



AND THE LAW

By Don. R. McGuire Jr., R.Ph., J.D.

This series, **Pharmacy and the Law**, is presented by Pharmacists Mutual Insurance Company and your State Pharmacy Association through Pharmacy Marketing Group, Inc., a company dedicated to providing quality products and services to the pharmacy community.

INDEMNIFICATION

John from Anytown Pharmacy is negotiating to become the supplier of prescriptions and other pharmacy services to the county jail. As a possible vendor to the county, John is presented with a contract covering this relationship. One of the paragraphs is entitled, "Indemnification". John reads through the paragraph, but he doesn't really understand it. In his eagerness to win the contract, John signs it and returns it to the county. What is Indemnification and was it wise for John to agree to it before he understood it?

Indemnification is ". . . the obligation [or duty] resting on one person to make good any loss or damage another has incurred or may incur by acting at his request or for his benefit."¹ It is also known as a Hold Harmless agreement. What it boils down to is if the county gets sued for something Anytown Pharmacy has done wrong; Anytown Pharmacy will defend the county. This can account for significantly higher defense costs, such as attorney fees, to be incurred by Anytown Pharmacy. The pharmacy may also be paying the

county's portion of any judgment in the case.

Indemnity agreements can be one-sided or mutual. A mutual indemnity agreement provides for each party to protect the other. However, a one-sided agreement requires only one party has to protect the other. This is a very important distinction and could result in significant costs for the indemnifying party. Anytown Pharmacy should review the agreement to ascertain what it provides. Many vendor agreements as presented do not provide for mutual indemnity.

Another important part of the review is to know what acts qualify for indemnification. Most commonly, indemnification is provided for breach of contract. Other actions that can be covered by indemnification include negligent acts, grossly negligent acts, wanton & reckless acts, intentional acts, and criminal acts. These are listed in an ascending order of seriousness under the law. Part of the pharmacy's negotiations should be the types of acts that are covered by the indemnification agreement. This is important because

¹ Barron's Legal Dictionary 226 (2d ed. 1984)

many parties entering into such agreements assume that their insurance will take care of this indemnification. However, this is not always true as most insurance policies will likely not provide any coverage for breach of contract, intentional acts or criminal acts. The insurance policy is a contract between the pharmacy and the insurance company and it is unaffected by any contract between Anytown Pharmacy and the county. Any promises to indemnify made by the pharmacy that are not covered by insurance will have to be paid by the pharmacy.

The acts are not the only key element in the Indemnification agreement. The types of indemnity payments provided can also be listed. Examples of these payments include: any and all losses, claims, expenses, fines, penalties, damages, judgments or liabilities. Again, there may be payments promised within the Indemnification agreement that are not covered by insurance, such as fines and penalties.

The Indemnification agreement may also provide the procedure that the party requesting indemnification has to follow in order to qualify contractually. This usually involves promptly notifying the other party and providing relevant documents to them. The party asking for indemnification has to cooperate in the defense of the claim with the other party and may have input into the choice of the lawyer who will defend the case. The choice of lawyer can be critical to the success of your case, but this language has the potential to create a disagreement when it comes time to make the choice.

Depending on the language contained in the county's contract, John may have made an expensive promise because

he didn't fully understand what he was agreeing to in promising to indemnify the county. Obviously, if nothing goes wrong, the issue is moot. But hope is not the best risk management strategy. Careful review of the content of the entire contract, including indemnification requirements, before signing it is a more reliable strategy.

© Don R. McGuire Jr., R.Ph., J.D., is General Counsel, Senior Vice President, Risk Management & Compliance at Pharmacists Mutual Insurance Company.

This article discusses general principles of law and risk management. It is not intended as legal advice. Pharmacists should consult their own attorneys and insurance companies for specific advice. Pharmacists should be familiar with policies and procedures of their employers and insurance companies, and act accordingly.