



# *Advanced Indemnification Provision Topics and Drafting Tips*

MATTHEW PARKS

STACEY & PARKS, PLLC

802 W. BANNOCK ST., LP 110

P.O. BOX 2265

BOISE, ID 83701

208 917-7780

# What will we cover today?

## Indemnification provisions in a nutshell

- Basic components
  - Indemnity
  - Hold harmless
  - defend

## Advanced Topics

- Who is being indemnified
- What is being indemnified
- How long does the indemnification obligation last

## Environmental Indemnity

- The “other” indemnity
- Why this is necessary
- What should it cover



# The three common components of an indemnification clause




1. Indemnification
2. Hold Harmless
3. Defend



# Indemnification and Hold Harmless

Indemnification is a contractual obligation by one party to pay or compensate for the losses or damages or liabilities incurred by another party to the contract or by some third person.

Black's Law Dictionary defines hold harmless as follows: "To absolve (another party) from any responsibility for damage or other liability arising from the transaction; INDEMNIFY." (It defines indemnify as follows: "To reimburse (another) for a loss suffered because of a third party's or one's own act or default. 2. To promise to reimburse (another) for such a loss. 3. To give (another) security against such a loss.")



In Mellinkoff's Dictionary of American Legal Usage, David Mellinkoff says that "hold harmless is understood to protect another against the risk of loss as well as actual loss." He goes on to say that indemnify is sometimes used as a synonym of hold harmless, but that indemnify can also mean "reimburse for any damage," a narrower meaning than that of hold harmless.



The duty to defend is the obligation to provide a defense to a covered claim.

The duty to defend does not depend on the outcome of the claim, whereas the duty to indemnify does not arise unless the outcome of the claim is adverse.

Thus, the duty to defend and duty to indemnify are separate and distinct obligations

# Advanced Topics

- ▶ Who
  - ▶ What
  - ▶ Where
  - ▶ How Long
  - ▶ Reciprocal Provisions
- ▶ Environmental Indemnity

# Who is Being Indemnified

- 1.The other party to the contract
- 2.Their employees?
- 3.Agents?
- 4.Consultants?
- 5.Subsidiaries?
- 6.Parent Company?
- 7.Third party beneficiaries?




# Drafting concerns

- For indemnitor
  - How many people are covered?
  - Should the provision be so broad?
  - Should there be indemnity for third persons
  - What is the level of control

## For indemnitee

- Are there partners or consultants that should be covered?
- Each project or deal is unique



The rule of interpretation of construction contract indemnity is that the indemnitor is entitled to have his undertaking strictly construed, particularly in those cases in which the agreement was prepared by the indemnitee.

*Barnett v. Eagle Helicopters, Inc.*, 122 Idaho 92, 95 (Idaho Ct. App. 1992)

The term “officers, directors, employees and joint owners” has been held by at least one court to be sufficiently precise, but not to include a consultant to the party to the indemnification agreement. See, e.g., *Melvin Green, Inc. v. Questor Drilling Corp.*, 946 S.W.2d 907, 911 (Tex. App. 1997).

Real estate contracts often have third parties that need to be covered by the indemnification:

1. Architects
2. Surveyors
3. Environmental consultants
4. Lenders
5. Project partners

# Tip: Definitions Section

A one size fits all list of Indemnitees may not be practical. A definitions section should include a definition of Indemnities that can be modified to account for the particular circumstances of the transaction.

Question – would anyone object to contracts using “Indemnifying Party” and the “Indemnified”?

# What may be covered?

Common types of losses subject to contractual indemnification:

- Third party claims
- Breach of representation or warranty
- Breach of agreement or covenant

# Categories of Damages

- ▶ Direct damages and losses
- ▶ “But only to the extent”
  - ▶ Comparative negligence and fault protections should not be waived
  - ▶ Make sure the indemnification would be covered by your client's insurance policy
- ▶ Other issues to consider
  - ▶ Consequential damages
  - ▶ Conflict with default provisions and waivers of certain damages
  - ▶ Has the indemnification provision carved out an exception to any waivers of damages?

Tenant shall indemnify and defend (using legal counsel acceptable to Landlord) all Landlord Parties (defined below) from **any and all** claims, costs (including reasonable attorneys' fees and costs) or **damages** to the extent arising in connection with the occupancy or use of the Premises by Tenant Parties (defined below), including any work undertaken or contracted for by Tenant; any negligent or wrongful act or omission of Tenant Parties; any accident, injury, occurrence or damage in the Premises; and any claim against Landlord by any employee or former employee of Tenant. Tenant agrees that the provisions of any employee injury insurance act, or any other employee benefit act shall not operate to release or immunize Tenant from its obligations under this Section. This indemnity is not contingent upon insurance coverage, is not limited to the amount of any insurance proceeds, and operates independently of the insurance provisions of this Lease.

Just pay attention to the bold text!

Does this erode a waiver of consequential damages?

# Ask a litigator

If you are working on a document and think there is an ambiguity or something to be exploited, or even if you do not, ask a litigation attorney to review the document. If another attorney could read the language and come up with another possible interpretation – you need to revise the language.

Do not convince yourself otherwise if you think your interpretation would prevail in court. Your objective is to keep the parties out of court with a well drafted agreement that is clear and concise.



# How Long Does the Obligation Last?

Indemnification should survive the termination of the underlying contract. Without appropriate language, the indemnification obligation may not survive.

But, should it be in perpetuity?

An Idaho district court held that indemnification provisions can be open ended and obligate a party perpetually. I have seen few contracts that limit the indemnification obligation. But, an argument could be made that by not indicating the obligation survives the termination of the agreement, the obligation is extinguished once the parties have performed the contractual obligations.

# Mutual Indemnification

## 1. Why is mutual indemnity applicable?

The two policy considerations underpinning the use of “knock for knock” or reciprocal indemnity agreements are: (1) the elimination of the expense of redundant insurance coverage; and (2) a reduction in unnecessary litigation and its expense. See *Darty v. Transocean Offshore U.S.A., Inc.*, 875 So.2d 106 (La.App. 4 Cir. 2004)

## 2. Always use separate provisions for clarity

## 3. Is this really indemnity?

- Parties of equal bargaining power essentially negotiate to each be responsible for damages they cause

## 4. Knock for knock or reciprocal indemnity

# Environmental Indemnity

- Real Estate Purchase Agreements and Construction Contracts
- Time sensitive
  - Do not take on responsibility for existing matters
- Control over the real property or construction site
- Strict liability
- Contractual waivers are not a defense to potential federal liability
  - Hold harmless is important, but pay careful attention to indemnity and defense obligations

# Who is indemnifying?

- ▶ Indemnification clauses must work in concert with insurance provisions
- ▶ Make sure the indemnifying party has the financial wherewithal to live up to the indemnification obligations – or that adequate insurance is required – and is in place
- ▶ Design professionals E&O policies
  - ▶ Defense costs may not be covered by insurance – depending on how the clause is drafted. Design professional E&O policies may only cover claims arising from negligence – and may not cover a defense of a non-negligence claim (i.e., breach of contract)

# Litigation Tips

## Drafting a Complaint

- Draft the complaint to trigger indemnification – include both indemnitee and indemnitor
- Indemnification does not mean an indemnified party cannot be sued or be found responsible
- Indemnitee might be the party with deep pockets

## Defending claims

- How is the indemnification triggered? By notice?
  - Provide timely notice
  - Make sure you know what is covered
- Common law indemnity as a fall back
- Selection of counsel provisions

# Questions

Thank you

Matt Parks

For a copy of the presentation, please email me – [mcp@splawidaho.com](mailto:mcp@splawidaho.com)