

‘I Agreed to do What?’ Indemnity Clauses: The Challenges Faced by Design Professionals

including the impact of Senate Bill 496

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One of the services we provide our Design Professional clients is contract review. Our review is from a risk management perspective and focuses on various provisions that could impact our client. By far the most challenging issues we deal with are indemnification provisions. An indemnification provision is an attempt by one party to shift risk to another party. The indemnitor (the party agreeing to indemnify the other party) agrees to hold harmless and indemnify the indemnitee (the beneficiary of the indemnification agreement) from various types of liability. Basically, this means they will not look to the upstream party to share in the cost of a claim (hold harmless) and they will make the indemnitee whole, for any losses the indemnitee suffered which arose out of the work of the indemnitee (indemnify).

It is important to understand the contractual coverage for the type of liability that is being transferred. A typical General Liability policy, such as the Insurance Services Office (ISO) Commercial General Liability Coverage Form (CG 0001), provides broad contractual liability coverage. It enables the named insured/indemnitor to hold harmless and indemnify the indemnitee for not only the named insured/indemnitor's negligence but also the negligence of the indemnitee. In other words, if a contractor agrees

to hold harmless and indemnify an owner, and there is a loss which is caused 75% by the owner and 25% by the contractor, the contractor is contractually obligated to pay 100% of the damages. This is insurable under a commercial general liability policy (unless it has been modified) and generally held to be legal in most states.



On the other hand, most, if not all, professional liability policies provide limited contractual liability coverage. Coverage is limited to liability assumed contractually for which the insured would have been liable in the absence of such a contract. Let's take a situation similar to the one referenced above. A design professional agrees to hold harmless and

indemnify the project owner from any and all liability arising out of the design professional's professional services. The courts determine that the owner is 75% at fault and the design professional is 25% at fault. The design professional would be contractually obligated to pay 100% of the damages; however, the professional liability policy would only cover the design professional for the 25% of the damages that was attributable to the design professional's negligence.

Indemnity Defined

From an insurance perspective, we typically break indemnities down into limited, intermediate and broad forms.

Limited Form Indemnity

A limited form indemnity merely states that the indemnitor will hold harmless and indemnify the indemnitee for the consequences of the indemnitor's negligence. This is insurable under both the professional liability and the general liability policies and is legal in California.

Intermediate Form Indemnity

An intermediate form indemnity requires the indemnitor to hold harmless and indemnify the indemnitee for anything and everything except the indemnitee's sole negligence. This is legal in California and is insurable under a commercial general liability policy. Responsibility for the indemnitee's negligence is un-insurable under a professional liability policy.

Broad Form Indemnity

A broad form indemnity requires the indemnitor to hold harmless and indemnify the indemnitee for anything and everything including the indemnitee's sole negligence. This is conceivably covered under a commercial general liability policy, but this type of indemnity is considered illegal in California.

The legal profession has historically broken down indemnities in a different fashion: Type I, Type II and Type III.

Type I

The classic Type I indemnity clause involves the indemnitee receiving defense, indemnity and a hold harmless agreement from the indemnitor for any claim, loss or other liability which arises from the work or services of the indemnitor, except that the indemnification does not apply with respect to the sole negligence or willful misconduct of the indemnitee. This is analogous to an Intermediate Form indemnity.

Type II

A Type II indemnity is similar to a Type I indemnity except that it does not pertain to the active negligence of the indemnitee. In other words, a Type II indemnity would require the indemnitor to be responsible for the passive negligence of the indemnitee. Although this is insurable under a commercial general liability policy, it is once again uninsurable under a professional liability policy. If the indemnitees are negligent (whether active or passive), they should be responsible. The contractual coverage under the professional liability policy will not extend to the indemnitee's negligence.

Type III

A Type III indemnity is similar to the limited form indemnity and is really no more than the basic statement of comparative fault in contractual form. The indemnitor agrees to indemnify the indemnitee for all losses caused by the indemnitor's negligent acts, errors or omissions. This is insurable under a commercial general liability policy as well as a professional liability policy.

Duty to Defend

Often an indemnification provision will also include an express duty to defend provision. While this is commonly covered by a General Liability Policy, it is not covered by a Professional Liability policy. This problem was made worse when the California Supreme Court ruled in the 2008 Crawford v. Weather Shield Manufacturing matter. The Court determined that even though Weather Shield did nothing wrong,

and therefore had no obligation to indemnify, Weather Shield was still on the hook for 100% of Crawford's legal fees. In other words, the duty to defend was a separate obligation from the duty to indemnify. But the Court went even further. They ruled that there didn't even have to be an express provision requiring defense. The duty to defend was inherent in the duty



to indemnify. If you agree to indemnify you automatically agree to defend. In order to avoid the possibility of being held responsible for funding the other parties' legal fees when you have done nothing wrong, it became necessary to amend any indemnity agreement to include an express disclaimer of the duty to defend. Needless to say, the Crawford case and the subsequent CH2M Hill matter created significant uninsured exposures for Design Professionals that were unable to negotiate a reasonable indemnification provision.

Fortunately, Senate Bill 496 was signed into law by Governor Brown on April 28, 2017. For contracts signed on or after January 1, 2018, it amends Section 2782.8 of the Civil Code as it pertains to a Design Professional's obligation to defend an upstream party. Most importantly, this new law limits the cost to defend an upstream party to the design professional's proportionate percentage of fault. To quote from the bill, a Design Professional will only be on the hook

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for the legal fees of another if “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.” In addition, this Section of the Civil Code now applies to both public and private contracts with the exception of contracts entered into with the State of California. Previously this Section only applied to public contracts other than the state of California.

Like most laws, there is still some uncertainty. While it appears to eliminate the immediate duty to defend, it does not specifically state that. Another question is whether the cost to defend will be insurable. The consensus opinion among the defense attorneys and professional liability claims adjusters that I have discussed this with is that this will eliminate the immediate obligation to defend an upstream party. This doesn’t mean that a demand for defense won’t be made, but if it is, it will likely be denied by the insurance company, who will now have a statute to back up that denial.

The second question pertains to whether or not legal fees awarded by a court or trier of fact in deference to this law would be covered damages. While some insurance companies may try to deny coverage by citing the contractual exclusion in the Professional Liability policy, in my opinion, the majority of insurance companies would cover these costs since they are negligence based.

What Does an Equitable Indemnity Look Like?

An equitable indemnity would be tied to the Design Professional’s negligence. This makes sense. If the Design Professional is at fault, they should be responsible for the resultant damages. What should be avoided is contractually agreeing to be responsible for someone else’s negligence. This is not only uninsurable, it is unfair.

Even with the passage of SB 496, it is still prudent to include an express rejection of the duty to defend. With this in mind, a preferred indemnitee might look something like this:

Notwithstanding any clause or provision in this Agreement or any other applicable Agreement to the contrary, Consultant agrees to indemnify and hold harmless (but not defend) the Client, its officers, directors and employees from and against damages and costs that Client is legally obligated to pay, to the extent caused by the negligent act, error or omission of the Consultant or anyone for whom the Consultant is legally responsible, subject to any limitations of liability contained in this Agreement.

Consultant shall have liability for reasonable and necessary defense costs incurred by persons indemnified to the extent caused by Consultant’s negligence herein and recoverable under applicable law on account of negligence.

Final Comments

When considering an indemnity agreement, you need to understand what type of contractual coverage you have. Once this is understood, you can determine whether or not a given indemnity is acceptable. It is important to point out that just because an indemnity is not insurable, it doesn’t mean you can’t sign it. This is a business decision which has to be evaluated against other factors such as desirability of the client and the project, the fee and your current workload.

As mentioned above, Cavnac & Associates reviews contracts for its clients from a risk management and insurance perspective. All contracts have challenges and the perfect contract has yet to be drafted. Our job as a risk manager and insurance broker is to quantify risk for our clients so they can make the best decision for their company. Ultimately, the decision to accept or reject an indemnity agreement is up to the client. ■

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Simple Summer Activities Your Kids Are Sure to Love

Summer is often filled with outdoor parties, warm weather and no school. Unfortunately, the arrival of summer can bring stress for many parents as they search for ways to keep their kids happy, healthy, engaged and safe without breaking the bank.

Listed below are a few simple—and inexpensive—summer activities that you and your children can do together this summer.

- **Make homemade frozen treats.** Cooking together is a great way to create memories that will last a lifetime and to instill healthy habits in your children. Click [here](#) for some recipes to get you started.
- **Go berry picking.** Many berries are in season in the summer. Take your children to your local berry farm to pick your own delicious strawberries, blackberries and raspberries.
- **Go hiking.** Enjoy the summer weather and your state's scenery, and get some exercise by taking a family hike at your nearest trail.

This article is intended for informational purposes only and is not intended to be exhaustive, nor should any discussion or opinions be construed as professional advice. Readers should contact a health professional for appropriate advice.

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Do You Know Seizure First Aid?

According to the U.S. Centers for Disease Control and Prevention (CDC), 1 in 10 people may have a seizure in their lifetime. A seizure is a change in the brain's electrical activity that can cause a variety of symptoms, including violent shaking, falling and losing bodily control. However, because there are [different types of seizures](#), symptoms can vary.

Knowing proper seizure first aid is important so that you can help keep a person who is having a seizure safe and prevent further injury. General seizure first aid includes the following:

- Clear the area immediately to prevent possible injury.
- If the person is standing, gently guide them to the floor. Roll them on their side and cushion their head.
- Time the seizure. If the person has epilepsy and the seizure lasts longer than three minutes, call 911.
- Call 911 if any of the following apply:
 - The person is pregnant.
 - The person has never had a seizure before.
 - The person does not regain consciousness after the seizure.
 - The seizure lasts longer than five minutes.
- Do not attempt to hold the person down or put anything in their mouth while they are seizing. Doing so could cause injury.

For other seizure first-aid tips, please visit the CDC's [webpage](#).

Turkey Burgers

- 1 pound ground turkey (85 percent lean, 15 percent fat)
- 2 medium onions
- 3 Tbsp. lemon juice
- ¼ tsp. Worcestershire sauce
- ¼ tsp. parsley

PREPARATIONS

1. Chop onions.
2. Combine onions, turkey, lemon juice, Worcestershire sauce and parsley in a bowl. Mix well.
3. Shape mixture into four patties.
4. Cook in a frying pan over medium heat or grill until internal temperature reaches 165 F.

Makes: 4 servings

Nutritional Information (per serving)

Total Calories	224
Total Fat	14 g
Protein	20 g
Carbohydrates	6 g
Dietary Fiber	1 g
Saturated Fat	4 g
Sodium	74 mg
Total Sugars	3 g

Source: USDA

Grilling Safety Reminders for Your Summer BBQ

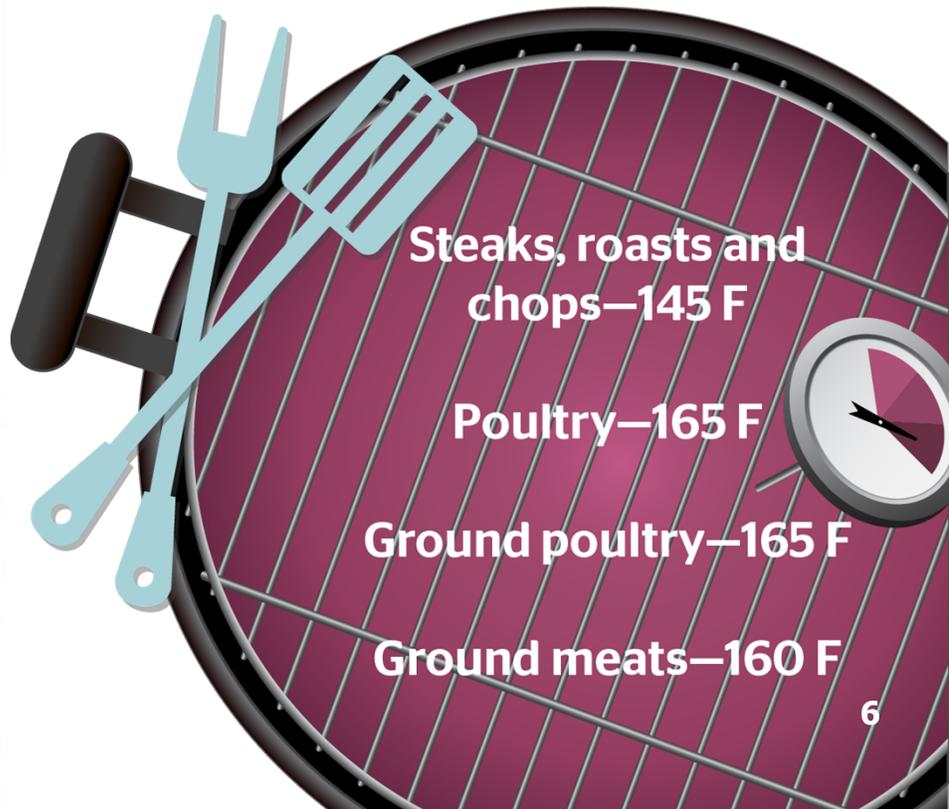
Though grilling is an extremely popular way to prepare food in the summer, it can also be dangerous. According to the U.S. Fire Administration, gas and charcoal grills account for an average of 10 deaths and 100 injuries annually. Additionally, the National Fire Protection Association reports that an average of 8,900 home fires are caused by grilling each year.

This year, keep the following safety suggestions in mind when you go to fire up your grill:

- Make sure your grill is at least 3 feet away from other objects including your house, trees and outdoor seating.
- Remember that starter fluid should only be used with charcoal grills and never with gas grills.
- If you suspect that your gas grill is leaking, turn off the gas and get the unit fixed before lighting.
- Do not bring your grill into an unventilated or enclosed space such as the garage or inside of your home.
- Do not let children and pets play near the grilling area when cooking until the grill is completely cool.

GRILL YOUR FOOD THOROUGHLY!

Prevent foodborne illnesses this summer by grilling your meat to the proper internal temperature.



Spotlight On



Cavnac & Associates is proud to support local and non-profit civic organizations, including Serving Seniors.



We provide meals, supportive services, health education, affordable housing and lifelong learning opportunities for seniors in San Diego County.

All individuals age 60 and older are eligible for our congregate meals, senior center activities, health education and social services.

People age 62 and older are eligible for permanent affordable housing at Potiker Family Senior Residence in East Village and Potiker City Heights Residence in City Heights.

We serve meals at 10 congregate dining sites and to home-bound seniors throughout San Diego County. Please visit our Contact Us page and click on a location on the map for directions, contact information and times.

All sites ask for a nominal donation of \$2.50, but no one will be turned away for being unable to donate.

We gladly accept donations in support of our programs and services. You can also visit our Get Involved page to learn more about Volunteer opportunities.