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Knowing the Rules of the Game to Maximize Leverage: Indemnity, Tendering, and Vouching

Critical Implications of a Tender: Vouching: How maximize your leverage and the impact of a tender demand through vouching by examining the elements, its application, and critical limitations. Legal analysis will focus on Florida law, but will address important broadly applicable concepts related to vouching.

a. **Vouching Doctrine Explained:**
   i. Vouching is a legal concept where an indemnitee can bind another with indemnification obligations to a judgment and related factual determinations by giving them notice of an impending claim and tendering their defense.
   ii. When a person is responsible over to another, either by operation of law or by express contract and he is duly notified of the pendency of the suit, and requested to take upon him the defense of it, he is no longer regarded as a stranger, because he has the right to appear and defend the action, and has the same means and advantages of controverting the claim as if he was the real and nominal party upon the record. In every such case, if due notice is given to such person, the judgment, arbitration award, or resulting settlement, if obtained without fraud or collusion will be conclusive against him, whether he has appeared or not.
   iii. **Application:** Judgments, arbitration awards, settlement agreements, defense fees/costs.

b. Elements: In practice, a party "vouches in" a non-party indemnitor by providing notice to the alleged indemnitor: (a) of the pendency of the suit against him; (b) that if liability is found, the defendant will look to the vouchee for indemnity; (c) that the notice constitutes a formal tender of the right to defend the action; and (d) that if the vouchee refuses to defend, it will be bound in any subsequent litigation between them to the factual determinations necessary to the original judgment, [arbitration award, or settlement]. Universal Am. Barge Corp. v. J-Chem, Inc., 946 F.2d 1131 (5th Cir. 1991): "[O]nce the alleged indemnitor is vouched in, the vouchee must choose either to appear and defend or to decline the tender, though the vouchee must make this choice without the benefit of an authoritative determination of the primary defendant's right of indemnification."

c. Notice of Claim v. Tender of Defense: While there is no case law in Florida expressly defining what constitutes tendering one's defense, other jurisdictions clearly distinguish a "notice of claim letter" from a tender of defense letter holding

that a notice of a claim letter "does not tender or request a defense." *Fireman's Fund Ins. Companies v. Ex-Cell-O Corp*., 790 F. Supp. 1318, 1332–33 (E.D. Mich. 1992). A formal demand for defense must be made. Id.

d. Opportunity to Defend: The opportunity to defend must be clear and unambiguous. Westinghouse Elec. Corp. v. J. C. Penney Co., 166 So. 2d 211, 213 (Fla. 1st DCA 1964), *Bothmann v. Harrington*, 458 So. 2d 1163, 1167-1168, 1984 Fla. App. LEXIS 15791, *5, 9 Fla. L. Weekly 2328. Olin's Rent-A-Car Sys., Inc. v. Royal Cont'l Hotels, Inc., 187 So. 2d 349 (Fla. 4th DCA 1966)

e. Causes of Action Demanding Indemnity and Defense: Notice and opportunity to defend can take several forms. Cause of action for indemnification and defense can also vouch a party into the terms of settlement agreement**.** *Continental Cas. Co. v. Godur, 476* So. 2d 242 (Fla. 3d DCA 1985).

f. Settlement Agreements

i. When Actual Liability Is Not Required: The original defendant is to offer the indemnitor before any settlement is concluded the choice of (1) approving the settlement or (2) taking over the defense of the case and agreeing to hold the indemnitee harmless in any event for damages which may be assessed against him more than the amount of the proposed settlement. "We have not required proof of actual liability where an indemnitee informs the indemnitor of a proposed settlement, and the indemnitor fails to object." If the indemnitor received adequate protection during the settlement negotiations, the indemnitee was required to show only potential liability. *GAB Bus. Servs. Inc. v. Syndicate 627*, 809 F.2d 755, 760 (11th Cir. 1987)

ii. When Liability Is Required: When the indemnitee has not given the indemnitor an opportunity to review, pass upon, or participate in the settlement, due process and "equitable indemnity principles" compel a demonstration of actual as opposed to potential liability. *Id.*

g. **Other Limitations on Vouching:** Florida law has limited vouching based on equitable principles related to reasonableness, potential fraud or collusion, adequate representation of interests, and relevant defense costs. Analyzing the relevance of each require analyzing the facts of each claim on a case-by-case basis.

h. Panel discussion on implications of evaluating a tender and vouching

Considerations When Evaluating a Tender

i. **Evaluating Indemnification:** Important considerations when analyzing a demand for indemnification including the various sources and forms of indemnification, and anti-indemnity statutes. Discussions will include examining the requirements and application of Florida's anti indemnity statute, as well as comparing it with various other States.

i. **Sources of Indemnification**: Indemnification is either derives from contract, or must be based on common law or statute.

ii. **Scope/Form of Indemnification:** There are four forms of indemnification: (1) Common Law, (2) Limited, (2) Intermediate, and (3) Broad Form. Intermediate and Broad Forms for indemnification are highlight regulated in many statues by anti-indemnification statutes. Florida is a prime example of such statutory regulation

that can make or break an indemnification provision related to construction or design contract.

iii. **Indemnity Statutes**

1. **Generally Explained, Application and Significance:** Intermediate and Broad Forms for indemnification are highlight regulated in many statues by anti-indemnification statutes. Florida is a prime example of such statutory regulation that can make or break an indemnification provision related to construction or design contract.
2. **Florida's Indemnity Statutes Explained:** Fla. Stat. §§725.06 and 725.08 - Intermediate or broad form of indemnification are only enforceable if they comply with 725.06 and 725.08. Provisions must include monetary limitations which must bear reasonable commercial relationship to contract and is part of the project specifications or bid documents. Indemnification must further be limited to damages caused by the indemnitor, indemnitor's contractors, subcontractors, materialmen, or agents, or the indemnitee or its officers, directors agents or employees. The indemnification cannot include claims or damages resulting from: gross negligence, willful, wanton, or intentional misconduct of indemnitee or officers, directors, agents, or employees, or for statutory violation or punitive damages except to extent statutory violation or punitive damages are from acts or omissions of indemnitor or subs, etc.
3. Florida's anti indemnity statute prohibits intermediate and broad forms of indemnification in public agency contracts.

iv. Application of Indemnification Statutes

1. **Florida's Inconsistent Application:** While Florida's anti indemnity statute states that any provision which fails to comply with its requirements is void, it has been applied inconsistently across various jurisdictions. Some courts have followed the statute strictly, voiding the provision in its entirety, while only enforce the provision as if it were drafted to provide a limited form of indemnity.

2. Other State Statutes and Applications

a. **Analysis of Texas Anti Indemnity Statute** – Insurance Code Section 151.001 – 151.151: Texas' Anti-Indemnity Statute prohibits and makes void any provision in a construction contract to the extent that it requires an indemnitor to indemnify a party against a claim caused by the negligence or fault of the indemnitee. This essentially voids intermediate and broad forms indemnity Can speak about the Texas anti indemnity statute and why they would never pickup.

b. Exceptions: Publics works project or single-family homes, townhouses and duplexes, joint defense agreements after a claim are made, residential homes, it is questionable whether condos and apartments are intended to be

covered. Texas also has found it to be against public policy for an indemnitor to indemnify OR name as an additional insured an indemnitee where it would cover that party's own negligence. Carrier's handle this in a verity of ways. Some carriers acknowledge additional insured endorsements and picking up defense, while others take the position that if a complaint (up until recently Texas was an 8 corners State) alleges any negligence against a tendering party then any obligation for AI defense is void and against public policy.

3. **California's Application and Crawford Demands:** Crawford v. Weather Shield Mfg., Inc., 44 Cal. 4th 541, 187 P.3d 424 (2008)- Under a valid indemnity agreement, indemnitor has immediate duty to defend upon a proper tender of defense, even if later found to be negligence-free.

v. General Panel Discussion on Indemnity

Additional Insured Demands and the Duty to Defend

j. **Evaluating Additional Insured Demands:** Evaluating AI demands, implications associated with four-corner vs. extrinsic evidence standards, contradictory Florida opinions, and how other States evaluate extrinsic evidence. Panelists will also discuss practical implications of AI as they relate to claim resolution.

i. **Generally – Four Corner States v. Extrinsic Evidence States:** Many States evaluate an insurer's duty to defend based solely on the allegations of the complaint. However, some jurisdictions allow parties to rely upon information found outside of the four corners of the complaint to determine whether a duty to defend is owed. This information is known as "extrinsic evidence. There are four states that do not allow any use of extrinsic evidence to determine the duty to defend (LA, PA, RI, WI).Some states permit extrinsic evidence only to confirm the existence of a duty to defend but not deny it (CT, MD, MN, MS, WA, GA).

ii. Florida's Application of Standards

1. Florida is generally considered a "four corners" state but there are cases that have ruled that extrinsic evidence can be used to evaluate an insurer's duty to defend in limited circumstances.
2. *BBG Design Build, LLC v. S. Owners Ins. Co., 820 F. App's 962, 965 (11th Cir. 2020)* ruled that "a court may consider extrinsic facts if those facts are undisputed, and had they been pled in the complaint, there clearly would have placed the claims outside coverage."
3. *Nationwide Mut. Ins. Co. v. Keen, 658 So. 2d 1101, 1103 (Fla. 4th DCA 1995)* ruled that "If uncontroverted evidence places the claim outside of coverage, and the claimant makes no attempt to plead the fact creating coverage or suggest the existence of evidence establishing coverage…the carrier is relieved of defending."

k. **Analysis of Extrinsic Evidence:**

i. Texas:

ii. Texas' use of extrinsic evidence when evaluating a duty to defend. Florida allows it in very limited circumstances and Texas just recently came out with a decision that allows similar use of extrinsic evidence when it used to be a very strict 8-corners state. Texas has traditionally been a strict eight-corners state when evaluating a duty to defend. Under the eight-corners rule, the duty to defend is determined by considering solely (1) the complaint against the insured and (2) the terms of the insurance policy. In 2004, the federal courts in the Fifth Circuit recognized an exception to the eight-corners rule referred to as the Northfield Exception. Under this exception, extrinsic evidence is allowed to be considered when determine wither or not there is a duty to defend when: (1) it is impossible to discern whether coverage is potentially implicated; (2) the extrinsic evidence goes "solely to a fundamental issue of coverage"; and (3) such evidence does not overlap with the merits of or engage the truth or falsity of any facts alleged in the underlying case. Up until very recently, the Supreme Court of Texas only recognized one limited exception to the eight-corners rule which allowed extrinsic evidence regarding collusion by the claimant and the insured to allege false facts to invoke a defense duty.

iii. *Monroe Guar. Ins. Co. v. BITCO Gen. Ins. Co., 640 S.W. 3d 195 (Tex. 2022)*: In 2014, a farm hired 5D Drilling & Pump Service, Inc. ("5D") to drill a commercial irrigation well. In 2016, 5D was sued for allegedly improperly drilling the well and abandoning it after 5D stuck the drill bit in the bore hole. 5D tendered to two insurance companies. One agreed to defend and the other refused, claiming that the alleged property damage occurred outside their policy period. The issue was whether the court could consider extrinsic evidence of the stipulated date that the drill bit became stuck to determine whether the insurer had a duty to defend. It was determined that the courts may consider extrinsic evidence of the date of an occurrence, but it declined to permit such evidence in this case as there was a dispute as to when the damage occurred. The BITCO test was established which states that extrinsic evidence is admissible to determine whether a duty to defend exists if: (1)_The extrinsic evidence does not overlap with any liability aspects of the case; (2)The evidence does not contradict facts alleged in the pleading; and (3) Admission of the evidence would establish whether coverage exists.

iv. California

1. Scottsdale Ins. Co. v. MV Transportation, 36 Cal. 4th 643, 115 P.3d 460 (2005)-Facts extrinsic to the complaint can give rise to a duty to defend when they reveal a possibility that a claim may be covered by the policy.
2. Montrose Chem. Corp. v. Superior Ct., 6 Cal. 4th 287, 861 P.2d 1153 (1993)- Undisputed extrinsic evidence can defeat as well as generate duty to defend.

v. **Practical Application of AI in Florida v. Other States:** In Florida, the analysis of the duty to defend an additional insured comes down the review of the contract between the AI seeking coverage and the insured, the insured's policy and the pleadings that brought the AI into the litigation. If this is a construction defect claim, it will nearly always be a completed operations claim. If the insured's policy only contains the CG 2010 AI endorsement, then there would be no coverage afforded for the additional insured since this endorsement only applies to ongoing operations. If the policy contains the CG 2037 AI endorsement, which covers completed operations, and the party seeking additional insured coverage is named in the Schedule, then the duty to defend the additional insured should be analyzed the same as it would for the named insured. The contract should be analyzed to see if there is a time limit specified as to how long the named insured is required to carry products-completed operations coverage or other limitations that could restrict coverage to the additional insured. Blanket additional insured endorsements often require that the contract or agreement between the named insured and additional insured specifically state that the additional insured is to be named as an AI on the named insured's policy, that the insurance afforded is primary and noncontributory and that the contract be executed by both parties prior to policy inception.

2. **Enforcement Mechanisms: Allocation and Contribution:** Recent changes in Florida law relevant to enforcing and evaluating tender demands. Panelist will analyze implications through experience with similar concepts in other States.
   a. **Allocation**
      i. **Joint and Several or All Sums v. Pro Rata Share:** Explained generally. In an All Sums or Joint and Several State, each policy that is potentially triggered for defense is 100% responsible for the defense of the insured. There is (in some states) a right of contribution against other potentially triggered policies, but each policy/carrier has an independent duty to defend the case fully. In a pro-rata state, each carrier is only responsible for its pro-rata share of defense/indemnity and that obligation is shared by the insured for any uninsured/underinsured years (i.e., exhausted policies)
   b. **Allocation in Florida**
      i. Fl. Stat. §768: Essentially ended joint and several liability but was only applied to tort cases until recently.
      ii. *Broward Cty. v. CH2M Hill, Inc.,* 45 Fla. L. Weekly D1736 (Fla. 4th DCA 2020):
         1. Upheld a trial court's allocation of liability for damages resulting from breach of contract claims against contractors and engineers in a construction defect case. \
         2. Fl. Stat. §768.81(3) requires the court to enter judgment against each party liable based on such party's percentage of fault. Applying a holistic approach to analyzing the complaint, we conclude that the contract against the engineer fell under the umbrella of the "negligence action against CH2M, so that the circuit court's allocation of fault was appropriate.

c. **Considerations in other states**
    i. California has what is known as an ***Armstong*** designation which permits an insured to pick and choose which policy it would like to defend it in a "suit" where multiple policies are potentially triggered. Each carrier has the right of contribution against other carriers, but the insured can choose which carrier it would like to respond. Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co., 45 Cal. App. 4th 1, 52 Cal. Rptr. 2d 690 (1996)(Established an insured's right to elect which policy's indemnity limits would apply to (asbestos) claims, subject to contribution amongst insurers.); California Pac. Homes, Inc. v. Scottsdale Ins. Co., 70 Cal. App. 4th 1187, 83 Cal. Rptr. 2d 328 (1999)(Expanded the Armstrong election doctrine to conclude that insurers could not "stack" SIR's/deductibles and force insured to pay more than one.)
    ii. SC is a pure pro rata state meaning that each carrier is only responsible for its pro-rata share of defense/indemnity. In practical use, carriers typically defend the entire complaint but take the pro-rata position for indemnity.

d. **Contribution Amongst Carriers in Florida**
    i. **Florida's Recent Changes: Contribution amongst carriers was previously prohibited by Florida Law based on** *Argonaut Ins. Co. v. Maryland Cas. Co.*. This discouraged carrier form accepting AI and Tender of Defense demands. However, the legislature recently responded to the Argonaut case and passed **Florida Statutes Section 624.1055** which states that a liability insurer who owes a duty to defend an insured and who defends the insured against a claim, suit, or other action has a right of contribution for defense costs against any other liability insurer who owes a duty to defend the insured against the same claim, suit, or other action. The statute limits defense costs incurred after the liability insurer's receipt of notice of the claim, suit, or other action and only applies to claims initiated on or after January 1, 2020.

e. **Panel discussion analyzing implications of contribution amongst carriers in Florida and similar enforcement mechanisms in other states**