



Limiting the Unintended Duty to Defend: An Analysis of State Law

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For lawyers advising design professionals and contractors in either contract negotiation or litigation, the ability to manage and predict the scope of contractual indemnity obligations is essential to proper risk management. Contractual indemnities can allocate liability and economic burdens in a manner that might not otherwise occur under common law or statutory tort law. Where duties imposed by a contractual indemnity exceed the standard of care, the design professional also runs the risk of losing the full protection of its professional liability insurance. The usual policy forms will not consider the indemnified party—typically an owner, lender, investor, or third-party beneficiary of the contract—an “insured” entitled to the policy’s protections and exclude coverage altogether for “liability assumed by contract.” When courts infer a duty to defend in a contractual indemnity even in the absence of fault on the part of the design professional, the risks assumed may become difficult to justify.

Important Cases to Consider

In recent years, design professionals and their insurers were unsettled by the California decisions in *Crawford v. Weather Shield Mfg., Inc.*¹ and *UDC-Universal Development, L.P. v. CH2MHill*,² which imposed financial liability for the defense costs incurred by two developers in residential construction defect litigation even though the indemnitors—a subcontractor in *Crawford* and an engineer in *CH2MHill*—were found by a jury to be not at fault.

It was unremarkable in *Crawford* or *CH2MHill* for the developer to demand a defense of the homeowners’ claims. The contractual indemnities in both cases expressly required a defense. Weather Shield’s subcontract promised “to indemnify and save [the developer J.M. Peters] harmless against all claims for damages, loss...and/or theft...growing out of the execution of [Weather Shield’s] work,” and “at [Weather Shield’s] own expense to defend any suit or action brought against [J.M.Peters] founded upon the claim of such damage[,],...loss...or theft.”³

However, the California Supreme Court in *Crawford* held that *every* indemnity contains implied duties to defend or reimburse the indemnitee’s defense costs—unless those duties are explicitly disclaimed in the contract—and those duties are triggered by the tender of defense “regardless of whether it was ultimately determined that [the indemnitor] was actually negligent.”⁴ The California Supreme Court in *Crawford* contrasted the rules of construction for contractual indemnities and liability insurance policies, observing that ambiguities in insurance policies are construed against the insurer,⁵ while language in other contractual indemnities seeking to impose liability regardless of the indemnitor’s fault “must be particularly clear and explicit, and will be construed strictly against the indemnitee.”⁶

The supreme court noted that California’s Civil Code section 2778 had, without change since 1872, established general rules for the interpretation of indemnity contracts “unless a contrary intention appears” in the indemnity.⁷ Three such general rules in Cal.Civ.Code §§2778.3-5 controlled the outcome in *Crawford*:

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- A contractual indemnity against claims, demands, or liability “embraces the costs of defense against such claims, demands, or liability” incurred reasonably and in good faith.
- The indemnitor “is bound, on request of the [indemnitee] to defend actions or proceedings brought against the [indemnitee] in respect to matters embraced by the indemnity” unless the indemnitee chose to conduct its own defense.
- If the indemnitor declines the indemnitee’s tender of defense, “a recovery against the [indemnitee] suffered by him in good faith, is conclusive in his favor against the [indemnitor].”⁸

Applying these statutory rules of construction for contractual indemnities, the California Supreme Court held in *Crawford* that, unless the parties’ agreement expressly provides otherwise, “a contractual indemnitor has the obligation, upon proper tender by the indemnitee, to accept and assume the indemnitee’s active defense against claims encompassed by the indemnity provision.”⁹ As Weather Shield’s subcontract did not disclaim the duty to defend, or expressly state it would not be liable for defense costs if it did not have to indemnify the developer, the supreme court held that Weather Shield must reimburse the developer’s defense costs even though a jury found it was not at fault.

In *CH2MHill*, a consultant providing engineering and environmental planning services for the developer of a residential condominium refused the developer’s demand for indemnity in litigation by the homeowners association, alleging property damage resulting from “defective conditions” due in part to “negligent planning and design of open space and common areas.”¹⁰ CH2MHill sought to distinguish the *Crawford* decision, which issued during the course of its litigation, by arguing that the homeowners’ complaint against UDC did not allege any defective performance by CH2MHill.¹¹ The California Court of Appeals rejected this argument on appeal, holding once again that the contractual indemnity was not so limited in scope that it required an “underlying claim of negligence specifically against CH2MHill in order to trigger [its] defense obligation.” Since the indemnity covered claims against UDC that “arise out of or are in any way connected with” a negligent act or omission by CH2MHill, it was obligated to defend and—once again—to reimburse the developer’s defense costs even though it had not been found at fault by the jury’s verdict.¹² The court of appeals held that CH2MHill’s duty to defend applied to “any ‘suit, action or demand brought against [UDC] on any claim or demand covered herein.’”¹³

The first question we seek to answer in this paper is whether courts in other jurisdictions will imply a duty to defend as an essential element of a contractual duty to indemnify. That is the “unintended” duty in the title. Second, we ask whether those courts require reimbursement of the indemnitee’s defense costs even if the indemnitor is not found at fault. Third, we will discuss legislative initiatives to avoid or limit unintended duties to defend, and conclude with recommendations for negotiating indemnities that do not include an unintended duty to defend.

Comparing Rules of Construction for Insurance Policies to Other Indemnification Agreements

Courts considering “duty to defend” cases often start their analysis by contrasting their rules of construction for insurance policies that include an express duty to defend the insured with their general rules of contract construction for other indemnification agreements. Within the insurance context, the duty to defend is well established and fairly uniform across the country. As a general rule, the insurer’s duty to defend is broader than its duty to indemnify and is triggered by allegations of conduct that fall within the scope of the policy’s duty to indemnify, as a so-called “covered claim.”¹⁴ This is often referred to as the “eight corners rule:” if the allegations within the four corners of the complaint can be reasonably construed to allege a claim for damages that would be covered within the four corners of the insurance policy, then the duty to defend is triggered.¹⁵ Some courts go even further by holding that the insurer’s duty to defend continues for as long as the claims against its insured might possibly be covered by the policy.¹⁶

In the absence of a contractual indemnity, a design professional or contractor sued by its client on a common law indemnity theory has a more limited exposure and no immediate duty to defend. Common law indemnity claims typically arise in the context of passive liability, such as *respondeat superior* or other vicarious liability claims.¹⁷ In those situations, the original defendant held liable to the original plaintiff for damages by virtue of its relationship to the responsible party has a right to obtain indemnification from the responsible party under common law, including the right to recover the cost of defense,¹⁸ but there is no independent duty to defend.

Indemnification agreements are contracts and, despite some variation in rules of construction applied from state to state, courts universally enforce the clear, unambiguous terms of contracts as agreed to by the parties.¹⁹ From this common starting point, differences have developed in the rules of construction that courts apply to insurance policies, as compared to other contractual indemnification agreements. Courts typically construe insurance policies broadly to give effect to the reasonable expectations of the insured; they will almost always construe ambiguities in favor of coverage.²⁰

In contrast, when interpreting other contractual indemnification agreements, courts typically construe their terms narrowly against the party seeking indemnification.²¹ In recent years, some states have also enacted legislation expressly prohibiting indemnification provisions that require defense before the indemnitor's fault is determined (as will be discussed below) or prohibiting contracts other than insurance policies that indemnify a party for its own negligence.²²

States With Indemnity Statutes Comparable to California's Civil Code

Legal authority for imposing a duty to defend in California without regard to the indemnitor's fault is found in the eight sub-parts of Cal. Civ. Code § 2778, rules for interpreting indemnity agreements. As applied in the *Crawford* and *CH2MHill* cases, the civil code implies a duty to defend unless it is expressly disclaimed. Our research identified only five other jurisdictions in the United States that have indemnity statutes that are virtually identical to this portion of California's Civil Code: North Dakota (N.D.C.C. §22-02-07(4)); Guam (Guam Code Ann. §30107); Montana (Mont.Code Ann. §§28-11-313 to 28-11-317; Oklahoma (Okla.Stat. Title 15 §427); and South Dakota (S.D. Codified Laws §§56-3-7 to 56-3-15).

As the indemnity rules of construction statutes in these other states and territories are nearly identical to California's Civil Code, we will not repeat them at length. Only North Dakota, South Dakota, and Oklahoma have reported decisions under their statutes. As of this date, no published opinion in these jurisdictions has expressly adopted the *Crawford/CH2MHill* rationale for implying a duty to defend without regard to fault in these other states.

Duty to Defend in Other States

Alabama

A case seeking to read an unintended duty to defend into an indemnity that did not expressly require a defense was recently decided in *St. Paul United Methodist Church v. Gulf States Conf. Ass'n of Seventh-Day Adventists, Inc.*²³ St. Paul rented a summer camp owned by Gulf States. St. Paul agreed to indemnify Gulf States in the following portion of its rental agreement:

Indemnification

User agrees to indemnify and hold Gulf States Conference Association of Seventh-day Adventists (or any of its employees, agents or officers) harmless against claims and liability of any kind (including any attorney fees and costs) arising out of injury or death to any person or persons or damage to any property occurring, in, upon or about the premises during user's occupancy or use.²⁴

One of St. Paul's guests was seriously injured by an employee of Gulf States, and Gulf States demanded from St. Paul a defense and indemnification for the bodily injury claim under the rental agreement. St. Paul sought a declaratory judgment that it had no duty to defend because none was required by the indemnification provision. The Alabama court applied basic contract rules of construction to give contract terms their clear and plain meaning. The court held that there was no duty to defend because the contractual indemnity did not include one.²⁵ This decision demonstrates how courts that are not constrained by statutory rules of construction will narrowly interpret contractual indemnification agreements.

Arizona

Arizona's leading duty to defend case, *M.T. Builders, L.L.C. v. Fisher Roofing, Inc.*,²⁶ involved a roofing company bound by its subcontract to indemnify a homebuilder. M.T. Builders settled a number of construction defect claims alleged by a condominium association and then sought indemnity from Fisher for both its defense costs and a share of the settlement. The homebuilder argued that its roofing subcontractor was precluded from re-litigating its liability on the indemnity or challenging the reasonableness of the settlement with the condominium association because it had refused the homebuilder's tender and had not provided a defense to claims relating to its work.

Fisher's contractual indemnity reads as follows:

20. To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Architect and the Builder and all their agents and employees from and against all claims, damages, losses and expenses, including but not limited to attorney's fees and court costs, arising out of or resulting from the performance or non performance [sic] of the Subcontractor's Work under this Subcontract, provided that any such claims, damage, loss or expense is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property including the loss of use resulting therefrom, to the extent caused in whole or in part by any negligent act or omission of the Subcontractor or anyone directly or indirectly employed by him or anyone for whose acts he may be liable, regardless of whether it is caused in part by a party indemnified thereunto. Such obligations shall not be construed to negate, or abridge, or otherwise reduce any other right or obligations of indemnity which would otherwise exist as to any party or person described in this paragraph.²⁷

In one of the most thorough analyses we have seen on this issue, the court of Appeals rejected the homebuilder's argument that a contractual indemnitor's duty to defend was co-extensive with that of an insurer.²⁸ Arizona did not have a statute implying a duty to defend in a contractual indemnity, as in the California cases, so the court determined the extent of the duties assumed solely from the contract language. Observing that the word "defend" was "notably absent" from Fisher's subcontract, the court held that the qualification placed on Fisher's duty to indemnify and hold the homebuilder harmless "to the extent caused in whole or part by" Fisher's negligence "prevents any interpretation of the indemnity provision as creating a duty to defend."²⁹

The court reasoned that there had been no finding of Fisher's fault in the underlying action prior to the homebuilder's settlement, and so Fisher was not bound by the settlement; nor was it precluded from litigating either its fault or the extent to which the settled claims might be subject to its indemnity.³⁰ As the reasonableness of M.T. Builders' settlement with the association was heavily disputed by Fisher, the court of appeals did not find the settlement binding on Fisher as to the amount that might be recovered if it was obligated to indemnify. Instead, the court remanded to the trial court for resolution of all disputed issues relating to the indemnity, reasonableness of the homebuilder's settlement, and potential allocation of defense costs between those covered by Fisher's indemnity and those not covered.³¹

The analysis employed by the *M.T. Builders* court provides a roadmap for resolving most, if not all, of the issues arising from contractual indemnities in design and construction defect cases, and illustrates the considerable protection the indemnitor gains by adding the "to the extent of the indemnitor's fault" limitation to what is otherwise a comprehensive indemnity.

A more recent, but unpublished Arizona decision, *Amberwood Dev., Inc. v. Swann's Grading, Inc.*,³² illustrates how efficiently the indemnitee's liability and defenses costs can be shifted to its subcontractor following the *M.T. Builders* model, where the contractual indemnity includes an express duty to defend and the scope of the indemnity covers "claims, demands, costs, attorney fees, causes of action and liabilities of every kind whatsoever arising out of or in connection with Subcontractor's work performed for Contractor"³³ without limiting the indemnity "to the extent of the indemnitor's fault."

Florida

Florida presents an example of a state that has statutory restrictions on the scope of indemnification provisions in the construction context, but no statutory provisions governing the interpretation of indemnity agreements *per se*.³⁴

A Florida "sick building" case presents another variation on the unintended duty to defend scenario. In *Barton Malow Company v. Grunau Company*,³⁵ a general contractor settled bodily injury claims asserted by employees working in a courthouse built by the contractor

and several subcontractors. Barton Malow sought to recover the damages paid under these settlements and its costs to defend the employees' actions from its subcontractors pursuant to a contractual indemnity each subcontractor had executed. The indemnity stated that each subcontractor would:

protect, defend, indemnify and save harmless...Barton-Malow Company...from and against all losses, claims, demands, payments, damages, suits, actions, attorney's fees, recoveries and judgments of every nature and description brought or recovered against...Barton-Malow Company.³⁶

The subcontractors persuaded the trial court to void this indemnity because it did not comply with Fla.Stat. §725.06, which limits when a party can be indemnified for their own negligence because the indemnity provision did not have a stated limit of liability assumed; nor did Barton Malow pay a separate consideration to its subcontractors for their unlimited promise to indemnify.

Even though Barton Malow was unable to pass through the cost of the settlement, it obtained an award from the trial court allocating a portion of its defense costs to each of the subcontractors because it was able to convince the trial court that the duty to defend was severable from the duty to indemnify.³⁷ Barton-Malow appealed the trial court's refusal to assess all of its defense costs against the six subcontractors joined in its third party complaint. The subcontractors cross-appealed, arguing that the duty to defend was inseparable from the rest of the indemnity and, therefore, unenforceable because the indemnity was declared void. The appellate court reversed and held for the subcontractors, ruling that no other term of the subcontract imposed a duty to defend except the invalid indemnity. The subcontractors were not obligated to pay the general contractor's defense costs because there was no legal basis in the contract for them to be obligated to indemnify for the employee settlements.³⁸ The appellate court expressly noted the difference in how courts interpret the duty to defend in insurance policies as compared to other agreements in which indemnification is not the primary purpose of the contract.³⁹

*Amtrak v. Rountree Transp. & Rigging*⁴⁰ presented a challenging factual scenario in determining whether or not there was a contractual duty to defend. General Electric Company, Inc. (GE) received a purchase order from the Kissimmee Utility Authority (KUA) for the purchase and transport of a customized, 82 ton combustion turbine to KUA's power plant in central Florida. The purchase order obligated GE to defend and indemnify KUA, its agents, and its design engineer, Black & Veatch, "to the extent of and on account of any negligent act or omission of [GE] in performing the work under the Contract."⁴¹ GE contracted separately with a specialized rigging and hauling contractor to transport the turbine and its associated equipment to KUA's power plant by road.

The private access road to KUA's facility crossed a railway grade crossing over tracks used by the National Railroad Passenger Corporation (Amtrak) for passenger rail service. As it attempted to move the turbine over this grade crossing, the private hauling company determined it would not clear the tracks, but left the transporter blocking the tracks while attempting to raise the vehicle high enough to clear them, at which point a passenger train collided with the vehicle, resulting in several injuries and loss of the train and turbine. In the ensuing litigation, the district court refused KUA and Black & Veatch the right to recover their defense costs from GE under the purchase order indemnity⁴² because both the indemnitees and GE were found not to be directly at fault for the collision.⁴³ GE, however, was found vicariously liable for the negligence of its transporter because this operation was deemed to be "inherently dangerous" as a matter of Florida law.⁴⁴

Nonetheless, even though it was vicariously liable for the negligence of its transporter, GE was not obligated to reimburse KUA and Black & Veatch for their attorneys' fees and other costs incurred in defense of this litigation because it was free of direct negligence for the collision. On appeal, the 11th Circuit US Court of Appeals affirmed this ruling, applying basic contract interpretation principles that words should be given their most natural or commonly understood meaning and focusing on the "to the extent of and on account of" condition in GE's indemnity.⁴⁵ The appellate court noted that this indemnity:

does *not* provide, in manner similar to some indemnity agreements, that GE must make such payments for damages, losses, or expenses that *may* arise out of a negligent act or omission of GE....[W]e conclude that the "to the extent of and on account of" language indicates that any payment of attorney's fees or other expenses is limited to situations where GE itself has been found negligent." (emphasis in original; internal citations omitted)⁴⁶

Illinois

Illinois is another example of a state with statutory limitations on the scope of indemnification provisions, but no such limitation on the interpretation of indemnity agreements generally.⁴⁷ Illinois' statute provides:

With respect to contracts or agreements, either public or private, for the construction, alteration, repair or maintenance of a building, structure, highway bridge, viaducts or other work dealing with construction, or for any moving, demolition or excavation connected therewith, every covenant, promise or agreement to indemnify or hold harmless another person from that person's own negligence is void as against public policy and wholly unenforceable. 740 ILCS 35/1 (agreements to indemnify or hold harmless)

The duty to defend is not implied in an agreement to indemnify and hold harmless where this duty is not expressly imposed (*TNT Logistics N. Am., Inc. v. Bailly Ridge TNT, LLC*).⁴⁸ *TNT Logistics* involved an indemnification provision in a lease whereby the landlord (Bailly) agreed to indemnify the tenant (TNT) for claims related to the use of the property. The provision at issue provided:

[Bailly] shall indemnify and hold [TNT] harmless from and against, and shall reimburse Tenant for, all liabilities[,] obligations, suits, causes of action, administrative actions, losses, damages, fines, penalties, claims, demands, costs, charges, judgments and expenses, including reasonable attorneys' fees and costs (collectively, "Claims"), arising from or in connection with any breach of these representations and warranties. This indemnification obligation shall include, without limitation, all Claims arising from any challenges seeking to eliminate or reduce the scope of [TNT]'s intended use of the Premises. This indemnification obligation shall not include any claims arising from [TNT]'s failure to operate its facility in conformity with local zoning laws and codes, provided that such local zoning laws and codes permit the operation of the Premises as represented and warranted in item (iii) above.⁴⁹

TNT sought to interpret the provision as both providing an immediate duty to reimburse costs associated with defending a claim and a duty to defend. The court rejected both arguments, finding that indemnification claims only become ripe on the determination of the underlying claim because the duty was to reimburse. There was no authority under Illinois law for the proposition that a duty to defend could be implied from an indemnification provision that made no reference to the duty to defend.⁵⁰ Again, the court enforced the plain meaning of the language used by the parties in their agreement. Federal courts applying Illinois law have applied the same rule of construction.⁵¹

According to *933 Van Buren Condo. Ass'n v. Van Buren*, the duty to defend under an indemnification agreement is measured by the allegations in the complaint and triggered by claims that fall within the scope of the indemnification agreement even if those claims are later dismissed.⁵² Unlike in the insurance context, under contractual indemnification the duty to defend extends only to covered claims, not all claims in the complaint.⁵³ Thus, even if the duty to defend is triggered, the indemnifying party is not obligated to provide a full defense to all claims. In *933 Van Buren*, the court distinguished between fraud claims based on the owner's own negligence from breach of warranty claims alleging faulty workmanship by the contractors—even though the warranty claims were also asserted against the owner—in determining whether the duty to defend had been triggered. The court narrowly construed this ambiguous indemnity provision that could be interpreted to require indemnification for any party's negligence, including the indemnitee, so that it would not be rendered void and unenforceable under 740 ILCS 35/1:⁵⁴

Indemnity

[IRCA] shall, at its own cost and expense, defend, indemnify and save harmless [WVB] and its agents, representatives, officers and employees from any and all loss, claims, liabilities, obligation suits or actions of any kind or character *** and from any and all expense (including costs and attorneys fees) arising from any injury, death or damage which may be sustained, incurred or received by any person *** or property and which may directly or indirectly result from the following:

- A. Any act, omission, neglect or misconduct of [IRCA] or any employee or agent of [IRCA] in connection with the performance of any covenant, term or provision of this Agreement, irrespective of whether such loss, claim, liability, obligation, suit, action and/or expense was actually or allegedly caused wholly or in part from the negligence of any other person or party.

The court concluded that an interpretation that complies with law is preferred to one that violates the law. The contracting parties were deemed to understand these legal limits to their indemnity when they signed the contract. As there was no evidence that the owner had acted as if the indemnity provision relieved it of liability for its own negligence, the court interpreted the indemnity more narrowly so as not to violate statutory restrictions on its enforceability.

Iowa

Iowa also enforces the plain meaning of the language used by the parties in their contracts when ascertaining whether or not a duty to

defend is read into a contractual indemnification provision. *Kaydon Acquisition Corp. v. Custum Mfg., Inc.*,⁵⁵ involved an asset purchase agreement whereby the seller agreed to indemnify the buyer for claims and costs arising out of equipment produced prior to the closing date of the transaction. The buyer sought defense and indemnity from the seller for a claim involving a cylinder manufactured prior to the closing date. The indemnification provision required the seller to:

indemnify and hold Buyer (and its shareholders, directors, officers, employees and affiliates) *harmless* from and against any and all claims, liabilities (including any strict liabilities with respect to any Loss specified under clause (iv) below), fines, penalties, natural resource damages, losses, damages, (including incidental or consequential damages such as lost profits resulting from any disruption of operation of the Assets), costs and expenses (including costs and counsel fees) incurred by Buyer from or related to any of the following (hereinafter called a "Loss" or "Losses").⁵⁶

The court found that, under Iowa law, "the duty 'to indemnify' does not expressly or impliedly include a duty 'to defend.'"⁵⁷ Central to the court's reasoning was the lack of the word "defend" or any words of similar import in the indemnification agreement.

New York

New York has a statutory framework similar to Illinois, with provisions strictly limiting the ability of contracting parties to assume another's tort liability in the construction context, but it does not have statutory provisions regulating the interpretation of indemnity provisions generally.⁵⁸ New York also follows contractual interpretation rules to give effect to the plain meaning of the contract and strictly construe its terms to limit the scope of an indemnification provision:

When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed. The promise should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances.⁵⁹

New York courts have concluded that "a non-insurer's 'duty to defend is not broader than its duty to indemnify.'"⁶⁰

North Dakota

North Dakota is another jurisdiction that adopted statutory rules of construction for indemnity provisions.⁶³ The Supreme Court of North Dakota recently considered the rule that an indemnitor assumes a duty to defend unless a contrary intention appears in the agreement.⁶⁴ The indemnification provision at issue states:

Indemnification for Professional Services: [KLJ] agrees to indemnify, save, and hold harmless the [City] from liability, including all costs, expenses, and reasonable attorneys' fees, which may arise out of or result from [KLJ's] negligent acts or omissions in rendering professional services under this agreement. [KLJ] shall not be responsible for an amount disproportionate to [KLJ's] culpability.⁶⁵

The court first noted that indemnity provisions in insurance policies and non-insurance indemnities are interpreted differently.⁶⁶ The court found that the plain language reflects the parties' intent that indemnity be limited and proportional to the indemnitor's liability. This court did not specifically require KLJ to defend claims or allegations.⁶⁷ The court then found that this language expressed a "contrary intention" as required by the statutory rules of interpretation to disclaim the implied duty to defend. The court did not require an express statement that no duty to defend was assumed.⁶⁸

Oklahoma

As noted above, Oklahoma adopted statutory rules for interpretation of indemnity agreements based on the California model.⁶¹ However, there is very little case law applying this statute so it remains to be seen whether an Oklahoma court will impose a duty to defend, or reimburse the indemnitee's defense costs, when the indemnitor is not at fault.

For example, in *Callaway v. WilTel Communs., LLC*, the U.S. District Court for the Northern District of Oklahoma acknowledged Oklahoma's statutory rules for interpretation of indemnification agreements, but did not rely on them in deciding that a contractual indemnity did not require a finding of the indemnitor's negligence before requiring indemnification for a bodily injury claim that occurred on the site of the indemnitor's work.⁶²

The court relied on general principles of contract interpretation in holding that a contract that required indemnification “for any and all claims” controlled over more specific language regarding the contractor’s scope of work and obligations for liability arising from the “acts or omissions” of the contractor. The district court resolved this conflict by requiring indemnification (without a finding of negligence) because the contract also included a term requiring that potentially conflicting obligations should be interpreted cumulatively. In this case, the court held that the parties’ intent to require indemnification without regard to fault was inferable from the clear language of the contract.

Pennsylvania

Pennsylvania is an example of a state with no statutory limitations on the scope of indemnification agreements and no statutory rules of construction governing the interpretation of indemnification agreements. Pennsylvania has strict rules of construction applicable to non-insurance indemnification agreements. “Indemnity agreements are to be narrowly interpreted in light of the parties’ intentions as evidenced by the entire contract. In interpreting the scope of an indemnification clause, the court must consider the four corners of the document and its surrounding circumstances.”⁶⁹ Rules of contract interpretation were incorporated into contracts and indemnification agreements that used only words of general import insufficient to show the parties’ intent was to indemnify the indemnitee for its own negligence where the established rule was that express language is required to indemnify someone for their own negligence.⁷⁰ The language at issue provided:

[The Zinssers]...exonerate, discharge, and agree to protect and save harmless and indemnify [Butler Petroleum]...from any and all liability for claims for loss, damage, injury or other casualty to persons or property...caused or occasioned by any leakage, fire, explosion or other casualty occurring through any imperfection in, injury or damage to, or by reason of the installation, use, operation and/or repair of the said equipment or of the premises.⁷¹

Thus, the court presumed that the parties knew the language they used was insufficient to indemnify a party for its own negligence.⁷²

Indemnification agreements are construed strictly against the drafter, especially when they are the indemnitee.⁷³ A duty to defend is not implied in an agreement to indemnify. The scope and effect of the duty are dependent on the language used. The duty to defend can be triggered by the allegations in the complaint, as in the insurance context, or not arise until liability has been determined depending on the terms of the indemnity.⁷⁴

Rhode Island

Rhode Island is another jurisdiction without specific statutory requirements governing indemnification provisions. It follows a contract interpretation approach, including a rule of construction that indemnity provisions are to be construed narrowly and require a clear, unambiguous expression of the parties’ intent to be effective (*See, Metso Automation USA, Inc. v. ITT Corp.*).⁷⁵ The language at issue in *Metso* provided:

[ITT] shall indemnify [Metso] against and hold it harmless from any and all liabilities in respect of suits, proceedings, demands, judgments, damages, expenses, and costs (including, without limitation, reasonable counsel fees) which [Metso] may suffer or incur by reason of [ITT’s] failure to pay, discharge or perform any of its liabilities or obligations which are not expressly assumed by [Metso] under this Agreement....⁷⁶

The court found that clear, unambiguous language used by the parties in this case did not contain any reference to a duty to defend and none would be implied.⁷⁷

South Dakota

South Dakota is another jurisdiction following the California approach with statutory rules of construction for indemnification agreements.⁷⁸ South Dakota also has a provision that voids any term in a construction contract that purports to indemnify someone for their sole negligence.⁷⁹ In *United States ex rel. Ash Equip. Co. v. Morris, Inc.*, the district court addressed whether or not a “contrary intent” to provide a defense was expressed in the language of the indemnity provision.⁸⁰ The indemnity provision provided:

To pay for all materials, skill, labor and instrumentalities used in, or in connection with the performance of this Subcontract when and as bills for claims therefore become due, and to save and protect the Project, the Owner, and the Contractor from all claims and mechanics' liens on account thereof, and to furnish satisfactory evidence to the Contractor when and if required, that he has complied with the above requirements.⁸¹

The court followed the lead of the North Dakota Supreme Court in *Specialized Contr., Inc.*, discussed above, in finding that because the indemnification language was limited to amounts owed by the indemnitor to third parties, the parties expressed a contrary intent regarding the duty to defend and the "all claims" language was insufficient by itself to create a duty to defend when that language merely characterized the indemnitor's obligation.⁸²

Statutory Limitations on Imposition of a Duty to Defend

Design professionals are accustomed to seeing overbroad indemnities in which their clients attempt to impose a duty to investigate and defend a potential claim at the first sign of trouble. This unequal bargaining position, in which large developers and governmental agencies present uninsurable and completely inequitable indemnities as a "take it or leave it" proposition, has prompted industry leaders to seek relief in their state legislatures. Some notable successes have been accomplished in Florida, Arizona, and Colorado through the efforts of the American Council of Engineering Companies (ACEC) and its member organizations.

Arizona

In 2013, ACEC of Arizona secured passage of one of the most comprehensive revisions to public sector indemnity statutes when SB1231 amended state, county, and municipal government procurement laws, including those of the state transportation department. ACEC of Arizona built on Florida's success in drafting its bill. The changes accomplished by SB1231 are seen in the amended version of Ariz.Rev.Stat. § 34-226, which reads as follows:

- A. The regulation and use of indemnity agreements in construction and design professional services contracts are of statewide concern. The regulation of indemnity agreements in construction and design professional services contracts pursuant to this section and their use are not subject to further regulation by a county, city, town or other political subdivision of this state.
- B. If a contractor, subcontractor or design professional provides work, services, studies, planning, surveys or other preparatory work in connection with a public building or improvement, the contracting agent may require that the construction contract or subcontract or design professional services contract or subcontract require the contractor, subcontractor or design professional to indemnify and hold harmless the agent, and its officers and employees, from liabilities, damages, losses and costs, including reasonable attorney fees and court costs, but only to the extent caused by the negligence, recklessness or intentional wrongful conduct of such contractor, subcontractor or design professional or other persons employed or used by such contractor, subcontractor or design professional in the performance of the contract or subcontract. A subcontract or design professional services subcontract entered into in connection with a public building or improvement may also require any subcontractor or design professional to indemnify and hold harmless the agent and that contractor, subcontractor, or design professional who executed the subcontract, and their respective owners, officers and employees, from liabilities, damages, losses and costs, including reasonable attorney fees and court costs, but only to the extent caused by negligence, recklessness or intentional wrongful conduct of the indemnifying subcontractor or design professional, or other persons employed or used by the indemnifying subcontractor or design professional in connection with the subcontract. Nothing in this section shall prohibit the requirement of insurance coverage that complies with this section, including the designation of any person as an additional insured on a general liability insurance policy or as a designated insured on an automobile liability policy provided in connection with a construction contract or subcontract or design professional services contract or subcontract.
- C. Except as provided in subsection B of this section, a construction contract or subcontract or design professional services contract or subcontract entered into in connection with a public building or improvement shall not require that the contractor, subcontractor or design professional defend, indemnify, insure or hold harmless the contracting agent or its employees, officers, directors, agents, contractors or subcontractors from any liability, damage, loss, claim, action or proceeding, and any contract provision that is not permitted by subsection B of this section is against the public policy of this state and is void.

D. Notwithstanding subsection C of this section, a contractor who is responsible for the performance of a construction contract or subcontract may fully indemnify a person, firm, corporation, state or other agency for whose account the construction contract or subcontract is not being performed and that, as an accommodation, enters into an agreement with the contractor that permits the contractor to enter on or adjacent to its property to perform the construction contract or subcontract for others.

E. If any provision or condition contained in this section conflicts with any provision of a contract between the state or a political subdivision of the state and the federal government, such provision of this section in conflict shall not apply to any construction contract or subcontract, or design professional services contract or subcontract to the extent such conflict exists, but all provisions of this section with which there is no such conflict shall apply.

F. For the purposes of this section:

1. "Construction contract or subcontract" means a written or oral agreement relating to the construction, alteration, repair, maintenance, relocation, moving, demolition or excavation of a structure, street or roadway, appurtenance, facility, development or other improvement to land.
2. "Design professional services" means architect services, engineer services, land surveying services, geologist services or landscape architect services or any combination of those services performed by or under the supervision of a design professional or the bona fide employees of the design professional.
3. "Design professional services contract or subcontract" means a written or oral agreement relating to the planning, design, construction administration, study, evaluation, consulting, inspection, surveying, mapping, material sampling, testing or other professional, scientific or technical services furnished in connection with any actual or proposed study, planning, survey, environmental remediation, construction, improvement, alteration, repair, maintenance, relocation, moving, demolition or excavation of a structure, street or roadway, appurtenance, facility, development or other improvement to land.
4. "Other person employed or used" means a subcontractor to a contractor or design professional in any tier, or any other person or entity who performs work or design professional services, or provides labor, services, materials or equipment in connection with a construction contract or subcontract or design professional service contract or subcontract subject to this section.

The Arizona statute eliminates the right for state or local government to impose a duty to defend on design professionals; opting instead for the right to recover defense costs after the determination of liability, and only to the extent caused by the design professional's negligence, recklessness, or intentional wrongful acts. The statute includes a preemption clause to prevent local charter governments from evading compliance with the statute, and it voids altogether any indemnity that would require the design professional to defend or indemnify the government agency for the agency's fault. Similar revisions were made in the indemnity statute used for state-wide procurement programs in Ariz.Rev.Stat. § 41-2586, and the Arizona Department of Transportation—which runs its own procurement program independent of the state procurement code—is required to comply with the same statute in the state procurement code by Ariz.Rev.Stat. § 41-2501.K (renumbered after July 1, 2017 as §41-2501.J).

California

As we were completing this paper, we received word that California's legislature amended its indemnity statute to cure—at least in part—the duty to defend problem in the jurisdiction where it first arose. SB496 was introduced in the 2017-2018 California legislative session to correct an earlier attempt to remove the duty to defend obligation from the California Civil Code. By amending Civil Code Section 2782.8, SB496 created a separate rule for indemnities in contracts for professional services provided by licensed architects, engineers, landscape architects, or land surveyors. The key elements of the new law are:

- It applies only to private sector contracts entered into on or after January 1, 2018.
- Contractual duties to defend are declared unenforceable "except to the extent that the claims against the indemnitee arise out of, pertain to, or relate to the negligence, recklessness, or willful misconduct of the design professional."
- The indemnitor is only required to reimburse defense costs in an amount proportional to the indemnitor's share of fault; if

there is no fault, there is no duty to reimburse defense costs.

- However, if one or more defendants cannot pay their allocated share of defense costs, the other defendants are directed to “meet and confer with other parties regarding unpaid defense costs.” (It is unclear from the bill how this “meet and confer” process will work or be enforced since the bill does not require allocation of the indemnitee’s unrecovered costs among the other indemnitors. The “meet and confer” requirement also should not be read to override the proportional liability term.)⁸³
- This provision is not applicable to projects with a project-specific general liability policy insuring “all project participants” that “covers all design professionals for their legal liability arising out of their professional services on a primary basis.”
- This provision does not apply to design professionals who are parties to a written design-build joint venture agreement.

The full text of SB496, with interlineated changes to California Civil Code Section 2782.8, follows (deletions indicated by ~~strike-throughs~~; additions by *italics*):

Section 1.

Section 2782.8 of the Civil Code is amended to read:

2782.8.

(a) For all contracts, and amendments thereto, entered into on or after January 1, 2007, ~~with a public agency~~ **2018**, for design professional services, all provisions, clauses, covenants, and agreements contained in, collateral to, or affecting any such contract, and amendments thereto, that purport to indemnify, including the duty and the cost to defend, the ~~public agency~~ **indemnitee** by a design professional against liability for claims against the ~~public agency~~ **indemnitee**, are unenforceable, except for claims ~~that~~ **to the extent that the claims against the indemnitee** arise out of, pertain to, or relate to the negligence, recklessness, or willful misconduct of the design professional. ***In no event shall the cost to defend charged to the design professional exceed the design professional's proportionate percentage of fault. However, notwithstanding the previous sentence, in the event one or more defendants is unable to pay its share of defense costs due to bankruptcy or dissolution of the business, the design professional shall meet and confer with other parties regarding unpaid defense costs.*** The duty to indemnify, including the duty and the cost to defend, is limited as provided in this section. This section shall not be waived or modified by contractual agreement, act, or omission of the parties. Contractual provisions, clauses, covenants, or agreements not expressly prohibited herein are reserved to the agreement of the parties.

(b) All contracts and all solicitation documents, including requests for proposal, invitations for bid, and other solicitation ~~documents~~ **documents for design professional services** between a public agency and a design professional, **documents for design professional services** are deemed to incorporate by reference the provisions of this section.

(c) For purposes of this section, ~~the following definitions apply:~~ **“design professional” includes all of the following:**

(1) ~~“Public agency” includes any county, city, city and county, district, school district, public authority, municipal corporation, or other political subdivision, joint powers authority, or public corporation in the state. Public agency does not include the State of California.~~

(2) ~~“Design professional” includes all of the following:~~

~~(A)~~ **(1)** An individual licensed as an architect pursuant to Chapter 3 (commencing with Section 5500) of Division 3 of the Business and Professions Code, and a business entity offering architectural services in accordance with that chapter.

~~(B)~~ **(2)** An individual licensed as a landscape architect pursuant to Chapter 3.5 (commencing with Section 5615) of Division 3 of the Business and Professions Code, and a business entity offering landscape architectural services in accordance with that chapter.

~~(C)~~ **(3)** An individual registered as a professional engineer pursuant to Chapter 7 (commencing with Section 6700) of Division 3 of the Business and Professions Code, and a business entity offering professional engineering services in accordance with that chapter.

(D) (4) An individual licensed as a professional land surveyor pursuant to Chapter 15 (commencing with Section 8700) of Division 3 of the Business and Professions Code, and a business entity offering professional land surveying services in accordance with that chapter.

(d) This section shall ~~only~~ apply *only* to a professional service contract, or any amendment thereto, entered into on or after January 1, 2007-2018.

(e) The ~~amendments made to provisions of~~ this section by the act adding this subdivision shall apply to services offered pursuant to a design professional contract, or any amendment thereto, entered into on or after January 1, 2011-*pertaining to the duty and cost to defend shall not apply to either of the following:*

(1) Any contract for design professional services, or amendments thereto, where a project-specific general liability policy insures all project participants for general liability exposures on a primary basis and also covers all design professionals for their legal liability arising out of their professional services on a primary basis.

(2) A design professional who is a party to a written design-build joint venture agreement.

(f) Nothing in this section shall abrogate the provisions of Section 1104 of the Public Contract Code.

(g) Indemnitee, for purposes of this section, does not include any agency of the state.

While SB496 does not completely resolve unintended duty to defend claims in California, it should end the more egregious cases in which a design professional is held liable for the indemnitee's entire defense costs even though it is not at fault. Governor Brown signed the bill into law on April 28, 2017 and it was filed with the Secretary of State on the same day.

Colorado

In C.R.S. §13-50.2-102 (2016), Colorado's legislature amended the state's indemnity statute for governmental projects to limit the duty to defend to the extent of the indemnitor's degree or percentage of fault, and to postpone the duty to reimburse the indemnitee for its defense costs until after this allocation of fault has been determined by adjudication, alternative dispute resolution procedure, or mutual agreement.

Furthermore, any attempt to require a defense of a public entity for its own negligence is void as against public policy and wholly unenforceable. The text of C.R.S §13-50.2-102(8) follows:

(8) (a) Any public contract or agreement for architectural, engineering, or surveying services; design; construction; alteration; repair; or maintenance of any building, structure, highway, bridge, viaduct, water, sewer, or gas distribution system, or other works dealing with construction, or any moving, demolition, or excavation connected with such construction that contains a covenant, promise, agreement, or combination thereof to defend, indemnify, or hold harmless any public entity is enforceable only to the extent and for an amount represented by the degree or percentage of negligence or fault attributable to the indemnity obligor or the indemnity obligor's agents, representatives, subcontractors, or suppliers. Any such covenant, promise, agreement, or combination thereof requiring an indemnity obligor to defend, indemnify, or hold harmless any public entity from that public entity's own negligence is void as against public policy and wholly unenforceable.

(b) This subsection (8) shall not apply to construction bonds, contracts of insurance, or insurance policies that provide for the defense, indemnification, or holding harmless of public entities or contract clauses regarding insurance. This subsection (8) is intended only to affect the contractual relationship between the parties relating to the defense, indemnification, or holding harmless of public entities, and nothing in this subsection (8) shall affect any other rights or remedies of public entities or contracting parties.

(c) If the indemnity obligor is a person or entity providing architectural, engineering, surveying, or other design services, then the extent of an indemnity obligor's obligation to defend, indemnify, or hold harmless an indemnity obligee may be determined only after the indemnity obligor's liability or fault has been determined by adjudication, alternative dispute resolution, or otherwise resolved by mutual agreement between the indemnity obligor and obligee.

While Colorado's indemnity statute will not rein in overbroad and uninsurable indemnities in private development, it is a good first step in curing the problems with unintended duties to defend, or back-end liability for an owner's or third party's defense costs without regard to the design professional's fault. Where this new framework of reimbursement based on proportional liability rather than fronting the defense can be extended to other jurisdictions, and to the private development market as well as public works, the financial burdens and insurability risks caused by unintended duties to defend will be reduced.

Florida

In what has become the model for efforts to limit the duty to defend in other states, Florida modified its indemnity statute for public agency contracts in Fla.Stat. §725.08 to eliminate altogether the right to require a duty to defend in contractual indemnities. Instead, Florida allows the indemnified agency to recover its reasonable attorneys' fees to the extent caused by the negligence, recklessness, or intentionally wrongful conduct of the design professional or persons employed or used by the design professional in the performance of its services. This same section prohibits an agency from requiring a defense or indemnity for its own fault.

The full text of Fla.Stat. §725.08, subparts 1 and 2, follows:

(1) Notwithstanding the provisions of s. 725.06, if a design professional provides professional services to or for a public agency, the agency may require in a professional services contract with the design professional that the design professional indemnify and hold harmless the agency, and its officers and employees, from liabilities, damages, losses, and costs, including, but not limited to, reasonable attorneys' fees, to the extent caused by the negligence, recklessness, or intentionally wrongful conduct of the design professional and other persons employed or utilized by the design professional in the performance of the contract.

(2) Except as specifically provided in subsection (1), a professional services contract entered into with a public agency may not require that the design professional defend, indemnify, or hold harmless the agency, its employees, officers, directors, or agents from any liability, damage, loss, claim, action, or proceeding, and any such contract provision shall be void as against the public policy of this state.

Texas

In 2015, the Texas legislature moved to restrict a design professional's duty to indemnify local governmental agencies only to damage "to the extent that the damage is caused by or results from" the design professional's "act of negligence, intentional tort, intellectual property infringement, or failure to pay a subcontractor or supplier" in Tex.Local Gov't Code §271.904(a) and (b). In this revision, the legislature also declared void and unenforceable any indemnity requiring a defense of the agency or any third party for that person's own fault or negligence, and limited the right to reimbursement of defense costs to "the government agency's reasonable attorney's fees in proportion to the engineer's or architect's liability." With this legislative change to its indemnity law, Texas has removed the duty to defend the public agency for its own negligence or fault, and limited the duty to reimburse defense costs to the extent of the indemnitor's fault.

The full text of the Texas statute follows:

(a) A covenant or promise in, in connection with, or collateral to a contract for engineering or architectural services to which a governmental agency is a party is void and unenforceable if the covenant or promise provides that a licensed engineer or registered architect whose work product is the subject of the contract must indemnify or hold harmless the governmental agency against liability for damage, other than liability for damage to the extent that the damage is caused by or results from an act of negligence, intentional tort, intellectual property infringement, or failure to pay a subcontractor or supplier committed by the indemnitor or the indemnitor's agent, consultant under contract, or another entity over which the indemnitor exercises control.

(b) Except as provided by Subsection (c), a covenant or promise in, in connection with, or collateral to a contract for engineering or architectural services to which a governmental agency is a party is void and unenforceable if the covenant or promise provides that a licensed engineer or registered architect whose work product is the subject of the contract must defend a party, including a third party, against a claim based wholly or partly on the negligence of, fault of, or breach of contract by the governmental agency, the agency's agent, the agency's employee, or other entity, excluding the engineer or architect or that person's agent, employee, or subconsultant, over which the governmental agency exercises control. A covenant or promise may provide for the reimbursement of a governmental agency's reasonable attorney's fees in proportion to the engineer's or architect's liability.

Conclusion and Recommendations for Mitigating the Risk of Contractual Indemnities

This survey of statutory and case law demonstrates that the unintended duty to defend risk is limited primarily to California (prior to SB496) and five other states or territories with statutory rules of construction that import a duty to defend in any indemnity. However, even in the six statutory “duty to defend” jurisdictions, courts outside California have not always enforced this duty as in the *Crawford* and *CH2MHill* cases.

Second, we determined that most other states will apply normal rules of contract construction to contractual indemnities other than insurance contracts. Those courts consider the most important factor in determining whether a duty to defend exists is the express language of the contract. If the indemnity does not include the words “defend” or allow any reasonable construction that would imply that duty, it will not be imposed. Limiting the indemnity obligation “to the extent of the indemnitor’s proportional fault” also curbs the likelihood that a court will imply a duty to defend. Likewise, if there is no duty to defend in the contract, the court will not order reimbursement of defense costs if the indemnitor is not found at fault.

Third, the best way to avoid assuming an unintended contractual duty to defend is to expressly disclaim the obligation. Indeed, in jurisdictions such as California, Guam, Montana, North Dakota, or Oklahoma that have statutory rules for interpreting indemnification agreements, it is absolutely necessary to state that there is no duty to defend, or at least clearly indicate a “contrary intent,” or risk having one implied by the court.

Fourth, limiting the indemnity’s scope to those damages and defense costs the indemnified party is legally obligated to pay that were caused by the indemnitor—to indemnify only “to the extent of the indemnitor’s fault”—makes it less likely a court will enforce a duty to defend at the first notice of a claim, or require reimbursement of defense costs in the absence of fault.

Our checklist for review and negotiation of indemnity terms to limit the risk of an unintended duty to defend, or recovery of defense costs without regard to the indemnitor’s fault, follows:

1. Modify the choice of law clause to avoid jurisdictions that imply a duty to defend in a contractual indemnity (as California did prior to SB496).
2. If the contract has an adverse choice of law that cannot be modified, determine whether the jurisdiction in which the project is located has a local law/local forum preference statute that will void the contractual choice of law.
3. Where possible, delete the duty to defend from the indemnity. Affirmatively disclaim the obligation to provide a defense, or limit the obligation to defend or reimburse defense costs “to the extent of the indemnitor’s fault, negligence, or willful misconduct.”
4. Impose in the contract additional conditions that the indemnitee must satisfy (e.g., duty to give prompt notice, duty to cooperate in the defense, an obligation not to admit fault or offer a settlement if the tender is accepted, and requirement of written authorization to settle or compromise a claim) before a defense must be provided.
5. Limit the indemnity obligation to loss, injury, or damages that are caused by or directly resulting from the indemnitor’s fault. The indemnity should not be triggered by any claim or demand “arising from or in connection with indemnitor’s scope of services or work on the project.”
6. Indemnify only for those damages or losses (including defense costs) that the indemnitee is “legally obligated to pay,” to avoid a tender on first notice of the claim to the indemnitee, and—more importantly—block the indemnitee from negotiating a collusive settlement with the claimant to escape liability.
7. Limit the duty to indemnify “to the extent of the indemnitor’s fault, negligence, breach of contract, or willful misconduct” so that a determination of fault is required before liability can be imposed.

8. Disclaim any obligation to defend, indemnify, or hold the indemnitee harmless for its own sole or partial fault or negligence, or for the fault of other parties and non-parties.
9. State that the intention of the parties in the indemnity is to have each party bear its own liability in proportion to its own fault (inclusive of the fault imputed for any other persons for whom that party is legally responsible).
10. Restrict the protection of the indemnity to the other contracting party—and not its lenders, investors, successors-in-interest or other third parties—whenever possible.
11. Prohibit the assignment of the contract, any claims arising from or relating to the contract, or any grant of third-party beneficiary status for anyone who is not a party to the contract containing the indemnity.
12. Where the contractual scope of services and available insurance coverage permits, negotiate a two-part indemnity in which claims covered by general liability insurance policies—for which the indemnitee may be named an additional insured on the policy—include a duty to defend, but indemnity claims based on professional services do not include a duty to defend.
13. Limit the duty to reimburse defense costs to those “reasonable and necessary attorneys’ fees and taxable court costs” incurred by the indemnitee (in addition to the other restrictions in this checklist).
14. When possible and permitted in the jurisdiction, include in the contract a limitation of liability and waiver of subrogation rights for claims covered by insurance.
15. When possible, obtain a reciprocal indemnity from the other party to the contract (particularly useful in prime-sub and joint venture scenarios).

Endnotes

¹ 44 Cal. 4th 541, 187 P.3d 424 (2008).

² 181 Cal. App. 4th 10, 103 Cal. Rptr. 3d 684 (2010).

³ 44 Cal.4th at 547-548, 187 P.3d at 427.

⁴ 44 Cal. 4th 541, 568; 187 P.3d 424, 442.

⁵ 44 Cal.4th at 552, 187 P.3d at 430.

⁶ *Id.*

⁷ 44 Cal.4th at 553, 187 P.3d at 431.

⁸ *Id.*

⁹ 44 Cal.4th at 554, 187 P.3d at 442.

¹⁰ 181 Cal.App.4th at 14, 103 Cal.Rptr. at 686.

¹¹ 181 Cal.App.4th at 19, 103 Cal.Rptr. at 692.

¹² 181 Cal.App.4th at 20, 103 Cal.Rptr. at 692.

¹³ *Id.*, italics in original text.

¹⁴ See, e.g., *Victoria Select Ins. Co. v. Vrchota Corp.*, 805 F. Supp. 2d 1337, 1342-3 (S.D. Fla. 2011), applying Florida law.

¹⁵ *Id.*

¹⁶ *Montrose Chemical Corp. v. Superior Court*, 6 Cal.4th 287, 295, 861 P.2d 1153, 1161 (1993), “The [insurer’s] defense duty is a continuing one, arising on tender of defense and lasting until the underlying lawsuit is concluded [citation], or until it has been shown that there is no potential for coverage....”

¹⁷ See, e.g., *Bellefleur v. Newark Beth Israel Med. Ctr.*, 66 A.D.3d 807, 888 N.Y.S.2d 81 (App. Div. 2009); *Mizuho Corporate Bank (USA) v. Cory & Assocs.*, 341 F.3d 644, 652-3 (7th Cir. 2003), applying Illinois law.

¹⁸ See, RESTATEMENT (SECOND) OF TORTS §§910, 914(2) (1979), also referred to as the “tort of another” doctrine.

¹⁹ See, e.g., *Victoria Select Ins. Co. v. Vrchota Corp.*, 805 F. Supp. 2d 1337, 1342 (S.D. Fla. 2011), discussing interpretation of insurance policy under Florida law and *Fid. & Guar. Ins. Co. v. Ford Motor Co.*, 707 F. Supp. 2d 1300, 1313 (M.D.Fla. 2010), discussing interpretation of indemnity agreement under Florida law; *Addison Ins. Co. v. Fay*, 905 N.E.2d 747, 753 (Ill. 2009), discussing interpretation of insurance policy under Illinois law and *Pekin Ins. Co. v. Designed Equip. Acquisition Corp.*, 63 N.E.3d 242, 252 (Ill. 2008), discussing interpretation of indemnity agreement under Illinois law; *Lend Lease (US) Constr. LMB Inc. v Zurich Am. Ins. Co.*, 2017 N.Y. LEXIS 112, *6 (N.Y. 2017), discussing interpretation of insurance policy and *Rodrigues v. N & S Bldg. Contrs., Inc.*, 839 N.E.2d 357, 360 (N.Y. 2005), discussing interpretation of indemnity agreement.

²⁰ *MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 648 (3 Cal.Rptr.3d 228, 238, 73 P.3d 1205, 1213), as modified on denial of reh’g (Sept. 17, 2003), “Moreover, insurance coverage is “interpreted broadly so as to afford the greatest possible protection to the insured, [whereas]...exclusionary clauses are interpreted narrowly against the insurer.”

²¹ *Hensel Phelps Constr. Co. v. Cooper Carry, Inc.*, 210 F. Supp. 3d 192, 198 (D.D.C. 2016).

²² See, e.g., Illinois 740 ILCS 35/1, agreements to indemnify or hold harmless; New York NY CLS Gen Oblig § 5-322.1.

²³ 2013 WL 2453719 (M.D. Ala. 2013); subsequently affirmed and summary judgment entered for indemnitor in 2014 WL 348291 (M.D. Ala. 2014).

²⁴ *Id.* at *3.

²⁵ *Id.* at *3.

²⁶ 219 Ariz. 297; 197 P.3d 758 (Ct.App. 2008).

²⁷ 219 Ariz. at 301, ¶4, 197 P.3d at 762.

²⁸ 219 Ariz. at 305, ¶21, 197 P.3d at 766.

²⁹ *Id.* ¶20.

³⁰ 219 Ariz. at 307, ¶32, 197 P.3d at 768.

³¹ 219 Ariz. at 307-312, ¶¶28-57, 197 P.3d at 768-773.

³² 2017 WL 712269 (Ct.App. 2017).

³³ *Id.* at *1, ¶3.

³⁴ See, Fla. Stat §§ 725.06 and 725.08.

³⁵ 835 So. 2d 1164 (Fl.App. 2002).

³⁶ *Id.* at 1167.

³⁷ *Id.* at 1166.

³⁸ *Id.* at 1167.

³⁹ *Id.* at 1166-7.

⁴⁰ 286 F.3d 1233 (11th Cir. 2002).

⁴¹ *Id.* at 1238.

⁴² *Id.* at 1259.

⁴³ *Id.* at 1240.

⁴⁴ *Id.* at 1248.

⁴⁵ *Id.* at 1262.

⁴⁶ *Id.*

⁴⁷ 740 ILCS 35/1, agreements to indemnify or hold harmless.

⁴⁸ 2006 U.S. Dist. LEXIS 73316, 2006 WL 2726224 (N.D. Ill. September 21, 2006), applying Illinois law.

⁴⁹ *Id.* at *4-5.

⁵⁰ *Id.* at *20.

⁵¹ *Lear Corp. v. Johnson Elec. Holdings, Ltd.*, No. 02cv6704, 2003 U.S. Dist. LEXIS 9132, 2003 WL 21254253, at *6-8 (N.D. Ill. May 30, 2003), finding that an agreement by one party to indemnify and hold harmless another party did not include an obligation to defend, *aff'd*, 353 F.3d 580 (7th Cir. 2003); *Agnew v. Bd. of Educ.*, No. 97cv5993, 1998 U.S. Dist. LEXIS 17903, 1998 WL 792487, at *4 (N.D. Ill. Nov. 6, 1998), noting that the plaintiff had “failed to cite any authority supporting his theory that indemnification is synonymous with the duty to defend”.

⁵² 61 N.E.3d 929, 945 (Ill. App. 2016).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ 301 F. Supp. 2d 945 (N.D. Iowa 2004).

⁵⁶ *Id.* at 950.

⁵⁷ *Id.* at 958.

⁵⁸ *See, e.g.*, NY CLS Gen Oblig § 5-322.1; NY CLS Labor §§ 240 and 241.

⁵⁹ *Rodrigues v. N & S Bldg. Contrs., Inc.*, 839 N.E.2d 357, 360 (N.Y. 2005), citations omitted.

⁶⁰ *Cuomo v 53rd & 2nd Assoc., LLC*, 111 AD3d 548, 548, 975 N.Y.S.2d 53 (App. Div. 2013); *see, Inner City Redevelopment Corp. v Thyssenkrupp El. Corp.*, 78 AD3d 613, 613, 913 N.Y.S.2d 29 (App. Div. 2010), because there has been no showing that defendant was negligent, any order requiring defendant to defend or indemnify is premature.

⁶¹ Okla. Stat. tit. 15, § 427.

⁶² *Callaway v. WilTel Communs., LLC*, No. 06-CV-0579-CVE-PJC, 2007 U.S. Dist. LEXIS 73795 (N.D. Okla. Oct. 2, 2007).

⁶³ N.D. Cent. Code, § 22-02-07.

⁶⁴ *Specialized Contr., Inc. v. St. Paul Fire & Marine Ins. Co.*, 825 N.W.2d 872 (N.D. 2012).

⁶⁵ *Id.* at 875.

⁶⁶ *Id.* at 878.

⁶⁷ *Id.*

⁶⁸ *Id.* at 881-2.

⁶⁹ *Chester Upland School District v. Edward J. Meloney, Inc.*, 2006 PA Super 141, 901 A.2d 1055, 2006 Pa. Super. LEXIS 1471 **7-8 (Jun. 15, 2006). *See, also, Consolidated Rail Corp. v. Delaware River Port Auth.*, 2005 PA Super 247, 880 A.2d 628, 632 (Pa. Super. 2005), same.

⁷⁰ *Ruzzi v. Butler Petroleum Co.*, 588 A.2d 1, 4-5 (1991).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Ratti v. Wheeling Pittsburgh Steel Corp.*, 758 A.2d 695, 702 (Pa. Super. 2000).

⁷⁴ *See, Thyssenkrupp Elevator Corp. v. Humford Equities*, 15 Pa.D.&C.5th 422 (C.P. 2010).

⁷⁵ *Metso Automation USA, Inc. v. ITT Corp.*, Civil Action No. 11-10514-FDS, 2014 U.S. Dist. LEXIS 132681 (D. Mass. Sep. 22, 2014), applying Rhode Island law.

⁷⁶ *Id.* at *24-5.

⁷⁷ *Id.* at *28.

⁷⁸ See, S.D. Codified Laws §§ 56-3-7 to 56-3-15.

⁷⁹ S.D. Codified Laws § 56-3-18.

⁸⁰ *United States ex rel. Ash Equip. Co. v. Morris, Inc.*, No. CIV 14-4131, 2016 U.S. Dist. LEXIS 109644 (D.S.D. Aug. 18, 2016).

⁸¹ *Id.* at *3.

⁸² *Id.* at *12-21.

⁸³ Attorneys involved in this legislative effort say the “meet and confer” requirement was added at the request of the construction trade associations to address their concerns that a disproportionate share of defense costs otherwise borne by design professionals would be imposed on their members.