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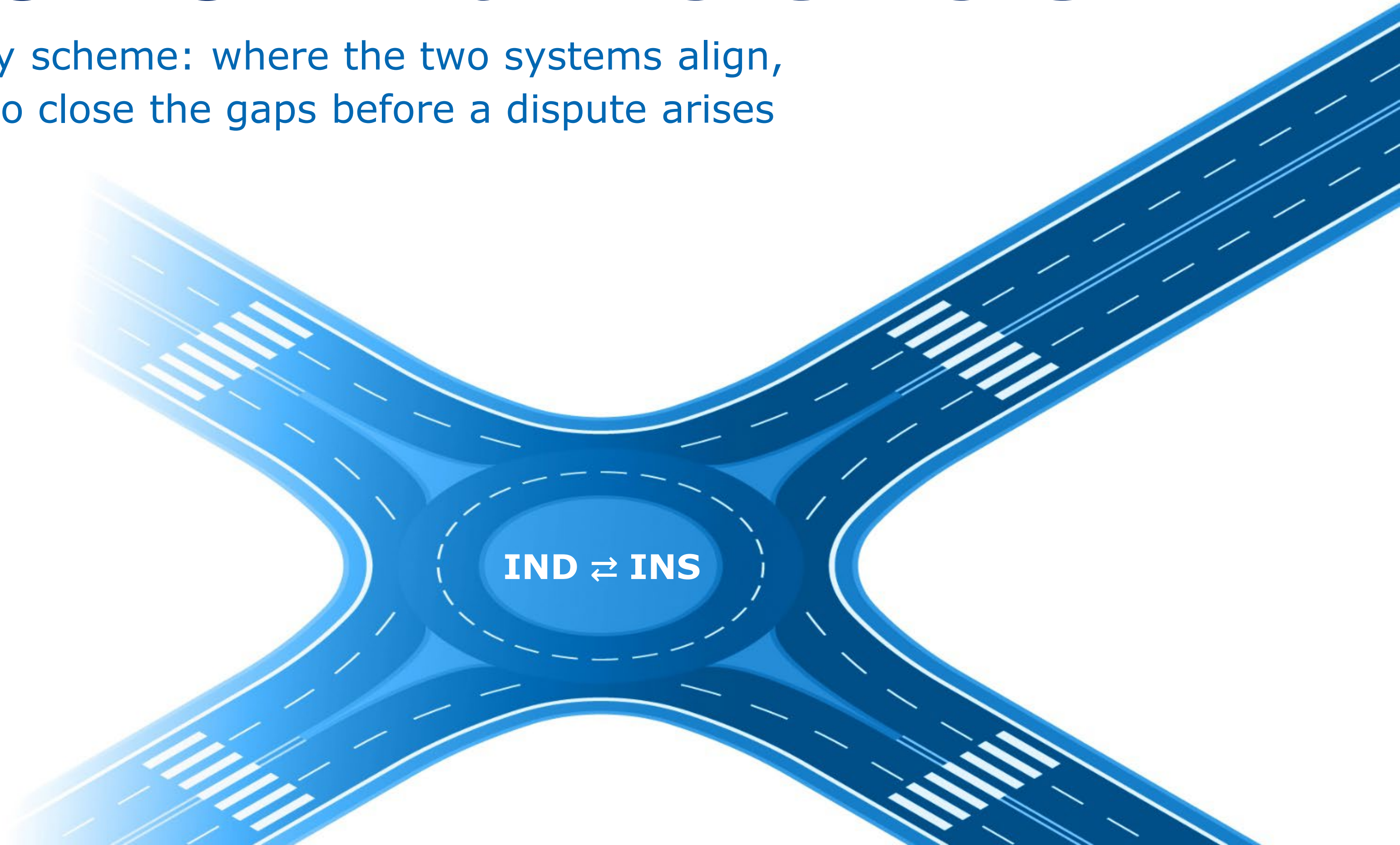
Indemnity and Insurance: Intersection or Traffic Circle?

Navigating a modern indemnity scheme: where the two systems align, where they diverge, and how to close the gaps before a dispute arises



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August 14, 2026

Speakers

Suzanne Day

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Suzanne Day is Chief Legal Officer of KIK Consumer Products, a leading North American manufacturer of branded and private label cleaning, laundry, dish care, and pool and spa products. She leads the team responsible for the company's corporate transactions, litigation, labor and employment, regulatory compliance, governance, and intellectual property matters, and serves as a trusted advisor to the executive team and Board of Directors on strategic matters.

Suzanne previously spent nearly 24 years at The Lubrizol Corporation, where she served as Chief Legal Officer and Senior Vice President of Corporate Responsibility, and earlier as Chief Legal Officer and President of Lubrizol Oilfield Solutions. She also has practiced as an associate and Senior Counsel in midsize law firms.

Eric Kristiansen

Texas Strategic Growth Partner and Co-Office Managing Partner of the Houston Office
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Eric Kristiansen has more than 25 years of experience as a litigator and disputes attorney, focusing his practice on the prosecution and defense of complex commercial matters, as well as the defense of premises, product liability, and property damage cases.

A substantial portion of Eric's practice involves the construction, interpretation, and enforcement of indemnity agreements, and he has earned a reputation as one of the leading indemnity lawyers in Texas. In addition to his litigation practice, Eric advises clients on risk mitigation and management, internal investigations, and safety policies and procedures.

INDEMNITY AT A GLANCE

Three Things to Take Back to Your Desk

Indemnity and insurance are two risk-transfer systems that are supposed to work in tandem. Today we map where they connect, where they collide, and how to build a scheme that actually holds up when a dispute arises.

Spot the alignment — and the gaps

Identify where indemnity provisions and insurance coverage align, conflict, or leave holes in protection, and the practical consequences of each configuration.

Evaluate through the enforceability lens

Test indemnity language against anti-indemnity statutes and fair-notice doctrines, drawing on real disputes over construction and interpretation — Deepwater Horizon, Ironshore, Cimarex, and others.

Draft and manage as one program

Apply risk-assessment and drafting strategies that in-house and outside counsel can use together to build a coherent indemnity-and-insurance program before an incident occurs.

THE ROUTE FOR THIS SESSION

Assurance, Not Insurance

Indemnity

- **A promise by a counterparty to bear your loss**
- Backed only by the indemnitor's balance sheet — no reserves, no solvency regulation
- Scope set by contract language, construed strictly against the indemnitee
- Policed by anti-indemnity statutes and fair-notice doctrines
- Issues when defense costs impact or exceed indemnity amounts

Insurance

- **A regulated third party accepts a defined risk for a premium**
- Backed by reserves, reinsurance, and solvency regulation
- Scope set by the policy and endorsements — which may not match the contract
- Duty to defend usually triggered by the pleadings (the “eight-corners” world)
- Don’t give up – exceptions to the eight-corners rule

Duty to defend ≠ duty to indemnify

Defense is a distinct — and usually broader — obligation, triggered by allegations rather than outcomes, and paid as incurred. The word “defend” should never appear (or be omitted) by accident.

THE VOCABULARY OF RISK TRANSFER

Three Forms of Indemnity — Plus the Oilfield Variant

Narrow form

"To the extent caused by" the indemnitor's own fault

Indemnitor covers only its own negligence. The multistate-safe default.

PERMITTED IN EVERY STATE

Intermediate form

Concurrent fault covered; sole negligence excluded

A 1%-at-fault indemnitor may pay 100% — or its proportionate share, if drafted comparatively.

BARRED BY A GROWING GROUP OF STATES

Broad form

"Regardless of fault" — even the indemnitee's sole negligence

The most aggressive form and the prime target of anti-indemnity legislation.

VOID IN MOST REGULATED CONTEXTS

Knock-for-knock: reciprocal broad form

Only insurable if the definition of insured contract is aligned. Each party covers its own people and property regardless of fault. If a party is only agreeing to pay for the results of the negligence of its own employees, it is not assuming the tort liability of another (which is the typical insured contract definition). Each side insures the risks closest to it — but broad form by nature, so it lives or dies by the anti-indemnity statutes and their insurance safe harbors.

THE INTERCHANGE

Two On-Ramps Connect Indemnity to Insurance

Ramp ① makes the promise solvent.

Ramp ② gives the indemnitee its own lane — a right against the insurer that can survive even where the indemnity itself is void.

WHERE THE SYSTEMS INTERSECT

The Aligned Scheme: Six Marks of Traffic That Flows

Coextensive groups

The insurance covers the same defined "Group" that receives the indemnity — affiliates, contractors, officers, employees, invitees.

AI scoped to the deal

Additional-insured coverage expressly limited (or extended) to the risks and liabilities assumed in the contract — you chose the scope, not the endorsement.

Primary and non-contributory

The indemnitor's policy responds first; the indemnitee's own tower is not dragged in or eroded.

Waiver of subrogation

The indemnitor's insurers cannot pay and then sue the indemnified group to claw the loss back.

Defense costs counted

Attorneys' fees and litigation costs expressly included in the indemnity — and counted against any insurance-based cap.

Insurance "in support of"

The policy schedule is expressly tied to the indemnity by section — satisfying safe harbors and fixing the intended cap.

WHERE THE SYSTEMS DIVERGE

Five Places the Wheels Come Off

The solvency gap

Indemnitor never bought the promised coverage. The indemnity generally remains valid — but your remedy is a breach claim against a counterparty who, by definition, is underinsured.

Scope mismatch

The endorsement is broader — or narrower — than the indemnity. Blanket AI endorsements can cover the indemnitee's sole negligence; "insured contract" endorsements can shrink to the indemnity's size.

Retention structures

SIR vs. deductible vs. fronting policy changes who defends, who pays first, and whether defense erodes limits. An SIR usually means no insurer defense until it's exhausted.

Punitive damages

The indemnity may cover them by silence; the policy may cover them by "all sums"; state public policy may forbid insuring them. Three documents, three answers.

The cap collision

A limitation-of-liability clause can swallow the indemnity — or vice-versa. Silence invites the argument. Carve-outs and super-caps must be explicit.

THE PUBLIC-POLICY OVERLAY

Roadblocks: Anti-Indemnity Statutes and Fair Notice

Construction

The large majority of states void construction indemnity for the indemnitee's own negligence — some only sole negligence (broad form), a growing group concurrent negligence too. Public/private and design-professional rules vary.

Oilfield

Texas, Louisiana, New Mexico, and Wyoming regulate well- and mine-service agreements. Only Texas offers an insurance safe harbor; Louisiana and New Mexico void insurance workarounds outright.

Transportation

Roughly thirty states now void indemnity in motor-carrier contracts for the shipper's or broker's own negligence — with unsettled FAAAA preemption questions layered on top.

Characterization is often dispositive: is this a "construction contract"? Does it "pertain to a well"? Scope fights decide these cases before the merits are ever reached.

Even a lawful indemnity must give fair notice

Express negligence

Intent to cover the indemnitee's own negligence must be stated specifically, within the four corners. "Any and all claims" — even "regardless of fault" — can fail.

Conspicuousness

The language must be presented so a reasonable person would notice it — bold heading, capitals, contrasting type. Don't bury it in boilerplate.

Ethyl Corp. · Dresser Industries (Tex.)

TEXAS-FORWARD, MULTISTATE AWARE

Texas Runs a Two-Statute Interchange

Oilfield: TOAIA

Tex. Civ. Prac. & Rem. Code ch. 127

- Voids well/mine-service indemnity for the indemnitee's sole or concurrent negligence…
- **…but the insurance safe harbor saves it: mutual indemnity survives to the limits each party agreed to carry for the other; unilateral capped at $500K**
- Mismatched limits → "lowest common denominator" (Ken Petroleum)
- Insurance must be "in support of" the indemnity (Getty Oil) — generic covenants may not qualify
- Fair notice applies on top — two independent hurdles

Construction: the "hidden" Act

Tex. Ins. Code ch. 151 (2011) — not where you'd look

- Broadly voids construction indemnity for claims caused by the indemnitee's own negligence or fault
- **Also voids additional-insured requirements to the same extent — the loophole is closed for Texas construction**
- Key exception: indemnity for claims by the indemnitor's own employees survives — preserving the each-covers-its-own-workforce structure
- Sits in the Insurance Code, not CPRC — routinely missed in diligence

Same state, same parties, same clause — different statute depending on whether the work "pertains to a well" or is a "construction contract."

THE ESCAPE LANE — SOMETIMES

The Additional-Insured “Loophole”

Where a statute voids the indemnity but not the insurance requirement, additional-insured coverage can still transfer the risk. States have split into two camps:

Loophole open

- Statute preserves the validity of insurance contracts; AI coverage survives a void indemnity
- Texas oilfield (TOAIA) and Wyoming (WOAIA) — insurance-side transfer still works
- Most construction statutes historically left the insurance side alone

Loophole closed

- Statute voids AI and waiver-of-subrogation workarounds too
- Louisiana (LOAIA) & New Mexico — anti-circumvention by text; NM even voids choice-of-law escapes
- Texas construction (ch. 151), Kansas, Oregon, Colorado, Minnesota, Montana, Georgia, and a growing list

The Marcel exception (La.):

An indemnitee may still obtain AI coverage if it pays the entire cost of that coverage itself — any material cost borne by the indemnitor defeats it.

WHEN THE POLICY READS THE CONTRACT

Two Cases Every In-House Lawyer Should Know

$750M

the insurance tower BP did not get

The lesson:

The endorsement and the contract are read together. Whichever side of the tender you're on, draft the AI scope deliberately — and never assume the tower is yours. Related trap: “minimum” insurance sets a floor, not a ceiling (Cimarex, 5th Cir.).

In re Deepwater Horizon (Tex. 2015)

BP was an additional insured on Transocean’s policies only “by virtue of” the drilling contract — so its coverage reached only the liability Transocean had assumed (above-surface pollution). The contract's limits became the policy’s limits.

Ironshore v. Aspen Underwriting (5th Cir. 2015)

A single “insured contract” endorsement was enough to incorporate the MSA’s $5 million cap — shrinking the additional insured’s coverage to the size of the underlying indemnity.

WHICH RULES OF THE ROAD APPLY?

Choice of Law: Same Words, Different Outcomes

Fundamental policy trumps the clause

Anti-indemnity statutes are "fundamental policy" under Restatement § 187 — a court may refuse the parties' chosen law where the work sits in an anti-indemnity state. New Mexico voids the workaround by statute.

Qualified-transaction statutes

Texas Bus. & Com. Code ch. 271 ($1M+), with New York and Delaware analogues, hardens the parties' choice for large deals — but doesn't override every specific anti-indemnity act.

Offshore: a different map entirely

Maritime law enforces clear indemnity — no anti-indemnity statute at all. OCSLA borrows adjacent-state law as a gap-filler (PLT, Doiron, Parker Drilling). Maritime vs. non-maritime can decide the whole case.

Threshold question, not an afterthought:

A knock-for-knock void under Louisiana's act may be fully enforceable under maritime law — identical words, opposite results. Pick governing law with every work-site state's statute in view.

WHEN THE WRECK HAPPENS

Work the Analysis, Then Tender in Writing

1

Locate every provision

Indemnity, defense, release, AI status — across the MSA, exhibits, work orders, incorporated terms

2

Map the insurance

"In support of"? AI scope? Waivers of subrogation? Limits promised vs. carried

3

Reconcile documents

Contract vs. PO/work-order terms — which controls?

4

Test enforceability

Governing law, anti-indemnity statute, safe harbor, fair notice

5

Quantify exposure

Limits, SIR/deductible, umbrella, punitives, caps

The tender letter is a future trial exhibit

- Quote the indemnity and AI language in full; show the definitions that make you an indemnitee
- Demand defense and indemnity explicitly; set a response deadline (10–14 days)
- Ask the recipient to put its insurer on notice immediately

Receiving a tender?

Don't just forward it to your carrier. Run the contract analysis independently — you may owe the tender even if your insurer denies coverage. Accept subject to a reservation of rights; a wrongful rejection buys you the lawsuit plus fees.

BEFORE THE DISPUTE

One Program, Two Desks: A Joint Playbook

At the drafting table

- Confirm governing law and the applicable statute before drafting a word
- State the form of indemnity expressly — never leave it to “any and all claims”
- Satisfy express negligence and conspicuousness (bold heading, capitals)
- Tie insurance “in support of” the indemnity by section; use fixed dollars, never “minimum”, if capping
- Scope the AI endorsement deliberately; primary & non-contributory; waive subrogation
- Carve out punitives; build pass-through protection into the Group definitions

Across the organization

- Audit the contract bank: form of indemnity, safe-harbor language, AI scope, by state and business line
- Reconcile promised limits against policies actually carried — yours and counterparties’
- Collect endorsements, not just certificates — a COI proves nothing about scope
- Stand up a tender protocol: claim intake, deadlines, template letters, insurer-notice triggers
- Map choice-of-law clauses against where work is actually performed
- Train the business: MSAs and POs signed in the field are contracts too

Five Rules of the Road

1. **Indemnity is assurance, not insurance.**
The promise is worth the promisor’s balance sheet — insurance support and AI status make it real.

2. **Governing law first; drafting second.**
The same words are enforceable in one state and void next door. Find the statute before you negotiate.

3. **Say the quiet part out loud.**
Express negligence, conspicuous formatting, the word “defend” on purpose — courts won’t supply what you didn’t write.

4. **The policy reads the contract.**
Deepwater Horizon and Ironshore: endorsement scope and contract scope are one drafting exercise, not two.

5. **Tender early, in writing — and reserve rights.**
Work the five-step analysis, quote the language in full, notice the insurers, calendar the deadlines.

Checklist for navigating indemnity

Scan to request your copy

Indemnity provisions are often where deals succeed and disputes are won or lost, sometimes years after the ink dries. This **checklist** walks through the key considerations when drafting, insuring, enforcing, and litigating indemnity provisions, so the protection you think you have is the protection you actually get.

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Questions?

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