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TAKING ON RISK WITH DUBIOUS REWARD

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If your radiology group is in the "medical business," why is it highly likely that it's also in the insurance business, in fact, as an insurer of the hospital's risk?

We're all familiar with the concept of taking on risk in return for reward, but if radiology groups are aware of this concept, why do they become putative insurers without properly calculating the risk or "premium" to be received in exchange?

Allocating risk

You're obviously aware that among the key points in an exclusive contract for radiology services are those dealing with exclusivity and financial support. But there are other elements at play -- provisions that govern the allocation of risk. This article focuses on one type of risk allocation provision: indemnification.

The basic concept of indemnification is simple: One party agrees to be financially responsible for the loss suffered by the other -- indemnified -- party. Stated a bit differently, from the perspective of legal risk, the party with the legal responsibility for damages, the indemnified party, shifts the financial responsibility to another party.

The situation becomes far more complex when the concept is actually applied to you. This is because there are different types of indemnification -- these provisions fall on a continuum, if you will, from the rather benign to the downright invidious.

For example, in some instances, indemnification clauses fall at one end of the continuum and can be beneficial to radiology groups and *relatively* benign to hospitals. An example is a provision indemnifying the group and its leaders from damages resulting from their performance of hospital-related administrative duties imposed by the exclusive contract.

In other cases, the indemnification provisions might cut against you but still incorporate some degree of fairness. An example would be requiring the group to indemnify the hospital in the event that the group does not pay taxes on the financial support it receives from the hospital and, as a result, the IRS seeks to collect tax "withholding" from the hospital.

Inherent in both of the examples above is a notion of "you break it, you buy it." In the first example, the hospital imposed an administrative role on one of your group members; if he or she is sued for carrying out that role, then the individual should be protected just as if he or she were a hospital administrator. In the second example, the group is liable for the tax consequences that flow from its receipt of hospital funds.

But in egregious cases, at the far end of the continuum, indemnification provisions can be used to impose financial liability on your group *not* for the group's wrongs but for the hospital's wrongs. Here's an example of actual indemnification language sought by a hospital:

> *Group shall indemnify Hospital for any costs, expenses, losses and attorney fees arising out of or incident to any harassing, abusive or otherwise inappropriate behavior or conduct by Group or any of Group's employees, agents or subcontractors, that results in the assertion of claims (including derivative claims or other claims asserted against Hospital) arising under Title VII of the Civil Rights Act of 1964, as amended, the Americans with Disabilities Act, the Civil Rights Act of 1991, the Age Discrimination in Employment Act, the Older Workers Benefit Protection Act and any analogous local, state or federal law or statute.*

The danger in a provision like this one is that it goes well beyond the "you break it, you buy it" notion underlying the previous examples -- in fact, it becomes "I break it, you buy it." The claims that the hospital seeks protection against are all employment-related claims, claims that would most likely be brought against the hospital *by its employees*, not by the employees of the group. How much, if any, causative responsibility would your group have for the events that you would, pursuant to such an indemnification provision, be held financially responsible for?

> *You've just entered the lobby of Community Hospital after having been away on a three-week vacation. Turning a corner into a hallway, you see Grace Smith, a 25-year veteran employee of the hospital, and a man you've never met, walking toward you. Grace says, "Hello." You notice that the man is wearing a hospital employee ID badge, so you extend your hand to him and say, "Hi, I'm Dr. Bob Jones from radiology. I don't believe we've met."*

Instantly, Grace Smith becomes upset and says, "I know you've seen me almost every day for at least 15 years, doctor, but at least you could have said 'hello' back to me. I'm sick and tired of Community Hospital trying to force me to retire!"

A week later, Ms. Smith sues Community Hospital, alleging, among other things, violations of the Age Discrimination in Employment Act. One day after being served with the lawsuit, the hospital's chief administrator sends your group a letter demanding indemnification.

The basis of the claim? The exclusive contract between Community Hospital and your group contains the very provision described above, indemnification against employment-related claims.

Yes, your group has defenses, and it has arguments over how to construe the meaning and scope of the indemnification provision, and you have arguments concerning allocation of responsibility. But do you want to be put in a position in which you are left holding the bag and grasping for defenses?

'But it's low risk ...'

As explained above, there's a significant difference between being called to indemnify based on something that you are in control of and something for which you have only tangential, or perhaps no, actual responsibility. In the latter case (as in the Ms. Smith example), your group is being put in the position of an insurer -- only without the luxury of having collected a premium.

One of the important concerns you must consider before entering into an indemnification provision is this issue of causation. Another is to understand that properly estimating the risk that you are assuming

requires more than simply determining the probability of an occurrence -- it also requires an understanding of the magnitude of the damages that might occur.

The risk of pulling the one "loser" out of six total choices (that is, five good results and one bad) is only 16.67%, seemingly low. But the analysis changes as we apply that probability (a) to spinning the roulette wheel at a holiday celebration for your party favor -- five great gifts and one whoopee cushion, or (b) to the chambers of a revolver in a game of Russian roulette. The downside of door-prize roulette: a joke item; the downside of Russian roulette: death.

The risk of having to pay up in respect of an indemnification provision might be low -- say the same one in six, or 16.67%, used in the above example -- but if the total losses subject to indemnification are $7,000,000, then the "expectation" (16.67% of $7,000,000) is $1,166,900. What benefit is your group receiving in return for this $1,166,990? But what if you're wrong and the $7,000,000 is really $10,000,000, and what if you're even more wrong about the odds? And, in any event, a $7 million or $10 million obligation would probably be your group's equivalent of losing at Russian roulette.

The key points

Unlike a gift, it's truly better to receive indemnification than to give it.

On the other hand, if you are feeling generous, at least understand the extent of the disconnect between causation and the duty to indemnify, the probability of an occurrence, and the scope of the potential loss. Finally, remember to question what you are receiving in return.

Bear in mind that if you fail to take these elements into account, it will be as if you've made a potentially group-destroying "gift" without ever having had the intent to do so -- we usually call that being taken.

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