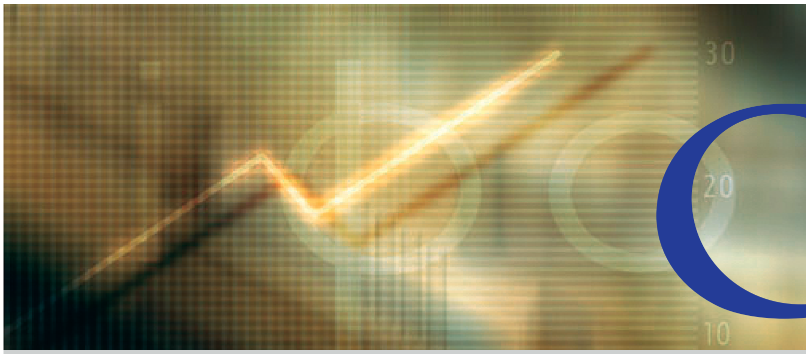

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## Understanding the Differences Between Indemnity and Exculpatory Clauses

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It is commonplace for all types of contracts, from purchase agreements to partnership agreements to leases, to contain indemnification and exculpatory clauses. While these provisions are routinely inserted into contracts, they are also often mistakenly viewed as interchangeable. However, it is important to understand there are critical differences between these two types of clauses.

With a typical indemnity provision, one party (the indemnitee) attempts to have the other party bear the risk and costs of losses incurred should a third party bring a claim against the indemnitee related to the underlying transaction. An indemnity provision does not prevent the filing of a lawsuit, or the injured party bringing the claim from recovering damages. Rather, it simply shifts the economic risk to the party giving the indemnification. For example, an entity selling real property might indemnify the buyer against claims related to the property during the seller's ownership.

Conversely, an exculpatory provision seeks to prevent one party from being able to recover from another party. In short, an exculpatory clause is intended to bar a party from being able to purse legal claims that it otherwise would have the right to assert. The claims affected by an exculpatory clause are those between the parties to the agreement and not third-party claims. For example, a borrower might release its lender from claims related to the loan in an amendment to the loan documents.

Understanding these differences will help ensure that you enter into contracts that provide the desired liability protections, or preserve those legal rights that you wish to retain.