



# Indemnification, Warranties and Liabilities

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UIDP

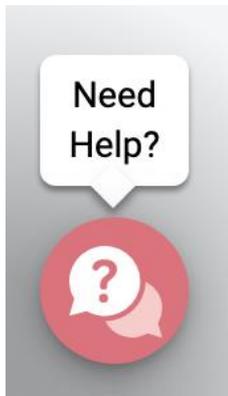


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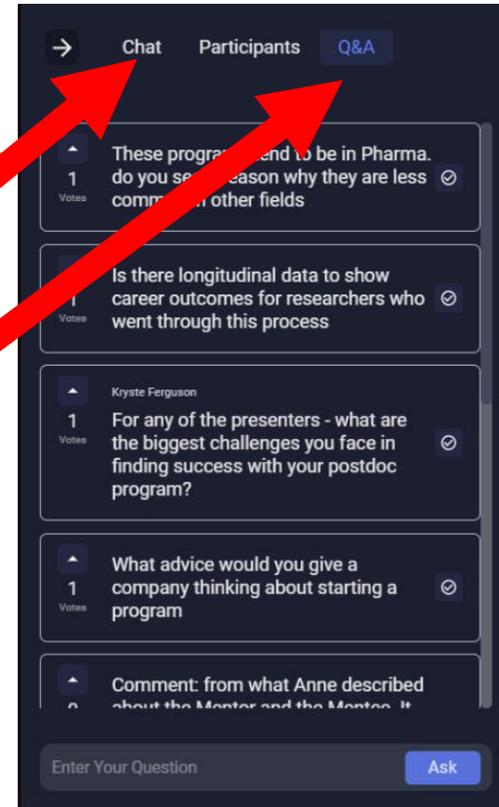
# how to PARTICIPATE

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## Live Chat and Q&A

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- Chat with one another.
- Submit questions using the Q&A tab at the top right of your screen.
- Upvote the questions you're most interested in

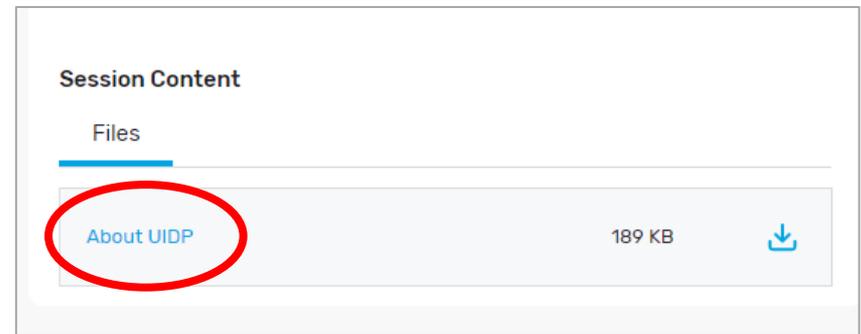


# how to PARTICIPATE

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## Handouts and Recordings

- Available handouts can be downloaded from the Session Content tab in the Attendee Hub.
- Session recordings will be posted in the Attendee Hub. You will be notified via email when they are available at uidp.org.



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# About This UIDP Webinar

The University Industry Demonstration Partnership (UIDP) is the premier forum for representatives from universities and industry to find better ways to partner.

The UIDP Contract Accords are the principle vehicle for members to formally communicate consensus points on key topics. They are living documents that can be modified to address trends and new strategies.

Today we are exploring business topics related to liability. The UIDP members reviewed and updated the related Contract Accords on these topics recently to recognize the breadth of methods, issues, and strategies presented by this topic in university-industry agreements.

# Indemnification – the primary liability tool?

- The legal definition of 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 him. Also to make good; to compensate; to make reimbursement to one of a loss already incurred by him.” *Cousins v. Paxton & Gallagher Co.*, 122 Iowa. 405, 98 N.W. 277; *Weller v. Eames*, 15 Minn. 407 (Gil. 370). 2 Am. Rep. 150; *Frye v. Bath Gas Co.*, 97 Me. 241, 54 Atl. 395, 59 L. R. A. 444, 94 Am. St. Rep. 500.

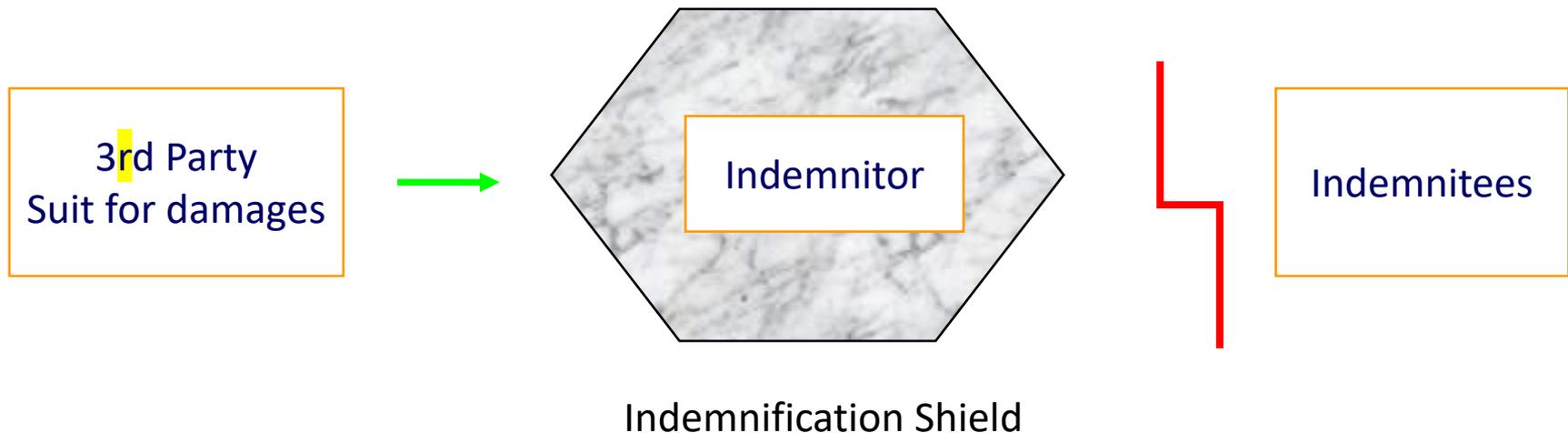
Law Dictionary: [What is INDEMNIFY? definition of INDEMNIFY \(Black's Law Dictionary\)](#)

# Duty to Indemnify v. Duty to Defend

- The duty to defend is the obligation to provide a defense to a covered claim. The duty to defend does not depend on the outcome of the claim.
- The duty to indemnify is triggered when the outcome of a covered claim is adverse.
- These separate and distinct obligations will incur different expenses for the indemnitor and should both be clearly addressed in the contract.

# Indemnification General Use

- Describe when a party will shield the other party from liability/shift a loss to another party.
- Require the indemnitor to pay defense costs regardless of ultimate allocation of fault
- Allocate risk between the contracting parties based upon economic considerations and often control over the risks.
- Usually comes with conditions, limitations, processes.



## Poll #1 (choose one)

Do you accept contracts that require you to indemnify the other party?

1. Yes, routinely
2. No, never
3. Yes, under certain circumstances

# Negotiation Pain Points

- University seeks to have Company (and Affiliates if appropriate) indemnify University for Company's use of results, IP and deliverables.
- University declines indemnifying company
  - For non-infringement of University results including IP or background IP used in project
  - For Negligence or breach
  - Period
- Universities push back on “warrants” because of implied indemnification
- Carve-outs from Company indemnification for claims arising from University's conduct of research
  - University personnel's negligence or willful misconduct
  - University's failure to comply with law or regulation
  - University's failure to follow protocol
- Company wants liability capped at the amount paid to the University for the project
- A Party wants shorter than statute of limitations time to sue the other party.

## Negotiation Pain Points Cont'd.

- Disagreement about situationally dependent fair allocation of risk, e.g.,
  - Investigator Initiated Research -> mutual indemnification or assumption of responsibility
  - Services performed for company may be appropriate
  - SOW dependent on a party's existing materials, tools, information
- Public University limitations
  - Constitutional limitation on accepting unfunded liabilities
  - Using state tort claims acts to avoid breach of contract
- Personnel acting within the scope of a party's employment or control
  - Students
  - Visitors
  - Subcontractors

# Risk is Fact- Dependent

	Indemnification	Reps/Warranties	Limit on Liability
Clinical Trial			
Sponsored Research			
Collaboration			
Material Transfer			
IP License			
Services (core facility)			
Other			

Source – Charles Adelsheim, Varian for UIDP webinar

# Alternatives to Indemnification to Reduce or Assign Risk, Mitigate Loss

- Contract provisions that take effect if certain events occur, e.g.,
  - Discounts to the buyer if deadlines are not met
  - Early termination
- Insurance / self-insurance
  - Coverage sufficient for claims, damages
  - Other party as additional insured
- Liability Cap
  - Set upper limit that a party pays if found liable for breach, etc. – often related to the cost of the project
- Exclude damages like “special, indirect, incidental, consequential, exemplary or punitive”

# Alternatives to Indemnification cont'd

- Provisions to monitor/affect performance
  - Acceptance/approval of deliverables
  - Required performance bonds if a subcontractor is required to perform a key element of the SOW
  - Re-performance or re-procurement requirements
  - Return of upfront funds
  - Loss of indemnification
- Provisions that set-aside funds if certain events occur
  - e.g., Escrow funds to cover unemployment compensation if people hired to do the work are laid off due to unexpected contract termination
- Acceptance of Liability
  - Neither Party indemnifies, defends, or holds harmless the other Party. Each party is responsible for its own negligent acts and omissions *to the extent allowed by law.*

# Alternatives to Indemnification cont'd

- Representations
  - Inducements to enter a contract - often a past fact, existing circumstance, or party's qualifications.
  - The defrauded party may void the entire contract, and recover sums paid if a representation is false.
- Warranty
  - Promise that a certain fact or outcome will be as stated.
  - Protects the warranty recipient against loss if the fact becomes untrue.
  - Damages for breach of warranty are the difference in the value as warranted and the value as received.
- Disclaimer of Warranty
  - Puts other party on notice that this remedy is not available
  - Some warranties are statutory and cannot be disclaimed

## Poll #2 (pick best answer)

We are one site in a funded project. Another institution is serving as the Data Coordinating Center (DCC). We will be sending a Limited Data Set to the DCC. In our DUA with the DCC, the DCC is putting a \$ cap on their liability. Would you accept?

1. Yes
2. No
3. Yes if the DCC is a non-profit
4. Yes if the sponsor indemnifies us
5. Other
6. Need more information to answer

# A note about Controlling Law

- Intended to provide guidance in the performance of the contract and certainty in how a court would interpret the rights and obligations of the parties.
- "law of the defendant" provisions defer determination of controlling law until there is a dispute so provides no guidance while the contract is being performed.
- Silence assumes each party performs the contract according to “applicable” laws and standards and requires jurisdiction and venue to be argued in the event of a dispute.
- If a particular jurisdiction's law is known to substantively affect performance, the SOW should specify standards of performance that are expected for each party.
- **State laws differ on interpretation of “best efforts”, warranties, force majeure, affect and scope of choice of law, applicability to performance vs just dispute, substantive issues, e.g., privacy, trade secrets.**

# A note about Force Majeure

- A defense against allegation of nonperformance.
- **Case law differs on what these clauses need to say and what conditions are precedent to enforceability.**
  - ✓ Generally, narrowly interpreted.
  - ✓ Under what circumstances – list or not.
  - ✓ What a party needs to do to mitigate the effect of the circumstances.
  - ✓ Does the circumstance need to be recognized by an external authority.

More info:

- <https://www.akerman.com/en/perspectives/the-coronavirus-and-force-majeure-clauses-in-contracts.html>
- <https://www.wilmerhale.com/en/insights/client-alerts/20200413-drafting-force-majeure-clauses-in-light-of-the-covid-19-pandemic>

# Consistency Across Contract Clauses

Indemnification and other liability clauses should be coordinated and consistent with (as appropriate):

- Statements of work governing the study as approved by relevant review boards (e.g., informed consent documents, personnel licensure and training)
- Warranty clauses, Insurance, Infringement, Limitation of Liability and other representations or certifications
- The place where the work is conducted (e.g., worker's comp, OSEH)
- Review/ acceptance of deliverables
- Termination provisions
- Controlling law provisions

# Random Practical Considerations

- Are the parties able to perform their obligations under the SOW and the contract?
- Have the parties built in flexibility, contingencies, or explicit performance standards - Grant vs. contract, Research vs. Service?
- Have the parties dealt with each other successfully before – can you avoid previous “mistakes”?
- What are the party’s relative abilities to bear the risk
  - ✓ Possession of facts/knowledge/control
  - ✓ Position to mitigate and manage
- Can you agree the parties will try in good faith to resolve the disputes prior to resorting to formal legal remedies?
- Is alternative dispute resolution possible and acceptable?

# Practical Considerations Cont'd.

- If there are laws or regulations that make certain terms non-negotiable – state them upfront.
- Are you negotiating about terms that are moot or unlikely to be relevant – ignore or delete?
- Are you willing to give up the benefit to avoid the risk?
- Does your institution/company have a process for accepting and allocating risk, e.g., approval of managers, chairs, deans?

## Poll #3 (check all that apply)

I'm going to review my organization's preferred terms and standard agreements on liability, etc.

1. Right away!
2. We're good. No changes needed
3. Need to discuss internally
4. Need to do more internal training

# Contract Accords

For University Industry Sponsored Agreements

# THANK YOU!



- Did you enjoy the session? Rate it in the Attendee Hub!
- You'll receive a survey via email about UIDPVirtual at the end of the week. Please give us your feedback.



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# Questions and Discussion