from liability for a loss and assumption of the responsibility by the Indemnifying party.

control, and thus Indemnifying another party may not be prudent. Or, the proposed Indemnification clause may be so broad that it may require a party to pay for acts of others, which increases potential risk and cost.

Likewise, the failure to include an Indemnification provision in an agree-

lar but can be drastically different. In reading an Indemnification clause, four areas should be addressed: (1) the scope of the Indemnification obligations; (2) who is to be Indemnified; (3) when the Indemnification obligations arise; and (4) the extent or limits to the Indemnification.

demnification provision. This may be described as simply "the Indemnified party," or more broadly as "all officers, members, managers, directors, controlling persons, agents, employees, representatives, consultants, contractors, affiliates, parent and subsidiaries." The breadth of who is

netcarrier™

nCloud Contact Center Lite

1 Free Month of nCloud Contact Center Lite Seats on Qualifying Orders*

*Standard Pricing, 10+ Seats

- Listen, Whisper & Barge
- Live Agent & Queue Monitoring
- Queue Recordings
- Intelligent Routing Strategies

2019 VISIONARY SPOTLIGHT AWARDS CHANNELVISION WINNER

NetCarrier's proprietary Contact Center Lite solution is designed to enhance the inbound call center environment. Businesses are able to manage high call traffic without missing important calls while maintaining a professional image. NetCarrier offers 24.7.365 U.S. based Customer Support.

855-NCLOUD4 • connect@netcarrier.com

Indemnified spans the spectrum from broad to limited, and each word matters in the definition.

The third area of review for an Indemnification clause is to determine when the Indemnification obligations arise. The obligations arise when words such as the following are used: "... any pending or threatened claims, damages, losses and expenses ... that arise out of or that result from performance of the work ..."

In this area of the Indemnification provision the words used may be broad (such as "any pending or threatened claims, damages, liabilities or expenses") or more limited. In addition, the phrase "that results from performance of the work ..." is also broad, as it does not require any link at all to the Indemnifying party's performance – all that is required is that it results from the "work." Again, the words used (and not used) in this area of the Indemnification section are

important. The significant meanings and costs involved with certain words appear in Box B.

It is important to note that Indemnification obligations should only apply to matters that arise from third-party actions. Direct damages incurred by the Indemnified party are addressed by breach of contract allegations. Edit Indemnification clauses carefully to ensure that only third-party matters are covered in the Indemnification provisions.

Box B – When Indemnification Obligations May Arise

Claims	Triggered upon the filing of a claim against the Indemnified party (before liability is determined).
Damages	The Indemnifying party reimburses the Indemnified party for damages paid by the Indemnified party.
Debts	Addresses established debts incurred by the Indemnified party.
Expenses	Reimbursement of money spent or cost incurred in a party's efforts in a matter.
Liabilities	Protects only against a legal finding of liability.
Pending	A matter that has begun, but not yet completed; unsettled; undetermined; in process of settlement or adjustment.
Threatened	Only an intention or possibility of a matter.



Your regional Pacific Northwest network partner.



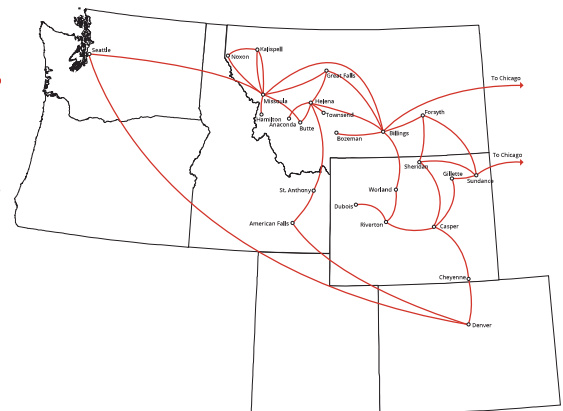
Blackfoot Carrier Services

30,000 service locations.

Diverse, redundant network routes.

Blackfoot is your trusted network operator, employing industry best practices to meet stringent SLAs. We leverage fiber and RF to accommodate topography and time-to-market considerations.

866-541-5000 | Blackfoot.com/Carrier



Finally, the extent or limitations of the Indemnification clause are provided by phrases such as “to the extent caused by” or “to the fullest extent permitted by law.” Be mindful to identify the vast difference between the breadth of responsibility between the various phrases. In addition, the Indemnification clause may limit the time in which to bring an action based on Indemnification, or there may be a cap on the amount of damages available under the Indemnification provision.

condition X occurs, then the party gets paid, but if condition X does not occur, the party does not get paid. If an Indemnification clause does exist in this agreement, then the party may have something to lose. Here, the party must consider the probability of the Indemnification clause enforced and the possible scope of monetary damages that may occur. Once again, there is a financial component to this Indemnification clause.

Ultimately, Indemnification is a financial consideration. You cannot spell “Indemnification”

Here are three examples of Indemnification clauses that may look similar to the casual reader, but are significantly different:

Sample: Broad Indemnification	Sample: Intermediate Indemnification	Sample: Limited Indemnification
<p>“To the fullest extent of the law, the Indemnifying party shall indemnify, defend, and hold harmless the Indemnified party, its officers, employees, agents, representatives, consultants, and contractors from and against any and all loss, costs, penalties, fines, damages, claims, expenses (including attorney’s fees) or liabilities ... arising out of, resulting from, or in connection with the representations, warranties, covenants, or services contemplated by this Agreement.”</p>	<p>“The Indemnifying party agrees to hold harmless and indemnify the Indemnified party from any and all liability that arises out of the Indemnifying party’s negligence, whether it be sole or in concert with others, in connection with the Indemnifying party’s representations, warranties, covenants, or performance of services contemplated by this Agreement.”</p>	<p>“The Indemnifying party agrees to indemnify the Indemnified party from and against liability caused by the Indemnifying party’s negligent performance of services contemplated by this Agreement.”</p>

There is a cost implied with each word in an Indemnification clause. As indicated above, the specific words used in an Indemnification provision and the extent of the Indemnifying obligations increases (or decreases) the amount of risk assumed by a party. Thus, if a party provides services or goods to another party pursuant to an agreement that has no Indemnification clause, additional costs are limited. But, if the same party provides the same services or goods to another party pursuant to an agreement that does have Indemnification obligations, then the Indemnifying party may incur additional future costs. As a result, the two scenarios carry different costs to provide the same services or goods.

In another example, a party may consider an agreement that is structured in a manner in which it appears that “they have nothing to lose,” such as in a relationship whereby if

without “finance,” and you should review each word in an Indemnification clause with consideration on the financial impact of the transaction.



Philip Josephson is the founder of Sterling Business Law where he and the firm deliver corporate legal and business advisory service to clients across the United States. Philip holds a Finance degree and a J.D. from the University of Miami, an M.B.A. from Columbia University; he is a Registered Investment Advisor (RIA); he is a member of the Florida Bar, the Arizona Bar, and the Federal Communications Bar; and he is a Certified Valuation Analyst (CVA) as certified by the National Association of Certified Valuation Analysts. He can be contacted at pjosephson@sterlingbusinesslaw.com. Nothing written above is intended to be legal advice.