



## ***CCM+S Newsletter: Indemnify and “Defend:” A Wolf in Sheep’s Clothing!***

Virtually every design professional has signed a contract containing an indemnity clause. Typically, indemnity provisions require Party A to promise to hold Party B harmless from the legal consequences of Party A’s conduct. If you have signed a contract with an indemnity clause, a recent case magnifies the potential exposure for signing a bad contract which could result in you having to pay your opponent’s attorney fees and costs, even if you are not found liable! This article explains some of the dangers and suggests some options to remedy the situation.

### **What is indemnity?**

Before discussing this new case, some basic information on indemnity is in order. Indemnity agreements typically contain two parts: the indemnity clause and a defense component.

Imagine on a typical construction project that Party A agrees by contract to indemnify Party B for claims stemming from Party A’s negligent actions. Thereafter, Party C sues Party B making a claim related to Party A’s involvement in the project. The first thing Party B is going to do is to tender his defense and indemnity to Party A pursuant to their contract. If Party A ultimately pays any money to Party B for the claims made by Party C, that is the indemnity.

The defense component is the cost Party B pays to defend against the claims made by Party C for attorney fees. By statute in California, the duty to indemnify encompasses the duty to defend. The defense aspect is the focus of some new case law and this article.

### **What is the problem?**

The problem is that depending on the language in your contract, a party could be made to defend another party with whom they contracted even though the first party is found by a jury to not be negligent and/or not in breach of their contract.

Recently, in *UDC-Universal Development, L.P. v. CH2M Hill*, a California case, a condominium homeowners’ association brought suit against UDC, the developer. UDC then cross-complained against its design professional, CH2M Hill, based on an indemnity provision in their contract.

The *UDC* jury returned with a finding of no negligence and no breach of contract by CH2M Hill. Therefore, CH2M Hill had no duty to indemnify UDC. However, the court ruled that regardless of that jury finding of NO NEGLIGENCE AND NO BREACH OF CONTRACT, CH2M Hill still had a duty to defend UDC and pay UDC’s defense costs in the suit brought by the condo association. The language of the indemnity provision in CH2M Hill’s contract explicitly called for CH2M Hill to defend UDC from “any claim or demand,” regardless of CH2M Hill’s negligence or non-negligence.

Therefore, CH2M Hill was ordered to pay UDC’s costs of defense even though CH2M Hill was not negligent or in breach of its contract.

### **What does this mean for indemnity agreements?**

It means that if you are asked to indemnify another party, extra caution must be taken with the language of an indemnity provision. The wording of such provisions may mean that even if you



are not negligent and did not breach the contract, you still have to pay the other party's defense costs. Not only could this be expensive, it could present problems with your insurance carrier.

**What problems could there be with my insurance?**

Professional liability insurance covers negligence claims against you; it is not made to cover liability assumed by contract in the absence of negligence. Therefore, under the *CH2M Hill* analysis, even if you are found not negligent or in breach of your contract, your contract may force you to pay all of the other side's attorney fees and costs. Because this is a contract obligation aside from any negligence, this obligation may not be covered by your insurance.

**What should you do when negotiating contracts?**

Consider the following:

- If you can, eliminate the indemnity agreement altogether.
- If this is not possible, another approach is to make the indemnity agreement reciprocal.
- Most importantly, any obligation to defend or indemnify needs to be tied directly to a finding of negligence on your part. This means that if the clause is written to create two separate obligations (one to indemnify and one to defend), both obligations have to be tied to a finding of negligence.

Here are two examples:

**EXAMPLE A**

- Consultant agrees to indemnify and hold Owner harmless from and against all claims, liens, demands, damages, injuries, liabilities, losses and expenses to the extent determined by a court of competent jurisdiction to have been caused by the Consultant's negligence.

In this example, there is a single clause that requires both defense and indemnity. Although the clause does not say defend, (as indicated above under California statutory law), the duty to indemnify encompasses the duty to defend. In the example above, the single clause is tied to an ultimate finding of negligence.

**EXAMPLE B**

- 1) Consultant agrees to defend, indemnify and hold Owner harmless from and against any and all claims, demands, damages, lawsuits, arbitrations, costs (including reasonable attorneys' fees and expert witness fees) related to, arising out of or connected with any negligent act, error or omission on the part of Consultant. 2) Consultant shall defend Owner against any claim under the foregoing provision.

Under example B, there are two separate clauses. The first clause involves both the defense and indemnity to the owner.

The second clause in example B addresses only the defense of owner. Although there is a reference to negligence, it is not a reference to a finding of negligence. As such, any claim for negligence (not a finding of negligence by a judge, jury, or arbitrator) will trigger the duty to defend. This is very similar to the clause that was examined in the *CH2M Hill* case discussed above. Under this scenario, as in *CH2M Hill*, even if the consultant proves they were not



**COLLINS COLLINS MUIR + STEWART** LLP  
ATTORNEYS AT LAW

negligent and have no duty to indemnify, they will still have a duty to pay the defense of the owner.

**So what is the take away?**

Indemnity clauses require precision. There is no magic language that will tell you automatically how whether a provision is good or bad. The above examples are not simply templates that can be compared to contracts to evaluate how the obligations will shake out. Each clause must be read and examined carefully.

Please contact us at either the South Pasadena or Orange offices to discuss further.

David E. Barker  
1100 El Centro Street  
South Pasadena, CA 91030  
Phone: (626) 243-1100  
Fax: (626) 243-1111  
[dbarker@ccmslaw.com](mailto:dbarker@ccmslaw.com)  
[www.ccmslaw.com](http://www.ccmslaw.com)

Christie B. Swiss  
1100 El Centro Street  
South Pasadena, CA 91030  
Phone: (626) 243-1100  
Fax: (626) 243-1111  
[cswiss@ccmslaw.com](mailto:cswiss@ccmslaw.com)  
[www.ccmslaw.com](http://www.ccmslaw.com)

***Nothing contained within this article should be considered the rendering of legal advice. Anyone who reads this article should always consult with an attorney before acting on anything contained in this or any other article on legal matters, as facts and circumstances will vary from case to case.***