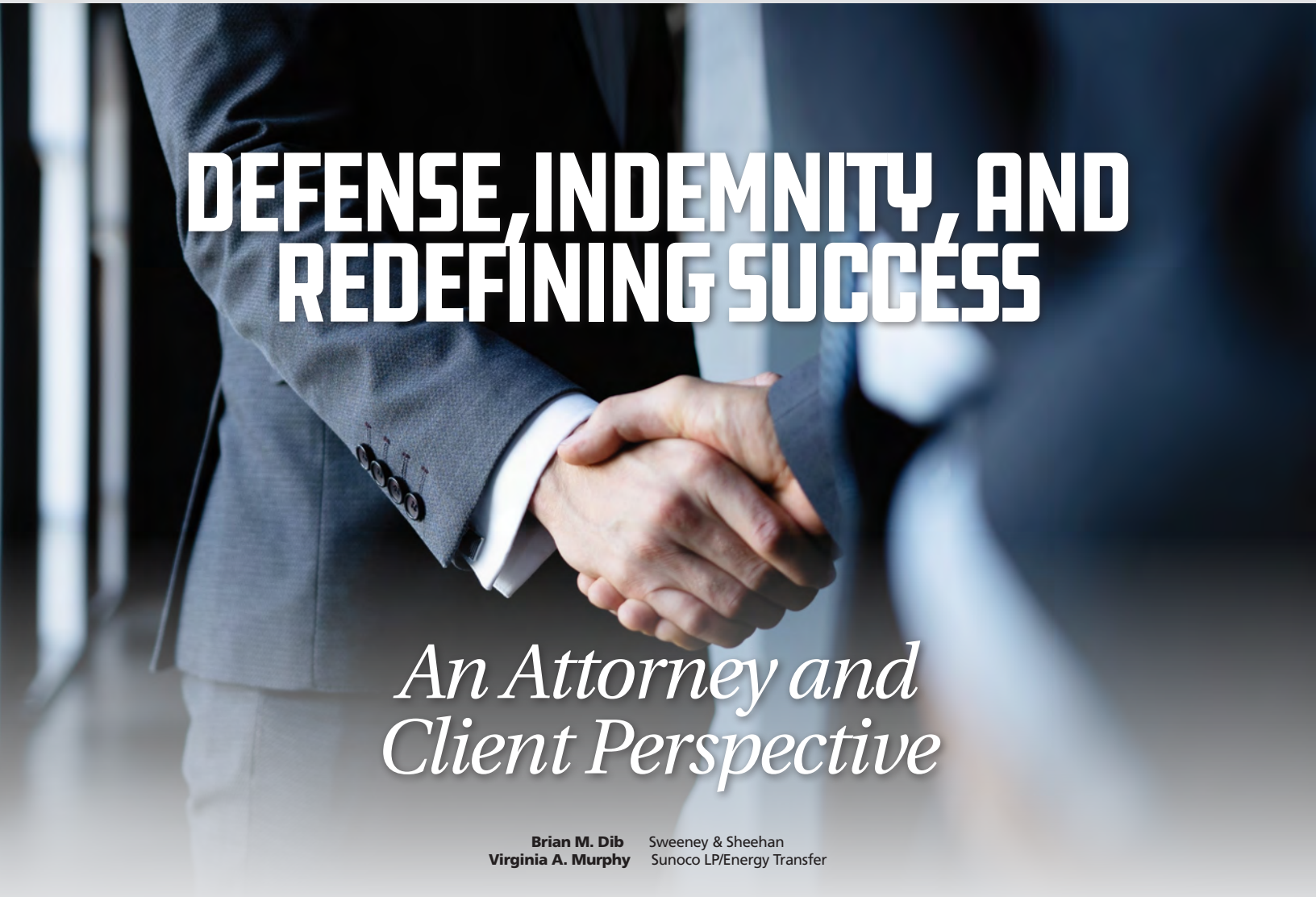

DEFENSE, INDEMNITY, AND REDEFINING SUCCESS

An Attorney and Client Perspective

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ATTORNEY PERSPECTIVE

Prior to joining Sweeney & Sheehan (Philadelphia), my background was in litigating personal injury cases as a plaintiff's attorney. The biggest transition for me in moving to the defense side was not figuring out how to bill hours or prepare client reports but how to define success when defending a case. On the plaintiff's side, success was a simple concept – obtain as much money for the client as possible. On the defense side, success was harder to define, took many different forms, and was rarely absolute.

One of my first client-specific projects was to research Pennsylvania's case law concerning the duty to defend and the duty to indemnify and to put together a guide to assist our client in enforcing their defense and indemnity agreements. Years later, that small project has blossomed into a program that has regularly yielded full indemnification for our clients and has also regularly yielded reimbursement of our clients' legal fees and litigation costs, including many 5- and 6-figure reimbursements. The process associated with seeking defense and indemnity brings me back to my plaintiff's attorney roots – preparing, sending, and following up on demand packages. Regularly achieving indemnification and reimbursement has helped redefine what it means to be successful in defending certain claims.

The goal of this article is to provide a brief introduction to contractual defense and indemnification agreements and to provide some practice tips for seeking to enforce those agreements to obtain successful outcomes for your clients. Defense and indemnity agreements come in many forms. Some examples of contracts with defense and indemnity provisions include construction contracts, franchise agreements, lease agreements, and maintenance agreements (including vendor agreements for snow removal and de-icing services). From the outset, you will want to determine the defendants in the case, the relationship of those defendants, whether a contractual agreement governs any of those relationships, and whether any of those contractual agreements contain defense and indemnity provisions.

Once you have identified the existence of a contractual agreement providing for defense and indemnification, you will want to examine what circumstances trigger the provision(s). You will also want to make sure that the provision(s) is/are enforceable in your local jurisdiction. Common triggers include claims arising from the work to be performed under the agreement (for construction contracts and maintenance/vendor agreements) and claims arising from the condition of the premises or arising from the contractual responsibilities of the contracting parties (for franchise and lease agreements). Under Pennsylvania law, to be enforceable, an indemnity agreement must contain clear and unequivocal language stating that indemnification is intended for

claims arising in part or in whole from the negligence of the indemnitee *(the party seeking indemnification)*.

It is important to understand that the duty to defend and the duty to indemnify are distinct legal obligations. The duty to indemnify is one party's promise to reimburse or hold harmless another party for a loss or damage that results from a contractually covered claim. That obligation normally takes the form of paying for or reimbursing a party for monies paid towards a settlement of a plaintiff's claims or reimbursement for a jury verdict against that party. Oftentimes, final resolution of the indemnity obligation must wait until a full resolution of the matter on the merits. In contrast, the duty to defend is triggered much earlier, and generally attaches when the allegations in the Complaint either match the duty to defend in the contractual agreement (with respect to a contracting party) or when the allegations in the Complaint trigger the possibility for coverage (with respect to an insurance agreement).

Because the duty to defend is usually triggered by the allegations in the Complaint, it is best practice to send a tender letter for defense and indemnification after receipt of a filed Complaint *(even if an earlier tender was sent pre-suit)*. The tender letter should outline the allegations of the plaintiff's Complaint and the contractual obligations of the party owing defense and indemnification, and it should explain why those contractual obligations have been triggered. We have also found it helpful to request a written response by a certain deadline. Separate tender demands should be sent to the party owing defense and indemnification and to that party's insurance carrier. The tender demand to the insurance carrier should request defense and indemnification both pursuant to contract *(discussed above)* and pursuant to additional insured status *(as most defense and indemnity contracts require the indemnitee to be named as an additional insured on any applicable commercial general liability insurance policy)*. Through discovery, it is helpful to explore whether there are multiple availability insurance policies, including any umbrella or excess liability insurance policies, which may provide additional coverage and tender opportunities.

It has been our experience that the following strategies have been helpful in obtaining defense and indemnification for our clients: (1) dedicating time to follow-up on the tender demands with counsel for the party owing defense and indemnification and its insurance carrier; (2) retendering after major events in the litigation, including, but not limited to, after depositions, expert reports, and at the conclusion of discovery; and (3) threatening and being willing to take legal action to enforce your clients' contractual rights for defense and indemnification. The latter can take the form of filing third-party or joinder complaints or separate lawsuits seeking defense and indemnification and/or filing coverage and bad faith actions against the applicable insurance carriers. As with all other aspects of litigation, persistence is the key to ensuring that your client achieves successful outcomes in obtaining defense and indemnification.

CLIENT PERSPECTIVE

As the manager of risk & insurance litigation for the largest independent fuel distributor in the United States, the strength and enforceability of our Dealer Supply Franchise Agreements are vital. These contracts exist with the objective of fully protecting our company against all claims, losses, and litigation arising from these agreements.

Some keys to our company's success in enforcing the indemnity and insurance obligations in these contracts include:

(1) Creating a solid paper trail and proactively following up – submit concise tender letters to the indemnitor and their insurer, attaching the applicable contract and citing the specific provisions triggering defense and indemnity obligations. This should be done immediately upon receipt of the claim and should regularly be followed up on by phone and email. Request written confirmation of defense, indemnity, your additional insured status and the primary and excess limits on all applicable policies.

(2) Upon receipt of the lawsuit, submit a follow-up comprehensive tender letter to the indemnitor and their insurer emphasizing the time limit for filing an answer with the court and confirming defense obligations and that fees and costs will be pursued.

(3) If the tender response is delayed or denied, retain strong outside counsel with knowledge of your company's contract language and experience effectuating these tenders. Have outside counsel aggressively pursue the tender and defense obligations and include specific crossclaims against the indemnitor in the litigation. Third-party Joinder complaints are sometimes necessary. Keep in mind that there is no legal requirement that indemnitees dismiss their contractual claim for fees and costs in exchange for the settlement of the underlying plaintiff's claim.

(4) Don't be afraid to file suit to enforce the contract provisions. In some states, in post-settlement indemnity and bad faith actions, penalties may be awarded in addition to actual fees and costs incurred.

(5) Learn from past claims experience and collaborate with in-house and outside counsel when contract language revisions are needed based on changes in the law or where new insurance policy exclusions may impact abilities to be fully compensated. Are the required limits of insurance in your contracts sufficient to protect your company?

Contractual indemnity claims are an important part of the claims management process and are one of the few areas that can return significant revenue to your company.

Brian Dib, a partner at Sweeney & Sheehan in Philadelphia, Pennsylvania, focuses a considerable part of his work on representing corporations and businesses in the retail, hospitality, energy and transportation sectors. Clients seek his assistance in managing catastrophic injury claims and those involving intricate and sensitive business relationships.

Ginny Murphy is the risk & insurance litigation manager for Sunoco LP/Energy Transfer. Ginny manages the national liability insurance program for both publicly traded companies and their affiliates, including their $20 million SIR. Areas of responsibility include claims and litigation management, safety, loss trends, prevention, risk reduction and cost containment.