

THARPE & HOWELL, LLP

SUMMARY OF CONTRACTUAL INDEMNITY LAWS

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Firm Partner Timothy Lake is pleased to provide the following summary of contractual indemnity laws governing the states of California, Nevada and Utah. This pamphlet is for informational purposes only and should not be considered legal advice. Should you have any questions or comments regarding the topics discussed, please feel free to contact Mr. Lake at telephone number (818) 205-9955; or via email directed to tlake@tharpe-howell.com

NEVADA AND UTAH

Insurance contracts, in both states, are treated as contracts of adhesion. There appears to be a fundamental assumption that insurance companies are in a superior position in drafting and bargaining, and therefore, contract terms are construed in favor of the insured. Insurance clauses should be taken and understood in their plain, ordinary and popular sense. *Catania v. State Farm Life Ins. Co., Inc.*, 95 Nev. 532, 598 P.2d 631 (1979) (citing *Home Indem. Co. v. Desert Palace, Inc.*, 86 Nev. 234, 468 P.2d 19 (1970)). Ambiguous insurance policy provisions are strictly construed against the insurer and in favor of the insured. Id.

In the *Catania* case, an insurance company was granted summary judgment against a family which sought to collect accidental death benefits relative to a family member who had died as a result of injecting an overdose of heroin. The trial court reasoned that because the man's death resulted from an intentional (not accidental) act of injecting drugs, the man's family could not, as a matter of law, recover under an accidental death clause. The Nevada Supreme Court reversed the trial court's decision reasoning that in construing the policy language in favor of the insured, it was not, as a matter of law, clear that the death was intentional (i.e., suicide). Id. supra.

It is also true in both Nevada and Utah that the duty to defend pursuant to an indemnity clause is broad and is triggered whenever the insurer ascertains facts giving rise to *potential* liability under the policy. *Equine Assisted Growth and Learning Association v. Carolina Cas. Ins. Co.*, 689 Utah Adv. Rep. 15, 2011 WL 3652331 (2011).

In Nevada, indemnity clauses which provide that one party shall reimburse another party for its own negligence must be in writing, and must be clear. There is no presumption that an indemnitor would intend to assume responsibility unless the contract put it beyond doubt by express stipulation. A contract of indemnity will not be construed to indemnify a party against loss of damage resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms. A party demanding indemnity from the consequence of its own negligence must express that intent in specific terms to prevent surprise to the indemnitor. *George L. Brown Ins. Agency v. Star Insurance Company*, 126 Nev. Adv. Op. 31, 237 P.3d 92 (2010).

In late 2010, the Nevada Supreme Court held that a Type I indemnity provision (obligating an indemnitor to indemnify and defend an indemnitee for the indemnitee's own negligence) must expressly or explicitly state that it does so. A general reference to "any and all claims" will not be sufficient to encompass the sole negligence of an indemnitee under Nevada law. Now the Nevada Supreme Court has extended this "expressly or explicitly provided" test to Type II indemnity provisions, i.e., those indemnity provisions allowing for complete indemnification of the indemnitee, even in the circumstance of contributory negligence of the indemnitee.

In *Reyburn Lawn & Landscape v. Plaster Dev. Co., Inc.*, 127 Nev. Adv. Op., 26 (2011), a homeowner's association made a claim for construction defects against the developer/general contractor of a single family home community, arising from the design, preparation and construction of retaining and boundary walls in the communities. The developer made indemnity claims against the retaining wall subcontractor and the landscape subcontractor, based on general indemnity provisions in the construction subcontracts. After the wall subcontractor settled out its liability, the case proceeded to trial with the plaintiff, the general contractor and landscape subcontractor on indemnity claims. During the trial, the subcontractor's president testified in essence that if his company did a certain act, that it would have been "a mistake." Based on this testimony, the general contractor made an oral motion for the entry of judgment on the indemnity obligation against the subcontractor. The district court granted that motion, finding that the subcontractor president's testimony amounted to a judicial admission of liability, and refused to allow the subcontractor to present any exculpatory evidence to the jury. Without the ability to determine the relative fault of the subcontractor, the jury returned a verdict in favor of the plaintiffs, finding the general contractor 99% liable for the defects and the plaintiffs 1% liable. Because the district court had already entered judgment on the indemnity obligation against the subcontractor, the district court ordered the subcontractor liable for the plaintiffs' judgment against the general contractor and awarded interest, attorneys' fees and costs against the subcontractor. The subcontractor appealed.

The Nevada Supreme Court, however, reversed the district court's ruling in its entirety. The Court noted that just as in Type I sole indemnity obligations under *Brown Insurance v. Star Insurance, supra*, an indemnification clause must explicitly or expressly state that the indemnitor will indemnify the indemnitee for the indemnitee's contributory negligence. A general statement of indemnity will not suffice. Contributory negligence indemnity is governed by the parties' agreement, and because Nevada has not adopted an anti-indemnity statute, the parties are free to contract for the allocation of indemnification responsibilities to each other.

These rules that such indemnity clauses are subject to unequivocal terms are also true in Utah. *Pickhover v. Smiths Management Corp.*, 771 P.2d 664 (1989). By contrast, an agreement to provide insurance for another's benefit, while analogous in some respects to an agreement to indemnify another for consequences of other's own negligence, is not subject to strict construction. *Id.*

CALIFORNIA

Whether an indemnity agreement covers losses resulting in whole or in part from an indemnitee's negligence depends on whether the agreement is a "general" indemnity agreement, and whether the indemnitee's negligence was "active" or "passive." A "general" indemnity agreement is one that does not discuss the issue of the indemnitee's own negligence. Such an agreement covers losses resulting from the indemnitee's "passive" negligence, such as the failure to discover a dangerous work site condition, but not the "active" negligence of the indemnitee. *Rossmoor v. Pylon*, (1975) 13 Cal. 3rd 622.

A Type One agreement is one that specifically affords indemnity for the indemnitee's own "affirmative" negligence, so long as it does not purport to indemnify the indemnitee against liability arising from the indemnitee's sole negligence or willful misconduct. To have this effect, an agreement must be particularly clear and explicit and will be construed strictly against the indemnitee. *Crawford v. Weather Shield*, (2008) 44 Cal. 4th 541; *Cal. Civ. Code* §2782(a).

Cal. Civ. Code §2782(c) prohibits an indemnity agreement in a residential construction contract from indemnifying a builder or general contractor from claims arising from negligence by the builder or general contractor. This is limited to post-2008 construction contracts.

In some situations, the language of an indemnity agreement may be held to create an ambiguity in the wording of an additional insured agreement if the endorsement is inconsistent with the parties' intent as expressed in the indemnity provision. An additional insured endorsement covering claims "arising out of" the insured's work was held ambiguous and could not be read as being more broad than the indemnity provision in the parties' construction contract. *St. Paul v. American Dynasty Surplus Lines Ins.*, (2002) 101 Cal. App. 4th 1038.

If an indemnitee's own liability insurer defends and settles a claim, it is equitably subrogated to the indemnitee's right of contractual indemnity against the indemnitor, and the indemnitor's liability insurer. In such a situation, the indemnitee's insurer can recover the full amounts expended where the indemnification agreement is enforceable. The indemnitee's insurer can "sue upon" the indemnitee's right of contractual indemnification with the indemnitor, and his insurer. *American Cas. v. General Star Indem Co.*, (2005) 125 Cal. App. 4th 1510.

If an indemnitor's liability insurer defends and settles a claim against the indemnitee/additional insured pursuant to an additional insured endorsement to the policy, such insurer is not entitled to contribution or sharing of costs from the indemnitee or the indemnitee's insurer where the indemnification agreement is enforceable. Otherwise, this would negate the indemnity provision in the construction contract. *Hartford Cas. v. Mt Hawley Ins.*, (2004) 123 Cal. App. 4th 278.

A provision in a contract that is a promise of indemnity against claims includes the costs of defense against those claims, and binds the indemnitor upon request to defend the action against the indemnitee on matters included in the indemnity provision. *Cal. Civ. Code* §2778(3), (4). An indemnitor must pay for the indemnitee's defense costs on only those claims on which it agreed to owe indemnity in the contract, which will depend on the outcome of the litigation. *Crawford v. Weather Shield*, at 557-558.

An indemnity/defense provision of a subcontract between a general contractor and a subcontractor obligates the subcontractor from the outset of the action against the general contractor to provide a defense to the suit against the general contractor that is based on the subcontractor's negligence. This is true even if the indemnity provision is keyed to a finding of the indemnitor's fault; the defense obligation applies immediately regardless of any later finding as to the indemnitor's fault. *Crawford v. Weather Shield*, at 561; *UDC v. CH2M Hill*, (2010) 181 Cal. App. 4th 10.

The parties to an indemnity contract can agree that the indemnitor is not responsible for the indemnitee's defense, or can agree that the defense costs are only subject to reimbursement incurred later. The contract can also require the indemnitor to make the indemnitee an additional insured of the indemnitor's liability insurance as added protection in the event the indemnitor is financially unable to pay the defense costs of the indemnitee. Such an agreement can also specify the language required of an additional insured endorsement, or the particular ISO CGL additional insured endorsement form to be used so that the

indemnitee is afforded “products-completed operations” coverage by the indemnitor’s liability insurer.

An assignee of an indemnity contract stands in the indemnitee’s shoes. If the indemnitor refuses to pay an indemnitee’s defense costs, the indemnitee, and in turn its assignee, can pay the costs and seek reimbursement from the indemnitor. *Searles v. Parson*, (2011) 191 Cal. App. 4th 1394.

ISO CGL CONTRACTUAL LIABILITY EXCLUSION

As you know, standard ISO CGL policy forms have a “contractual liability” exclusion that has an exception for an “insured contract.” An “insured contract” is defined as: “that part of any other contract or agreement pertaining to your business under which you assume the tort liability of another party to pay for ‘bodily injury’ or ‘property damage’ to a third person or organization.” An indemnity agreement in a construction contract between a subcontractor and a general contractor has been held to be an “insured contract” obligating the subcontractor’s insurer to defend the subcontractor as to its duty to pay the defense and indemnity costs of the general contractor/indemnitee. However, this does not directly require the subcontractor’s insurer to defend the general contractor since it is not made an insured of the policy issued to the subcontractor by a defense/indemnity contract. *Golden Eagle Ins. v. ICW*, (2002) 99 Cal. App. 4th 837; *Great Western Drywall v. Interstate Fire*, (2008) 161 Cal. App. 4th 1033.

The current ISO CGL form provides that the defense costs that are covered under an “insured contract” are part of the “damages” for which the insured has assumed liability and which the insurer must indemnify. Thus, such “damages” reduce the “occurrence” limits of the policy, instead of coming out of the unlimited coverage for “Supplementary Payments” as was the case under former ISO CGL forms. *Golden Eagle Ins. v. ICW*, at 688.

The coverage provided under the “insured contract” exception to the “contractual liability” exclusion is only to the extent that the policy covers the “occurrence” and resulting injury or damage that produced the liability of the insured triggering the defense/indemnity obligation. Damages for other contractual breaches remain excluded. In other words, the underlying claim against the insured must still be one for which coverage is otherwise afforded under the indemnitor’s policy. An example would be a breach of a contract performance provision whereby the insured agreed to pay liquidated damages if its work is not completed on time, or purely economic damages not covered by a CGL policy. *Bernstein v. Consolidated American Ins.*, (1995) 37 Cal. App. 4th 763. In order for there to be coverage for a breach of an “insured contract,” the damages must consist of covered “bodily injury” or “property damage” not otherwise excluded by the other exclusions of the policy. The coverage provided by the “insured contract” exception is subject to all the other exclusions of the policy form.

The above summary is obviously very general. If you or your staff have any specific questions or are dealing with claims that have indemnity issues in the states which Tharpe & Howell has offices in, we would be pleased to assist. Feel free to have your staff call or e-mail with any indemnity questions at telephone number (818) 205-9955; email tlake@tharpe-howell.com – with no obligation of course!

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