Assumption of Defence: Seven Points to Consider

Andrew Yolles
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A co-defendant has offered to "assume" or take over your client's defence in a lawsuit. Great! But before you agree, there are some important points to consider to ensure your client is properly protected in the future.

#1: Why are they assuming your client's defence?

The first thing you may want to consider when another party offers to assume your client's defence is *why* the offer is being made. Usually, this offer is made for one of two reasons.

Insurer's Duty to Defend

The first reason a co-defendant may offer to assume your client's defence is because your client is insured under the co-defendant's liability insurance policy. This may be pursuant to a contractual obligation to add your client as an additional insured on the co-defendant's policy, as is common in contractor and service agreements, or because the co-defendant's liability policy itself contains provisions that extend coverage to other entities that stand in certain relationships to the named insured, which in this case includes your client.

If this is the case, it is important to realize that it is the co-defendant's insurer, and not the co-defendant itself, that is offering to assume your client's defence. This usually means that your client is insured in some fashion under the co-defendant's liability policy, with all the rights and protections afforded to insureds under our law.

If your client is insured under the co-defendant's liability policy, it may be worthwhile to obtain clarification as to the nature of the coverage afforded to your client under that policy, and whether there are any limitations on the extent of that coverage.

What kind of insurance policy is it? What are the policy limits, and is the claim likely to resolve or be assessed within them? Is the coverage extended to your client under the policy limited to claims arising from the operations, or negligence, of the co-defendant,

and if so, is it likely to apply? These are all issues you may wish to consider and be certain you have a satisfactory answer to.

If the answer to these questions reveal that there may not be sufficient coverage to indemnify your client with respect to damages assessed against it at the end of the litigation, your client will need to carefully consider whether it wants to give up control over the defence of the litigation.

There seems to be a common misconception that a defendant who is an additional insured under a co-defendant's liability policy, and whose defence is being assumed by the co-defendant's insurer as a result, is entitled to confirmation that the co-defendant's insurer will ultimately indemnify the defendant in respect of any damages assessed against it. It is sometimes suggested that in the absence of such confirmation, there is a conflict of interest between the defendant and the co-defendant's insurer and counsel.

Usually, it would be premature for an insurer to commit to coverage for indemnification of an insured before the resolution of the underlying litigation. Unlike the insurer's defence obligations, which are triggered as soon as allegations are made against the insured that could, if proven true, potentially fall within the scope of coverage for indemnification, an insurer's duty to indemnify an insured usually arises when the insured becomes obligated to pay damages as a result of a covered loss, and whether the loss is in fact covered is determined on the basis of the facts found at trial (see, eg., *Nichols v. American Home Assurance Co.*, [1990] 1 SCR 801).

Therefore, an insured is not usually entitled to a determination of coverage for indemnification until after underlying litigation has concluded.

With that said, it may be worthwhile to inquire as to whether the insurer has raised any concerns about coverage for the loss at issue, and whether the insurer is reserving its rights with respect to any known breaches of the insurance policy.

Because your client probably isn't entitled to confirmation of coverage for indemnification, the mere fact that such confirmation is not provided will not usually constitute a conflict of interest for the co-defendant's lawyer in assuming your client's defence. However, there may be cases where such conflicts could arise.

For example, if your client has been added to the co-defendant's liability policy, but only for claims arising from the co-defendant's negligence, and there is a real question in the case as to whether the co-defendant was negligent, then any lawyer attempting to represent both your client and the co-defendant could arguably have a conflict of interest.

It is in your client's interest for the co-defendant to be found negligent (so that your client will be covered under the co-defendant's policy), while it is in the co-defendant's interests not to be found negligent.

If there is such a conflict of interest, it may be appropriate to push for the insurer to appoint separate counsel and separate adjusters for each defendant, with appropriate ethical walls put in place by the insurer.

Contractual Defence

The other common reason one defendant will offer to assume the defence of another is because there is a contractual relationship between the defendants that includes an indemnification agreement. If the co-defendant is offering to assume your client's defence pursuant to an indemnification agreement, consider the language of the agreement.

Although some indemnity agreements do require the indemnitor to defend the indemnitee, many do not, and simply state that the indemnitor must hold the indemnitee harmless and indemnify it. In that case, the indemnitor has no legal right to assume the defence of the indemnitee. Rather, the indemnitee may choose to conduct its own defence, entirely at the expense of the indemnitor.

Often, there are practical reasons to permit the co-defendant to assume your client's defence, even in the absence of specific language in the indemnity agreement requiring the co-defendant to defend your client. It relieves your client of having to be concerned with directing the defence of the claim, and it simplifies the litigation by removing a lawyer. However, it is worth some consideration, as there may be cases where your client would prefer to direct the litigation, notwithstanding the indemnification agreement.

In any event, in contrast to the previously discussed scenario where the co-defendant's insurer offers to assume your client's defence as an additional insured, where the co-defendant offers to assume your client's defence pursuant to a contractual indemnification agreement, you will want to confirm whether the co-defendant also undertakes to indemnify your client pursuant to the agreement.

If the co-defendant will not agree to indemnify your client in respect of the claim at issue, then your client should probably think long and hard before agreeing to permit the co-defendant to assume its defence. In such a case, your client would likely want to maintain a crossclaim against the co-defendant in breach of contract, which will be difficult, if not impossible, if both parties are represented by the same counsel.

#2: Do you need a crossclaim?

As indicated above, if the co-defendant assumes your client's defence, it would take a creative arrangement to be able to maintain or prosecute a crossclaim against the co-defendant at the same time.

It is accordingly worth considering whether your client may need to maintain a crossclaim against the co-defendant for any reason. For example, your client may want to pursue the co-defendant for its own damages, arising from the same facts as the main action. It may be worthwhile to discuss this issue with your client.

#3: Who is going to defend your client?

Before your client agrees to permit the co-defendant to assume its defence, it is probably worthwhile to confirm which lawyer or law firm will be handling the defence.

You will want to confirm that the lawyer or firm has the requisite expertise to handle the type of claim in question, and your client may have reservations about certain lawyers or firms representing them. Better to find out before it is too late.

#4: What information will your client receive?

You will want to ensure that the co-defendant and its lawyer are prepared to keep your client apprised of the litigation. Although the co-defendant is agreeing to defend, and maybe even indemnify, your client in respect of the litigation, it is still litigation that your client is a party to.

It is usually worthwhile to discuss minimum reporting requirements with the co-defendant, such as the expectation that your client will be promptly advised of all significant developments in the litigation. Your client may want to receive full reports and assessments from the co-defendant's lawyer, or they may prefer to simply be notified of events as they occur.

You may want to consider whether your client needs to be apprised of settlement offers and negotiations as well, depending on whether your client may remain exposed.

#5: What happens if they have a change of heart?

Litigation often takes years to complete, and cases can change considerably over that time. Although the co-defendant may have the purest of intentions now in offering to

assume your client's defence, it is still worth planning for the contingency that they may change their mind down the road.

It is accordingly often worth discussing with the co-defendant what notice it must give to your client if it is considering changing its mind. For example, you might ask the co-defendant to agree to notify your client within five days if it becomes aware of any new information that may cause it to re-evaluate its contractual or insurance obligations.

You will also probably want the co-defendant to agree that it will not compromise your client's defence position in any way if it has reason to believe it may rescind its agreement to defend (and, if applicable, indemnify) your client.

#6: What closing documentation will your client get?

You will probably want to ensure that your client will be named on any full and final release executed by the plaintiff in respect of the claim in question. You will also want to ensure that the co-defendant agrees to provide your client with the executed release, notice of discontinuance, dismissal order, and/or judgment and satisfaction piece, as the case may be.

#7: Do you need minutes of settlement?

Often, negotiations with the co-defendant on the terms of their assumption of your client's defence are straightforward and fairly uncontentious. In such cases, correspondence outlining the terms and both parties' agreement will usually suffice.

But these negotiations aren't always so friendly. Where the negotiation of the terms by which the co-defendant will assume your client's defence are more complicated or adversarial, you may want to consider having both parties execute minutes of settlement, outlining the terms both parties agree to be bound by with respect to the defence of the action.

There will no doubt be many other issues and considerations that arise from case to case when a co-defendant offers to assume your client's defence. The seven points above will hopefully provide a starting point as you begin your negotiations.

Good luck!