

# Dealer's Choice

The Subro Settlement Game and the  
Wildcards of Indemnity & Confidentiality

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# The Fine Print is Important



# Get In Front of These Issues

- “Money” is only half the battle
- Planting Seeds – start addressing issues early on
- Don’t Wait Until Money Deal Done



# Hurdles to Watch Out for...







# Indemnity Provisions

# The Basic Problem

- **Settlement is Half the Battle:** In dealing with property damage subrogation claims, there are a number of cases where reaching agreement on the amount of the Settlement is only part of the negotiation.
- **Other Issues:** Reaching agreement on other issues, especially indemnity and confidentiality language, can be just as difficult, if not more so, than reaching agreement on the amount of the settlement.



[illegible]

# What is Indemnity?

- According to Black's Law Dictionary it is:
  - A collateral contract or assurance, by which one person engages to secure another against an anticipated loss or to prevent him from being damnified by the legal consequences of an act or forbearance on the part of one of the parties or of some third person. Term pertains to liability for loss shifted from one person held legally responsible to another person.



# What is Indemnity?

- Purpose:
  - Essential purpose of indemnity language in a release is to protect the settling party from future claims, costs, expenses and/or attorneys fees after settling a claim or lawsuit.
- Best Basic Approach:
  - A Settlement Should Not Make you an Insurer for the Defendant/Target

# Who wants what?

- Defendants:
  - Defendants and liability insurers naturally want to make the protection – and language – as broad as they can.
- Plaintiffs:
  - On the other hand, the Plaintiffs and subrogating insurers would prefer to have no indemnity language at all whenever possible or language that is as narrow as possible.
- Reaching agreement on language that bridges the gap between these opposite positions can be very difficult.

# Know what you agree to!



# Know what you agree to!

- When you are in the position of the party releasing claims, and the Defendant insists on indemnity language, you must make sure you read the language carefully and understand exactly what you are agreeing to do and provide “indemnity” for.



# Indemnity Provisions

## Broad Example

- shall indemnify and hold harmless Prime Contractor and its directors, officers, employees, agents, stockholders, affiliates, subcontractors and customers from and against all allegations, claims, actions, suits, demands, damages, liabilities, obligations, losses, settlements, judgments, costs and expenses (including without limitation attorneys' fees and costs) which arise out of, relate to or result from any act or omission of Subcontractor.
- “includes but is not limited to any and all costs, expenses, attorneys' fees, expert costs, travel expenses for necessary personnel, judgments, settlements, verdicts and any and all other associated expenditures.”

(Note: Not limited to “incident” and not limited to the type of claim being brought, i.e. insured only)



# Indemnity Provisions

## Narrower Example

- Plaintiff shall indemnify and hold harmless Defendant and its directors, officers, employees, agents, stockholders, affiliates, subcontractors and customers from and against all allegations, claims, actions, suits, demands, damages, liabilities, obligations, losses, settlements, judgments, costs and expenses (including without limitation attorneys' fees and costs) from the Incident (as defined herein) **by only the insured**, which arise out of, relate to or result from any act or omission of defendant from the Incident.
- It is expressly agreed by the parties hereto that any **indemnity for a claim by the Insured is limited to the amount of this settlement (\$50,000), and it does not include the costs to defend.**

\*Still concerns, but narrower than prior version\*

# Indemnity Provision

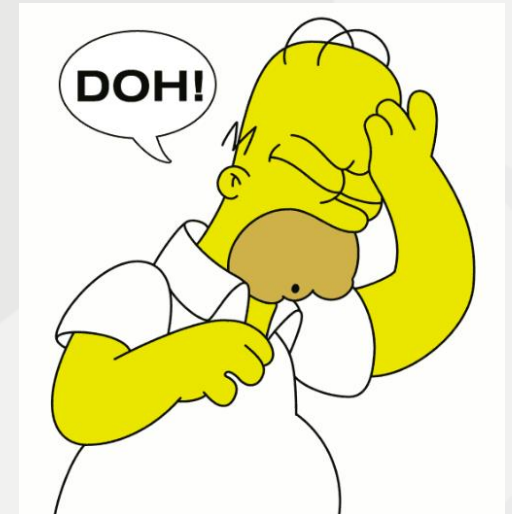
## Narrow Sample – Warranty of No Assignment

- Each Party represents that it will not have, and that it has not, assigned or transferred any interest in any claims which are the subject matter of this Litigation. Each Party further agrees that there are no liens by any former attorneys or by any experts or others with respect to the claims that are the subject matter of this Litigation. Each Party further agrees to indemnify, defend and hold the other Parties harmless from any liabilities, losses, claims, demands, costs, expenses or attorney's fees incurred as a result of such assignments, liens or transfer to any person or entity.

# Indemnity Provisions

## What's the Big Deal?

- Common Scenarios:
  - Known or Unknown Party Makes a Claim (Neighbor Damaged)
    - E.g., Condo Building Water Losses
  - Insured Makes a Claim
- Effect:
  - Becoming an Insurance Carrier Again



# Indemnity

## Key Questions

- Who is being protected?
- Who is providing the protection?
- What protection is included?
- Are there limits?
- Is it only future indemnity payments or does it include attorney's fees and other costs or expenses?
- Are you agreeing to indemnify for actions of known parties or strangers?
- Are you agreeing to indemnify actions you control?
- Has the statute of limitations run? Has the statute of repose run?
- Does it matter if the statute of limitations or statute of repose has run? E.g., other contractual terms and conditions?

# What To Do When Encounter?

## Step One

### Defense Doesn't Need It:

- Release Waives Known and Unknown Claims
- Dismissal with Prejudice
- No Assignment of Claim
- Agree to Return Insured Deductible
- Statute of Limitations/Repose





# **What To Do When Encounter?**

## **Step Two – Water It Down**

- Limit Indemnity To:
  - Your subro claim/warranty of no assignment;
  - Insured's claim for the deductible;
  - Specific Timeframe – only until the SOL expires (which has already expired)
  - Who assigns/controls/pays defense counsel
  - Limit to a % or amount of the settlement – put a cap on the scope of indemnity
  - Exclude defense and related costs

# Other Indemnity Considerations

- Settlements as Judgments
  - Judgments – only count for the plaintiff
  - Explain the Effects of a Judgment at Trial



# Confidentiality Provisions

# What is Confidentiality?



# What is Confidentiality?

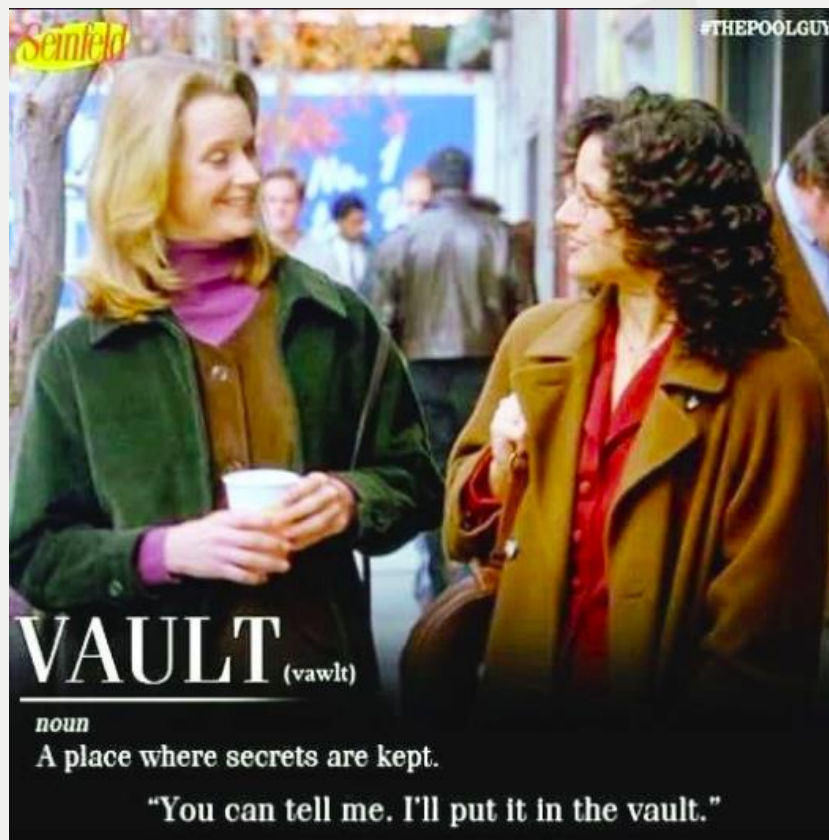
- Black's Law Dictionary:
  - Confidentiality: The state of having the dissemination of certain information restricted.





# Confidentiality Provisions

- Real World: Defense Wants Protection From:
  - Publication
  - Sharing



# We Are Not Publicizing Anyways

Defense Just Paid Me  
A Boat Load Of Money



# Sample

## Broad Confidentiality

- [Name of Plaintiff / Claimant] further agrees that they shall treat the fact of this compromise settlement between the parties, the amount of the settlement, and the contents of this Agreement, as absolutely confidential and shall not disseminate, publicize, and/or otherwise share the fact, amount and terms of settlement with the public or any other parties. [Name of Plaintiff / Claimant] shall not disclose anything regarding this compromise settlement to any other person or entity not directly affiliated with the parties, unless legally compelled to do so, and then, only upon timely prior notice to [Name of Defendant], giving it sufficient time to contest any such disclosure. In the event any inquiry is made of [Name of Plaintiff / Claimant] concerning this matter, they shall indicate only that “the litigation has been dismissed,” and shall give no other indication of the outcome. Confidentiality is a material part of this Agreement, and is intended to apply to and be binding upon [Name of Plaintiff / Claimant] personally, and all employees, agents and other representatives of [Name of Plaintiff / Claimant, if appropriate] . The [Name of Plaintiff / Claimant] shall take all steps necessary to assure that this provision is communicated to and followed by those intended to be bound.

# Sample

## Reasonable Confidentiality

- The terms, conditions, and the fact of settlement shall not be disclosed to any person other than the parties, the parties' representatives and the parties' counsel, except as may be required by: (1) notice to the Court in the Action of the fact of settlement and filing a Stipulation of Dismissal in the Action, (2) an Order of a Court of competent jurisdiction; (3) a proceeding to enforce the terms of the Release and Settlement Agreement; (4) any reporting requirements to any tax authority, any federal or state agencies, any insureds, any attorneys, any adjusters, any internal supervisors, staff and/or employees of RELEASORS, any insurers, any reinsurers, and/or any brokers; and/or (4) any law or corporate governance laws to be disclosed, including legally required financial reporting requirements.

# Confidentiality Provisions

## Step One – Make Breach Meaningless

- Agree to Keep Confidential
- But No Consequences From Breach





# **Confidentiality Provisions**

## **Step Two – Allow For Certain Disclosures**

- Access to info by insurer's auditors, reinsurers, regulators, and attorneys;
- Access for tax, financial, or government compliance purposes;

**Notwithstanding anything to the contrary, nothing in this Agreement shall prevent the disclosure of confidential information or the terms hereunder to lawyers, accountants, auditors, insurers/reinsurers (if any), together with such insurers/reinsurers' third party service providers, actuaries or intermediaries (collectively "Recipients") or regulators, provided the disclosure of the information is reasonably necessary to effectuate the terms of this Agreement, or is required for tax, financial reporting, or governmental compliance purposes, or to transact the business of insurance. Prior to disclosure, the Recipients shall be informed of the confidential nature of the information and shall agree to keep such information confidential.**

# **Confidentiality Provisions**

## **Step Two – Allow For Certain Disclosures**

Continued...

- Access to info by TPAs & Others
  - Know where settlement info goes within an organization and make sure there are exceptions for these recipients

# Confidentiality Provisions

## Other Considerations

- What if “the Cat is Already Out of the Bag”?
  - Prior publication, prior filings/motions and being mindful of information already in the public domain
- Insurance Company Specific Considerations?
- Pre-Approved Language
- Financial Reporting Requirements
- Reporting to Insureds
- Reporting to Re-insurers
- Internal Policies on Info. Sharing (Applies to TPA and Counsel as well)

# Confidentiality Provisions

## Other Considerations

- What if they want your lawyer to keep it confidential?
- The Limits on Lawyers (for both sides)
  - Model Rule 3.4(f) (all states except NY, OR, WA and CA):
    - Prohibits defense lawyers from requesting “a person other than a client to refrain from voluntarily giving relevant information to another party” subject to limited exceptions – applies to future cases
  - Model Rule 5.6(b) (all states):
    - “a lawyer shall not participate in offering or making ... an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a client controversy”
    - Cannot prohibit the lawyers from pursuing a similar claim against a defendant & generally cannot prohibit a lawyer from using info.
    - The Penalty Box?
      - Public Interest Considerations
      - benefit for all potential clients – e.g., repetitive failure cases

# Confidentiality Provisions

## Other Considerations

- Designation of Documents as Confidential & Need to Discard/Destroy
  - Prior Confidentiality Agreement/Stipulations/Protective Orders?
    - Evaluate prior agreements
- Return the Evidence?
  - Is there physical evidence?
    - Does anyone want it?
  - Is this addressed in the settlement?
  - Do others need it?
  - Do others have an interest in it?

# Other Wild Cards

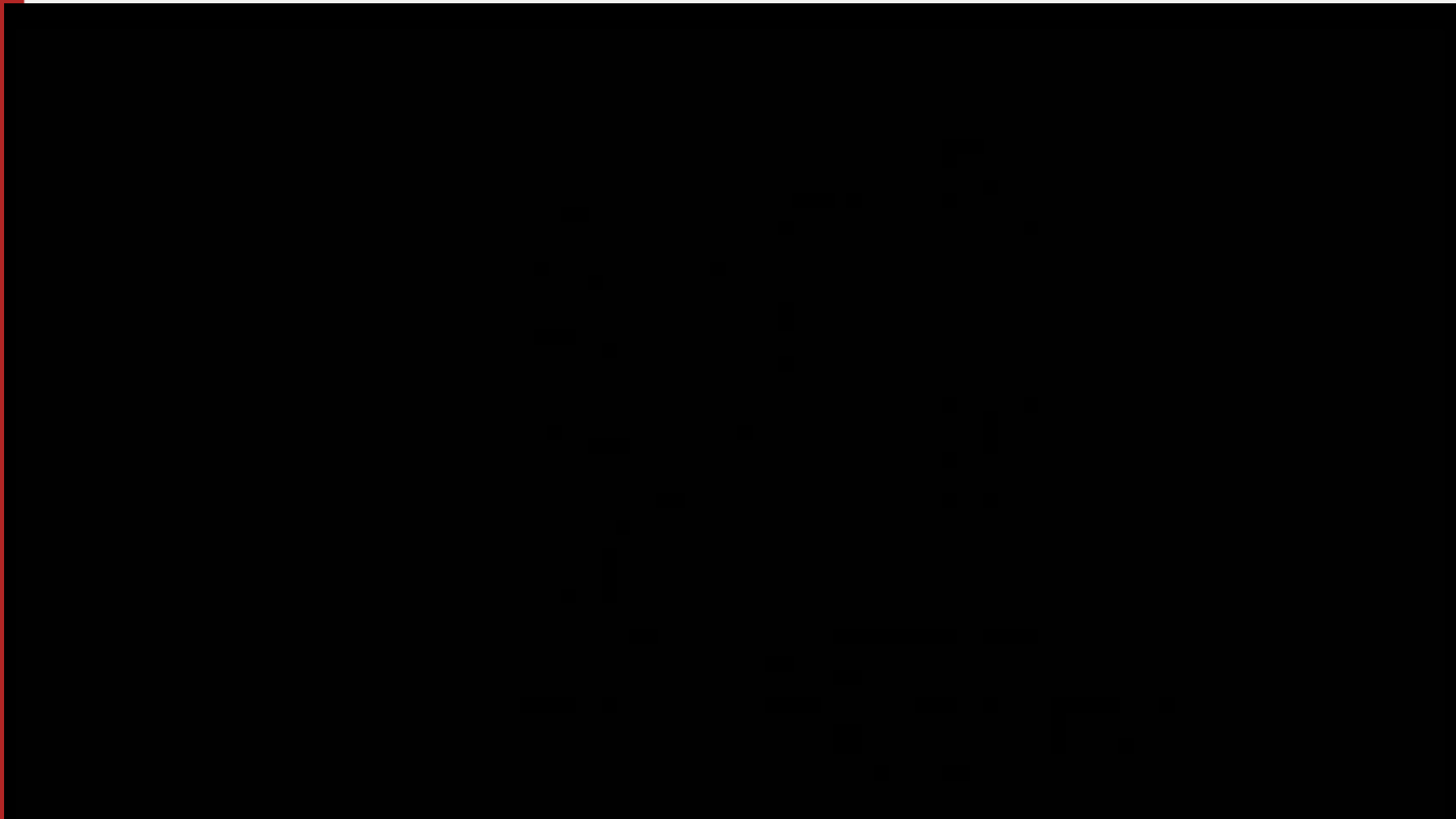


# Insured Signing the Release

- We Do Not Represent Insured
- Let Sleeping Dogs Lie



# **Sometimes Asking Makes it Worse**



# Be Sure “Releasors” Does Not Include Insured

- Defense release will often define “Releasor” to include the insurance company and its parent company, subsidiaries, officers, directors, “insureds”, etc, in the long definition. Be sure to object to this!
- Beware of any argument that insured’s claims are included in release. See *American Bridge Manufacturing Company v. Walter Toebe Construction Company* (E.D. Mich 2010) (under unique facts of case, subro carrier’s release, which simply defined Releasor as the insurance carrier a/s/o the insured, was interpreted to include the insured)
- If know of uninsured losses, specifically state in release “This release does not apply to the separate claims being brought by Plaintiff’s insured xyz corporation.”

# Deductible Reimbursement

- Does the insured receive the full deductible first or a pro-rata share?
  - Policy controls
  - If silent, check state insurance regs
    - CA: must demand deductible pre-suit; pro-rata return after accounting for expenses
    - Check company policies as well

# Uninsured Losses?

- Consideration for approaching the insured:
  - Policy limits paid?
  - Known uninsured losses?
  - Experience during the adjustment?
  - Public Adjuster/Counsel?

# Approaching Insured to Sign Release

- Incentive
  - Money for signing release
  - Did not need to incur costs
- \*Need Advice Retain Separate Counsel\*





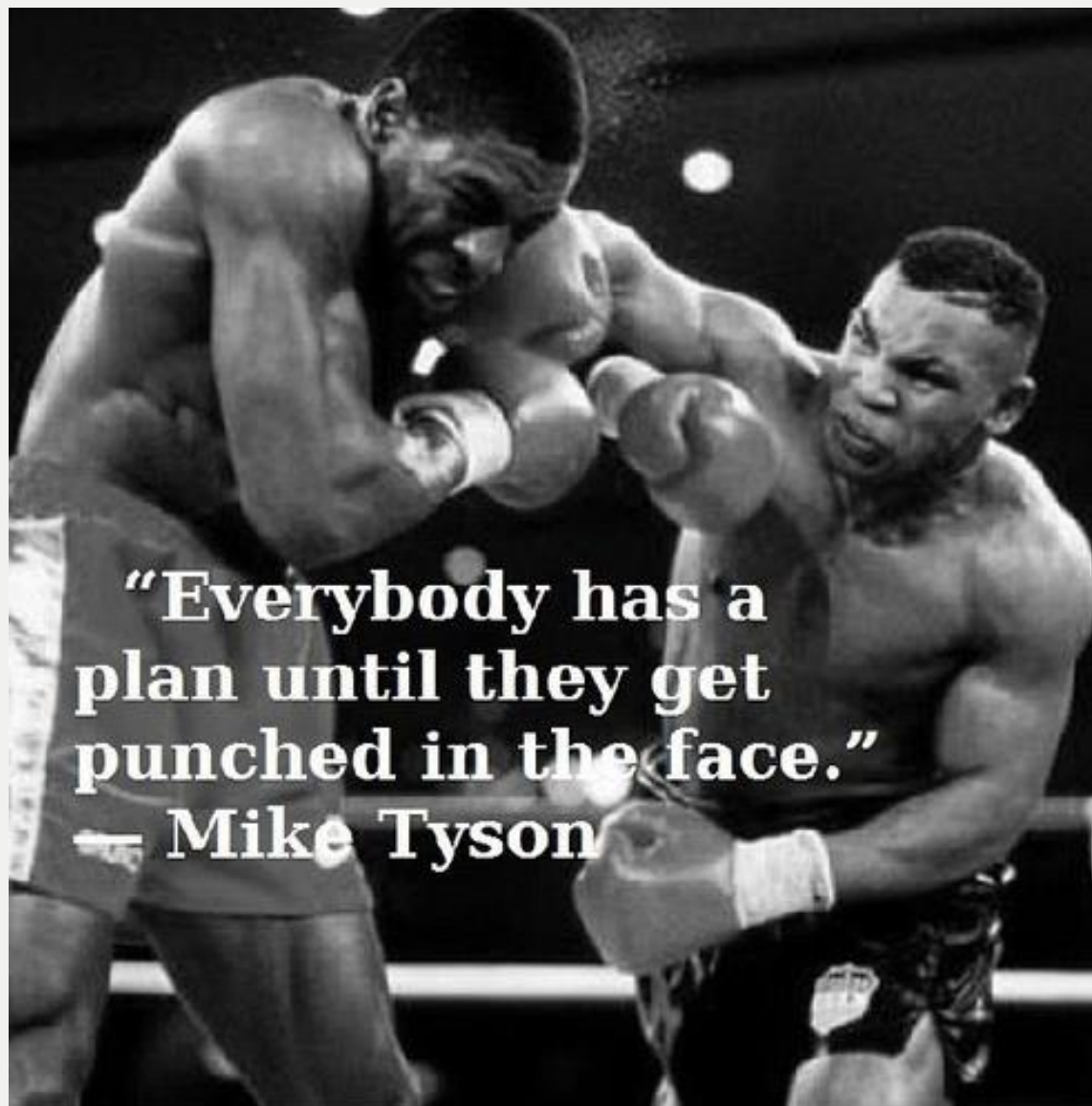
# Claims Against Builders/Contractors

- Practice Pointer: Be sure to not waive away future claims against the builder in your release.
  - Example: water failure in year 1-5; but statute of repose still open for future unrelated claims



# Other Settlement Snags

- Payment Deadlines and Instructions
  - Government Entity Delays
  - Know local state rules
  - Don't File the Stipulation of Dismissal until the Check is in Hand



## Contact Information

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