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AIA CES INFORMATION


To Infinity and Beyond: How Broad Indemnity Clauses Create Limitless Liability

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- 1 Indemnity clauses
- 2 Overly broad indemnity clauses
- 3 Minimizing risks

Agenda

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Indemnity clauses

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CONTRACTING



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Every battle is won or lost
before it is ever fought.

– Sun Tze , *The Art of War*

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INDEMNIFICATION

Definition

Indemnity clause

A contractual provision in which one party agrees to answer for any specified or unspecified liability or harm that the other party might occur. Such a clause obligates the indemnifying party to protect the indemnified party against claims that might be brought by third parties.

Source: *Black's Law Dictionary* (12th ed. 2024).

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Indemnify

To reimburse (another) for a loss suffered because of a third party's or one's own act or default. To promise to reimburse (another) for such a loss. To give (another) security against such a loss.



Hold harmless

To absolve (another party) from any responsibility for damage or other liability arising from the transaction.



Defend

To do something to protect someone or something from attack. To supply a legal defense for.

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CASE LAW

Background



- Nov 10, 2015
Engineering Contract executed.
- Oct 2016
Construction Contract awarded to Contractor.
- Sept 21, 2021
Contractor files suit against Project Owner for non-payment.
- Oct 19, 2021
Project Owner seeks indemnification from Engineer.

Engineer required to indemnify Project Owner "to the extent of the negligent acts, errors, or omissions, reckless or intentional misconduct of [Engineer], its agent(s), officers, employees or subcontractors in the execution of the work [in the Engineering Contract] or in guarding the same."

Case Citation: *New Eng. Bldg. & Bridge, Co. v. Town of Cohasset*, 2024 WL 2304843 (D. Mass. May 21, 2024).

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CASE LAW

Deficiencies are not determinative of negligence



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The fact that the 30-inch siphon pipe ultimately failed does not mean that [Engineer] was necessarily negligent for having recommended it in the first place, if for instance, rainfall at the Project site was much higher than a reasonable engineer could have anticipated at the time.

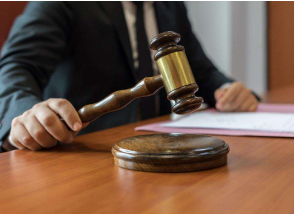
Case Citation: *New Eng. Bldg. & Bridge, Co. v. Town of Cohasset*, 2024 WL 2304843 (D. Mass. May 21, 2024).



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CASE LAW

Ruling



Client failed to present expert testimony to “lay out the standard of care of a reasonable engineer designing the siphon pipe or explain how [Engineering Firm] failed to meet that standard in making its design recommendations.”

Ruling: Engineering Firm did not have a duty to indemnify.

Case Citation: *New Eng. Bldg. & Bridge, Co. v. Town of Cohasset*, 2024 WL 2304843 (D. Mass. May 21, 2024).



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DRAFTING INDEMNITY CLAUSES



Covered Parties

Limit your indemnity obligation to the client and their directors, officers, and employees.



Covered Claims

Limit your indemnity obligation to the damages caused by your negligence in the performance of your services.



Duty to Defend

Explicitly disclaim a duty to defend.



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INDEMNITY

AIA B103-2017

§ 8.1.3 The Architect shall indemnify and hold the Owner and the Owner's officers and employees harmless from and against damages, losses and judgments arising from claims by third parties, including reasonable attorneys' fees and expenses recoverable under applicable law, but only to the extent they are caused by the negligent acts or omissions of the Architect, its employees and its consultants in the performance of professional services under this Agreement. The Architect's obligation to indemnify and hold the Owner and the Owner's officers and employees harmless does not include a duty to defend. The Architect's duty to indemnify the Owner under this Section 8.1.3 shall be limited to the available proceeds of the insurance coverage required by this Agreement.



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INDEMNIFICATION CLAUSE

EJCDC E500, 2020

§ 6.10(A) To the fullest extent permitted by Laws and Regulations, Engineer shall indemnify and hold harmless Owner, the Owner's officers, directors, members, partners, agents, and employees, from losses, damages, and judgments (including reasonable consultants' and attorneys' fees and expenses) arising from third-party claims or actions relating to the Project, provided that any such claim, action, loss, damages, or judgment is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Work itself), including the loss of use resulting therefrom, but only to the extent caused by any negligent act or omission of Engineer or Engineer's officers, directors, members, partners, agents, employees, Subconsultants, or Engineer's Subcontractors. This indemnification provision is subject to and limited by the provisions, if any, agree to by Owner and Engineer in Exhibit I, "Limitations of Liability."

§ 6.10(C) The indemnification commitments in this Agreement do not include a defense obligation by the indemnitor unless such obligation is expressly stated.



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Overly broad indemnities

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AVOIDING COMMON PITFALLS

Red Flag Words

Covered Parties

- Agents
- Representatives
- Lenders
- Shareholders
- Stockholders
- Trustees
- Lien holders
- Affiliates
- Subsidiaries
- Sureties
- Beneficiaries
- Students

Covered Claims

- In whole or in part
- Arising out of
- In any way related to
- In connection with
- Any/all
- Solely
- Regardless of fault
- Irrespective of
- Willful misconduct
- Intentional acts
- Other improper conduct
- Breach of contract

Duty to Defend

- Defend
- Protect
- Save



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CASE LAW

Background/Indemnity Clause

Consultant shall indemnify and hold Owner, Developer, and their respective officers, directors, employees and agents free and harmless from and against any and all claims, liens, demands, damages, injuries, liabilities, losses and expenses of any kind, including reasonable fees of attorneys, accountants, appraisers and expert witnesses, to the extent they arise out of or are in any way connected with any negligent act or omission by Consultant, its agents, employees, or guests, whether such claims, liens, demands, damages, losses or expenses are based upon a contract, or for personal injury, death or property damage or upon any other legal or equitable theory whatsoever. Consultant agrees, at his own expense and upon written request by Developer or Owner of the Subject Property, to defend any suit, action or demand brought against Developer or Owner on any claim or demand covered herein.

Case Citation: UDC-Universal Dev., L.P. v. CHDM-Hill, 181 Cal. App. 4th 10, 103 Cal. Rptr. 3d 684 (2010).



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CASE LAW

Broad Duty to Indemnify and Defend



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Even if 'any claim or demand covered herein' is interpreted to refer back to the indemnity requirement, that clause is so broadly worded as to apply to claims 'in any way connected with any negligent act or omission' by [Consultant] 'or upon any other legal or equitable theory whatsoever'...

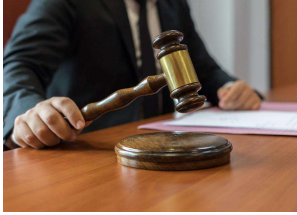
Case Citation: UDC-Universal Dev., L.P. v. CHDM-Hill, 181 Cal. App. 4th 10, 103 Cal. Rptr. 3d 684 (2010).



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CASE LAW

Ruling



Case Citation: UDC-Universal Dev. L.P. v. CH2MHill, 181 Cal. App. 4th 10, 103 Cal. Rptr. 3d 684 (2010).



Non-negligence finding released the Design Professional from the duty to indemnify, but not the duty to defend.

Ruling: Design Professional required to reimburse Client for cost of defense despite a finding of non-negligence by the Design Professional.

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PL COVERAGE

IV. Exclusions

The insurer will not defend or pay under this Policy for any claim:

...

(B) Contractual Liability

Arising out of:

1. The Insured's actual or alleged liability under any oral or written contract or agreement, including but not limited to express warranties or guarantees; or
2. Any actual or alleged liability of others that the Insured assumes under any oral or written contract or agreement.

However, this exclusion shall not apply to:

- a. The Insured's liability that exists in the absence of such contract or agreement; or
- b. The Insured's liability assumed in a written contract or agreement as set forth in subparagraphs a., b. and c. of paragraph 4. of the definition of Insured.



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STATE SPECIFIC CONSIDERATIONS

Implied duty to defend

Mont. Code Ann. § 28-11-316

An indemnity against claims, demands, or liability...embraces the cost of defense...

Mont. Code Ann. § 28-11-316

The person indemnifying is bound, on request of the person indemnified, to defend actions or proceedings brought against the person indemnified in respect to the matters embraced by the indemnity...



Cal. Civil Code § 2778

In the interpretation of a contract of indemnity, the following rules are applied, unless a contrary intention appears:

...

(4) The person indemnifying is bound, on request of the person indemnified, to defend actions or proceedings brought against the latter in respect to the matters embraced by the indemnity...

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STATE SPECIFIC CONSIDERATIONS

Individual Liability

Florida Statutes § 471.023(3)

Except as provided in s. 558.0035, the fact that a licensed engineer practices through a business organization does not relieve the licensee from personal liability for negligence, misconduct, or wrongful acts committed by him or her. Partnerships and all partners shall be jointly and severally liable for the negligence, misconduct, or wrongful acts committed by their agents, employees, or partners while acting in a professional capacity. Any officer, agent, or employee of a business organization other than a partnership shall be personally liable and accountable only for negligent acts, wrongful acts, or misconduct committed by him or her or committed by any person under his or her direct supervision and control...

Note: § 558.0035 outlines how a design professional can guard against individual liability.



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CASE LAW

Limitation of Liability Clause

In recognition of the relative risks and benefits of the project to both [Client] and [Consultant Firm], the risks have been allocated such that [Client] agrees, to the fullest extent permitted by law, to limit the liability [Consultant Firm] and its subconsultants to the total dollar amount of the approved portions of the scope for the project for any and all claims, losses, costs, damages of any nature whatsoever or claims expenses from any cause or causes, so that the total aggregate liability of [Consultant Firm] and its subconsultants to all those named shall not exceed the total dollar amount of the approved portions of the Scope or [Consultant Firm's] total fee for services rendered on this project, whichever is greater. Such claims and causes include, but are not limited to negligence, professional errors or omissions, strict liability, breach of contract or warranty.

Case Citation: *Witt v. La Gorce Country Club, Inc.*, 35 So. 3d 1033 (Fla. Dist. Ct. App. 2010).



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CASE LAW

Individual Liability



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Under the facts of this case, a cause of action in negligence exists irrespective, and essentially, independent of a professional services agreement...and therefore, we find that the limitation of liability provision was, as a matter of law, invalid and unenforceable as to [design professional in his individual capacity].

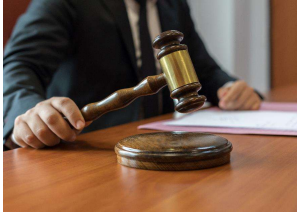
Case Citation: *Witt v. La Gorce Country Club, Inc.*, 35 So. 3d 1033 (Fla. Dist. Ct. App. 2010).



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CASE LAW

Ruling



Case Citation: *Witt v. La Gorce Country Club, Inc.*, 36 So. 3d 1033 (Fla. Dist. Ct. App. 2010).



Limitation of liability clause in the professional service agreement only applies to the Firm, not the Design Professional in his individual capacity.

Ruling: Design Professional was held personally liable for damages in excess of \$4 million.

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STATE SPECIFIC CONSIDERATIONS

Guarding Against Individual Liability

Florida Statute § 558.0035

(1) A design professional employed by a business entity or an agent of the business entity is not individually liable for damages resulting from negligence occurring within the course and scope of a professional services contract if:

...

(c) The contract includes a prominent statement, in uppercase font that is at least 5 point sizes larger than the rest of the text, that, pursuant to this section, an individual employee or agent may not be held individually liable for negligence.

§ 558.0035 outlines how a design professional can guard against individual liability.



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ANTI-INDEMNITY STATUTES

California

California Civil Code § 2782.8

(a) For all contracts, and amendments thereto, entered into on or after January 1, 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 indemnitee by a design professional against liability for claims against the indemnitee, are 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. 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 defense costs. The duty to indemnify, including the duty and the cost to defend, is limited as provided in this section...



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ANTI-INDEMNITY STATUTES

Virginia

Code of Virginia

§ 11-4.4 Any provision contained in any contract relating to the planning or design of a building, structure or appurtenance thereto, including moving, demolition or excavation connected therewith, or any provision contained in any contract relating to the planning or design of construction projects other than buildings to which the architect or professional engineer performing such work purports to indemnify or hold harmless another party to the contract against liability for damage arising out of bodily injury to persons or damage to property suffered in the course of the performance of the contract, caused by or resulting solely from the negligence of such other party, his agents or employees, is against public policy and is void and unenforceable...



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ANTI-INDEMNITY STATUTES

Virginia

Code of Virginia

§ 11-4.4 ...Every provision contained in a contract between an architect or professional engineer and a public body relating to the planning or design of a building, structure or appurtenance thereto, including moving, demolition or excavation connected therewith, or relating to the planning or design of construction projects other than buildings by which the architect or professional engineer performing such work purports to indemnify or hold harmless the public body against liability is against public policy and is void and unenforceable. This section shall not be construed to alter or affect any provision in such a contract that purports to indemnify or hold harmless the public body against liability for damage arising out of the negligent acts, errors or omissions, recklessness or intentionally wrongful conduct of the architect or professional engineer in performance of the contract...



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ANTI-INDEMNITY STATUTES

Virginia

Code of Virginia

§ 11-4.4 Any provision contained in any contract relating to the planning or design of a building, structure or appurtenance thereto, including moving, demolition or excavation connected therewith, or any provision contained in any contract relating to the planning or design of construction projects by which any party purports to impose a duty to defend on any other party to the contract, is against public policy and is void and unenforceable...

An overly broad Indemnity clause imposing a duty to defend on the design professional is void and unenforceable for public policy reasons.



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CHOICE OF LAW AND VENUE

Choice of Law and Venue

⚠ Sample Owner's Provision

The laws of the State of _____ shall exclusively govern this Agreement as to both interpretation and performance.

The venue for resolving any disputes concerning the parties' respective performance under this Agreement shall be _____.

Consider how the choice of law and venue could impact your rights, remedies, and obligations in the event of a claim.



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Minimizing risks

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QUIZ

Indemnity Clause

⚠ Sample Owner's Provision

To the fullest extent permitted by law, Design Professional agrees to indemnify, defend, and hold harmless, Client and/or Owner and their respective officers, agents, members, representatives, employees, affiliates, lenders, and sureties (the "Indemnitees") from and against all claims, damages, losses and expenses (including, but not limited to, attorneys fees and expenses and costs of litigation) arising out of or resulting from bodily injury or death of any person, or property damage, including loss or use of property, arising or alleged to arise out of or in any way related to, either directly or indirectly Design Professional or any of its consultant's (i) acts, errors, and/or omissions; and/or (ii) breach and/or failure to comply with all or any part of this subcontract; and/or (iii) failure to comply with applicable laws.



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MUTUAL INDEMNIFICATION CLAUSE

EJCDC E500, 2020, Exhibit I

§ 1.01 (A) To the fullest extent permitted by Laws and Regulations, Owner shall indemnify and hold harmless Engineer and its officers, directors, members, partners, agents, employees, and Subconsultants, and Engineer's Subcontractors, from and against any and all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals, and all court, arbitration, or other dispute resolution costs) arising out of or relating to the Project, provided that any such claim, cost, loss, or damage is attributable to bodily injury, sickness, disease, or death or to injury to or destruction of tangible property (other than the Work itself), including the loss of use resulting therefrom, but only to the extent caused by any negligent act or omission of Owner or Owner's officers, directors, members, partners, agents, employees, or others retained by or under contract to the Owner with respect to this Agreement or to the Project.



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LIMITATION OF LIABILITY CLAUSE

AIA E503-2017

§ C-6 Except for acts amounting to willful or intentional wrongs, neither the Architect, Architect's consultants, nor their agents or employees will be jointly, severally or individually liable to the Owner in excess of....

- (A) The compensation to be paid pursuant to this Agreement or Dollars (\$_____), whichever is greater.
- (B) The proceeds of the available professional liability insurance coverage required under this Agreement.



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LIMITATION OF LIABILITY CLAUSE

EJCDC E500-2020, Exhibit I

§ 1.02 To the fullest extent permitted by Laws and Regulations, and notwithstanding any other provisions of this Agreement, the total liability, in the aggregate, of Engineer and Engineer's Subcontractors, officers, directors, members, partners, agents, employees, and Subconsultants, to Owner and anyone claiming by, through, or under Owner for any and all injuries, claims, losses, expenses, costs, or damages whatsoever (including but not limited to direct, indirect, special, incidental, punitive, exemplary, or consequential damages), arising out of, resulting from, or in any way related to the Project, to Engineer's or its Subconsultants' or Engineer's Subcontractor's services, or to this Agreement, from any cause or causes whatsoever, including but not limited to the negligence, professional errors or omissions, strict liability, breach of contract, indemnity obligations, or warranty express or implied, of Engineer or Engineer's officers, directors, members, partners, agents, employees, or Subconsultants, or Engineer's Subcontractors...



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LIMITATION OF LIABILITY CLAUSE

EJCDC E500-2020, Exhibit I

§ 1.02

- (A) will not exceed the total amount of \$[Enter Amount] or the total compensation received by Engineer under this Agreement, whichever is greater. Higher limits are available for an additional fee.
- (B) will not exceed the total compensation received by Engineer under this Agreement.
- (C) Will be limited to (1) responsibility for payment of all or the applicable portion of any deductibles, either directly to the Engineer's insurers or in settlement or satisfaction, in whole or in part, of Owner's Claims, and (2) total insurance proceeds paid on behalf of or to Engineer by Engineer's insurers in settlement or satisfaction of Owner's Claims under the terms and conditions of Engineer's applicable insurance policies up to the amount of insurance required under this Agreement...



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WAIVER OF CONSEQUENTIAL DAMAGES

AIA B101-2017

§ 8.1.3 The Architect and Owner waive consequential damages for claims, disputes, or other matters in question, arising out of or relating to this Agreement. This mutual waiver is applicable, without limitation to all consequential damages due to either party's termination of this Agreement, except as specifically provided in Section 9.7.



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RISK MANAGEMENT STRATEGIES

Indemnification

Proper Scope



Limit your indemnity obligations to the coverage you have under your insurance policies (e.g. proper parties, the appropriate claims, and explicitly disclaim a duty to defend).

Carve Out for PL Claims



Consider carving out professional liability claims from an overly broad indemnity provision. Draft a separate indemnity for PL claims.

State Laws/Nuances



Consult with knowledgeable, local counsel to identify how the applicable state laws and regulations can impact the validity and enforceability of an indemnity agreement.


Other Contract Terms



Particularly if the indemnity agreement is overly broad, consider negotiating for other contract terms to help manage and mitigate the risks associated with the Agreement.



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THANK YOU!

This concludes our presentation. Thank you for your time and participation.

QUESTIONS?

Policyholders can send questions to riskmanagement.us@victorinsurance.com

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This document is for illustrative purposes only and is not a contract. It is intended to provide a general overview of the program described. Please remember only the insurance policy can give actual terms, coverages, amounts, conditions, and exclusions. Program availability and coverage are subject to individual underwriting criteria.
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