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EXPRESS INDEMNITY CLAUSES IN CONSTRUCTION CONTRTACTS.

A. Definitions.

1. Indemnity**:** A contract by which one agrees to save another from a legal consequence of the conduct of one of the parties to the agreement or some other person (Civil Code ' 2772). The California Supreme Court has defined it as "the obligation resting on one party to make good a loss or damage another party has incurred."

2. Indemnitee: The party claiming indemnity; when a general contractor agrees to indemnify and hold harmless the owner, then the owner is the indemnitee. Similarly, when the subcontractor agrees to indemnify and hold harmless the general contractor, then the general contractor is the indemnitee.

3. Indemnitor: The party who agrees to assume the responsibility for the loss; when a general contractor agrees to indemnify and hold harmless the owner, the general contractor is the indemnitor. In the context of general contractor v. subcontractor, it is generally the subcontractor as the indemnitor who agrees to indemnify the general contractor.

B. Types of Potential Indemnity Recovery.

1. 3 Basic Types. There are three basic types of indemnity under which a construction trade potentially may be pursued: (1) Express Contractual Indemnity; (2) Implied Contractual Indemnity and (3) Implied Non-Contractual Indemnity.

2. Related Equitable Basis. There is also a related doctrine of Equitable Indemnity which permits a trade which allegedly is a concurrent tortfeasor to seek to obtain partial indemnity from other alleged concurrent tortfeasors under a comparative fault basis.

C. Express Contractual Indemnity.

1. Definition. Express Contractual Indemnity is based upon a written agreement by one person to indemnify or hold another harmless from the legal consequences of its conduct. The scope of Express Contractual Indemnity depends upon the wording of the indemnity language. In MacDonald & Kruse, Inc. v. San Jose Steel Co., 29 Cal.App.3d 413

(1972), the court attempted to classify three types of Express Contractual Indemnity. Since then, the MacDonald & Kruse classifications have achieved a life of their own and are the source for the often heard references to "Type 1" (specific) or "Type 2" (general) indemnity agreements.

2. Classification of Indemnity Provisions. The three types of Express Contractual Indemnity agreements identified by the court in MacDonald are as follow:

Type 1. A Type 1 indemnity agreement contains an expression of intent that the indemnitor is to indemnify the indemnitee for, among other things, the indemnitee's own negligence, either standing alone or together with the negligence of others, including that of the indemnitor. This type of indemnity agreement has also been described as a "specific" indemnity agreement. An example of this clause would be when the subcontract requires the subcontractor to indemnify the prime contractor against "any and all" claims arising out of the performance of the subcontract save and except claims arising from "sole negligence or sole willful misconduct of contractor." CI Engineers & Contractors, Inc. v. Johnson & Turner Painting Co., 140 Cal.App.3d 1011 (1983). Although the indemnity agreement did not specifically state that the indemnitee was to be indemnified for its "own" negligence, the court said it was clear that was what they meant when they said any and all claims . . . except the sole negligence of a contractor.

Type 2. A Type 2 indemnity agreement contains a promise by the indemnitor to indemnify or hold the indemnitee harmless, but does not expressly provide that the indemnitee will be indemnified for its (the indemnitee's) own negligence. A Type 2 indemnity agreement is often referred to as a General Indemnity Agreement. Language which has been found to be a Type 2 or General Indemnity (hold harmless) Agreement includes promises to indemnify for liability:

"From any cause whatsoever"

"which might arise in connection with the agreed work"

"caused by or arising out of the operations" of the indemnitor," or,

"arising out of or in any way connected."

See, Rossmoor Sanitation v. Pylon, Inc., 13 Cal. 3d 622 (1975).

Type 3. A Type 3 indemnity agreement provides that the indemnitor will indemnify the indemnitee for liabilities caused solely by the indemnitor's negligence. If there is any negligence on the part of the indemnitee or any third party, whether "active" or "passive," it will bar any claim against the indemnitor, even if negligent conduct by the indemnitor contributed to the loss. In this type of agreement, for example, the subcontractor is required to indemnify the general contractor only for the subcontractor's negligence, no one else's negligence. This agreement would exclude any responsibility by the indemnitor for the general contractor's or any other third party's negligence.

3. Erosion of the MacDonald Classification Scheme. In some limited situations, depending on the language of the agreement, a strict interpretation of a general indemnity agreement which would deny indemnity for an indemnitor's fault because either the indemnitee or a third party were also negligent, may not always apply.

   a. Courts have reasoned that a mechanical application of the active-passive analysis should not always be controlling, and depending on the intent expressed in the agreement, enforceability of the indemnity agreement may at times primarily turn upon a reasonable interpretation of that intent. Therefore, under certain circumstances in a joint negligence factual situation, depending on the intent of the parties, a proportional indemnity analysis may be applied. *See*, Hernandez v. Badger Construction Co., 28 Cal.App.4th 1791 (1994).

   b. Courts also have held that rather than classifying the type of indemnity contract as 1, 2 or 3, it is more helpful to refer to them as either specific or general, which classification would depend upon the parties' intent as expressed in the contract.

4. Express Contractual Indemnity and Insurance Coverage. When an express indemnity agreement applies to a loss and both the indemnitee's and indemnitor's general liability insurance policies apply to the loss, in the absence of a prior written agreement to the contrary, the indemnitor's policy will be deemed to provide primary coverage. Such a loss will not be apportioned between the insurers pursuant to the Aother insurance@ clauses of the policies. Rossmoor, *supra*, 13 Cal. 3d 622.

5. Express Contractual Indemnity v. Additional Insured Status. In instances in which an indemnitee is not named as an additional insured (AI) on the indemnitor's liability insurance policy, there is no duty owed by the indemnitor's liability insurer to either defend or indemnify the indemnitee.

Alex Robertson Co. v. Imperial Casualty & Indemnity Co.,8 Cal.App.4th 338 (1992) .

a. Where an indemnitee is named as an AI insured on the indemnitor's liability insurance policy, the scope of the coverage afforded the indemnitee will be determined by reference to the insurance policy, and not by the scope of the Express Indemnity clause contained in the construction agreement.

b. If the indemnitor's liability insurer does not place appropriate limitations on the scope of the coverage provided to the indemnitee, a situation can result where the loss does not come within the Express Contractual Indemnity language, but the indemnitee is nevertheless entitled to receive coverage under the indemnitor's liability policy. Chevron U.S.A., Inc. v. Bragg Crane & Rigging Co., 180 Cal.App.3d 639 (1986) .

6. Express Contractual Indemnity v. Implied Indemnity. When Express Contractual Indemnity applies to a loss, the terms of the contract typically will control over any doctrine of implied indemnity. In other words, the parties' own expression of indemnity in the contract supersedes any notions of implied indemnity. If, however, the express contract of indemnity does not apply to the loss, implied indemnity is not precluded. Maryland Casualty Co. v. Bailey & Sons, Inc., 35 Cal. 4th 856 (1995); E.L. White, Inc. v. City of Huntington Beach, 21 Cal. 3d 497 (1978).

7. Overbroad Indemnity Agreements Within Construction Contracts. Civil Code ' 2782 makes void and unenforceable any provisions within a construction contract which purport to provide indemnity against liability arising from the sole negligence or willful misconduct of the indemnitee.

D. Implied Contractual Indemnity.

Implied Contractual Indemnity is based upon some underlying contractual relationship between the indemnitee and the indemnitor where the indemnitor's liability has arisen from the indemnitor's breach of an implied contractual duty owed to the indemnitee. Examples of Implied Contractual Indemnity include an implied promise to perform work under a contract in a safe and careful manner, and to perform contract services in a skillful and proper manner.

E. Implied Non-Contractual Indemnity.

1. Origin. This type of indemnity (sometimes referred to as equitable indemnity) arises where, in equity and good conscience, the burden of a judgment should be shifted from one person to another.

2. Doctrine. The so-called Atort of another@ doctrine is based on the principle that everyone is responsible for the consequences of their own wrong and if others, who were not at fault, have been compelled to pay damages for such a wrong, they may in turn recover these damages from the ultimate wrongdoer. Moreover, when the prerequisites of Civil Code ' 1021.6 have been satisfied, the indemnitee=s attorneys fees incurred in defending against the claim also are potentially recoverable.

3. No Primary Fault of Indemnitee. Implied Non-Contractual Indemnity arises where the liability of the purported indemnitor to the injured third party is primary (immediate, initial or direct) and the liability of the indemnitee to the third party is secondary (imputed, vicarious, derivative or constructive).

4. Common Examples: Common situations where Implied Non-Contractual Indemnity arises are as follow:

a. Special Relationship Between Indemnitor and Indemnitee. Examples of special relationships entitling the party secondarily liable to Implied Non-Contractual Indemnity include: principal and agent; employer and employee or employer and independent contractor; general contractor and sub-contractor; vehicle owner and driver for imputed liability; and, vendors of products and manufacturers of products.

b. Indemnity Without Special Relationship. A right of indemnification may arise as a result of equitable considerations and is not restricted to situations involving a wholly vicarious liability. In other words, an absence of a special relationship between the indemnitee and indemnitor is not fatal to the right of indemnity if another basis for relief is shown. Examples of this type of relationship include: a city is entitled to indemnity from property owner who created a dangerous condition; and, a carnival sponsor is entitled to indemnity from a carnival concession operator which created a dangerous condition.

F. Related Issue: Preclusion of Indemnity in Construction Accident Cases.

Labor Code ' 3864 abolishes the right of Implied Contractual Indemnity and Implied Non-Contractual Indemnity against an injured employee's employer. The only type of indemnity which is proper against an injured employee's employer is Express Contractual Indemnity based on a written agreement executed prior to the employee's injury by both parties to the agreement. Hansen Mechanical v. Superior Court, 40 Cal.App.4th 422 (1995).

G. Effect of Fault on the Part of the Potential Indemnitee/Indemnitor

1. Doctrine. Recent changes in case law affect the impact of fault, or the absence of fault, on the part of the indemnitor in the context of a Type 1 situation. Additionally, as mentioned above, in the context of a Type 2 or Type 3, the issue frequently arises where the indemnitee is deprived of the right to indemnity because of its own fault. These issues are examined below

in the context of the various types of indemnity.

2. Express Contractual Indemnity - Type 1.

a. Under a specific indemnity clause (Type 1), the indemnitee's own fault does not deprive it of the right to indemnity unless the injury was due to the Asole negligence or willful misconduct@ of the indemnitee. By definition, a Type 1 clause is one in which the responsibility for the negligence of the indemnitee is expressly provided to be at the risk of the indemnitor. As a result, absent "sole" negligence or "willful misconduct" on the part of the indemnitee, the indemnitee's malfeasance usually is of no consequence.

b. There has been a significant departure from early doctrine that for the indemnity obligation to arise, an indemnitor must have been at fault (or alternatively, there must be some factual nexus between the actions of the indemnitor and the harm). Recent cases decided in Southern California now stand for the following three basic propositions, which to some extent are a radical departure from earlier doctrine:

(1) Parties to an indemnity agreement can voluntarily allocate fault any way they deem fit so long as it is not contrary to public policy.

(2) Judicial construction of an indemnity clause most likely will allow indemnity without fault on the part of an indemnitor in the context of a commercial project.

(3) Judicial construction of an indemnity clause most likely will not allow indemnity without fault on the part of an indemnitor in the context of a residential project but will allow such a result in the context of a commercial project.

See, Centex Golden v. Dale Tile,78 Cal.App.4th 992 (2000); Heppler v. J.M. Peters,73 Cal.App. 4th 1265 (1999); Continental Heller v. Amtech Mechanical, 53 Cal.App. 4th 500 (1997).

3. Express Contractual Indemnity - Types 2 & 3.

a. Under the context of a general indemnity clause (Type 2 or Type 3), the indemnitee's own fault may deprive it of the right to indemnity if it (1) participated in an affirmative act of negligence; (2) had knowledge of, or acquiesced in, such an act; or, (3) failed to perform some duty which it had undertaken by virtue of its agreement with the indemnitor.

b. In the case of a Type 2 indemnity clause, typically only active negligence of the indemnitee may preclude it from indemnity recovery. Passive negligence will not have that effect in a Type 2 agreement, but

would bar indemnity in a Type 3 agreement.

c. In the final analysis, the critical determination will not be based upon a rigid classification of the indemnity clause in question as a Type 1, 2 or 3, but will be determined by an analysis of the parties' intent, as reflected in the language of the contract and the circumstances of the injury. Rossmoor Sanitation, *supra*, 13 Cal. 3d 622; Hernandez, *supra*, 28 Cal.App. 4th 1791. .

4. Implied Indemnity (Contractual & Non-Contractual). Under the context of implied indemnity claims, whether they arise from contract or not, the indemnitee's participation in the wrong, in either an "active" or "passive" manner, will usually preclude its right to indemnity.

5. Definition of AActive@ v. APassive@ Negligence.

a. In Cahill Brothers, Inc. v. Clementina Company, 208 Cal.App.2d 367 (1962), the court made the following ruling:

> "[I]f the person seeking indemnity personally participates in an affirmative act of negligence, or is physically connected with an act of omission by knowledge or acquiescence in it on his part, or fails to perform some duty in connection with the omission which he may have undertaken by virtue of his agreement, he is deprived of the right of indemnity. He is said to have been actively negligent."

b. In Rossmoor Sanitation, *supra*, 13 Cal. 3d 622, the California Supreme Court ruled that whether the conduct is "passive" or "active" is generally a question of fact, although in some cases, it may be determined as a question of law. Examples of "passive" negligence cited by the Rossmoor court include the following:

(1) Failure to exercise a right of inspection over certain work and to specify changes;
(2) Failure to exercise the right to order removal of defective material, and
(3) Failure to discover a dangerous condition which was created by others.
(4) Examples of "active" negligence cited by the Rossmoor court include the following:

(a) Digging a hole which caused injury;
(b) Supplying a scaffold that does not meet safety order requirements; and
(c) Creating a perilous condition which resulted in an explosion.

(5) An example of how this determination of Aactive@ vs. Apassive@ is made is illustrated by the Rossmoor court=s decision, which involved a collapsing trench at a construction site. At the trial level, the jury had found that Rossmoor was only passively negligent, and found Pylon responsible under the indemnity clause. This finding was made despite the existence of 10 specific instances of conduct on the part of Rossmoor, which other courts have defined as constituting active negligence. On appeal, Pylon contended that Rossmoor was actively negligent as a matter of law, arguing that the following conduct on the part of Rossmoor demonstrated the requisite Aactive@ as opposed to Apassive@ conduct:

(a) Furnished the plans and specifications under which the trenches had been excavated;
(b) Retained the engineering firm to prepare the plans;
(c) Approved the plans;
(d) Supervised personnel on the job site at various stages of construction to interpret plans and to direct Pylon's work;
(e) Knew of, permitted and approved excavation of the trench;
(f) Used hazardous practices not consistent with good construction practice;
(g) Experienced difficulty with land slippage and excavation collapse during construction;
(h) Never requested a compaction report on the first trench;
(i) Conducted dynamiting operations during which trucks and heavy equipment caused vibrations; and
(j) Worried about delays in construction.

(6) In making its ruling that active negligence could not be determined as a matter of law, the appellate court held that the trier of fact had reasonably concluded Rossmoor was Apassively@ negligent because Rossmoor:

Had no supervisory personnel at the site of the accident;
Had no knowledge that Pylon=s employees intended to enter the unshored trench; and,
Pylon was directly responsible for the trench remaining unshored.

H. Attorney's Fees Recoverable in Indemnity Claims.

1. Express Indemnity. Under express indemnity, attorney's fees spent by an indemnitee defending against a claim covered by the indemnity agreement are generally recoverable against the indemnitor as part of the loss incurred by the indemnitee due to the indemnitor (they typically are the subject of a

contractual Aprevailing party@ attorney=s fees provision).

2. Implied Indemnity. In claims based upon implied indemnity, CCP '1021.6 provides for the discretionary award of attorney's fees to a party who prevails on such a claim if the court finds the indemnitee was required to defend an action, after demanding indemnity from the indemnitor, and that the indemnitee was found to be without fault in the principal case. In other words, if the indemnitee timely demands indemnity from the indemnitor and thereafter incurs attorney's fees, the defending indemnitee generally will be allowed to recover those attorney's fees from the indemnitor as part of its successful indemnity claim against the ultimate wrongdoer.

3. Other Statutory Basis: CCP '1038. Section 1038 allows the purported indemnitee to recover costs and attorneys fees incurred in the successful defense of any type of indemnity action which the purported indemnitee proves was brought or prosecuted by the purported indemnitor without reasonable cause and without a good faith belief there was a justifiable controversy under the facts and law. This relief is only available by noticed motion at the time of granting of summary judgment, motion for directed verdict, motion for judgment (bench trial), or motion for nonsuit.

I. Effect of Good Faith Settlement Determination on Indemnity Claims.

1. Introduction. In third party litigation, it is not unusual for both the indemnitee and indemnitor to be named as direct defendants, and for the indemnitor to also be a cross-defendant in an indemnity cross-complaint by the indemnitee. The indemnitor is free to reach a direct settlement with the third party, and to seek good faith settlement determination pursuant to CCP ' 877.6. Disposition of the pending indemnity cross-complaint is dependent on the type of indemnity involved.

2. Express Contractual Indemnity. Good faith settlement determination does <u>not</u> absolve the purported indemnitor of liability for Express Contractual Indemnity.

3. Implied Indemnity. Good faith settlement determination absolves the purported indemnitor of any further liability for claims of Implied Contractual Indemnity [<u>Bay Development, Ltd. v. Superior Court</u>, 50 Cal. 3d 1012 (1990); <u>Peter Culley & Associates v. Superior Court</u>, 10 Cal.App. 4th 1484 (1992)], for Implied Non-Contractual Indemnity [<u>Far West Financial Corp. v. D&S Co.,</u> 46 Cal. 3d 796 (1988)], and for Comparative or Equitable Indemnity [CCP ' 877.6].