Duty to Defend

WHAT IT MEANS FOR THE SURVIVAL OF YOUR FIRM.
The recommendations contained herein are intended as loss prevention measures for insurance purposes only. Walker & Associates Insurance personnel are not providing a legal opinion on these contract provisions. The comments were not prepared by an attorney, are not legal advice, and cannot be relied upon as legal advice. We recommend that agreements be reviewed by your firm’s attorney for your contract issues.
LEARNING OBJECTIVES:

1. Examine Case law on how courts view the Duty to Defend.

2. Review why the duty to defend is uninsurable on the professional liability policy.

3. Understanding why many times “defend” is requested in indemnification clauses and the common concerns with removing this from your contracts.

4. Review Indiana’s current anti-indemnification clause and our legislative efforts.
• CH2M Hill is contracted to provide engineering and environmental planning services in connection with the development of a residential condo complex
• UDC was the developer of the project
• Contract obligated CH2M Hill to indemnify UDC under certain conditions and to defend UDC against “any suit, action or demand” brought against UDC “on any claim or demand covered herein”
• The HOA filed a complaint against UDC for property damage resulting from “defective conditions” at the project, due in part to negligent planning and design of open space and common areas.

• HOA submitted consultant reports describing the adverse effects of drainage problems at the site, as well as soil instability, erosion, settling, and other geotechnical concerns.
UDC cross-complained for indemnity against numerous subcontractors and tendered its defense against the HOA to all cross-defendants based on their contracts with UDC.

CH2M Hill answered with a general denial rejecting UDC’s tender.

UDC paid for its own defense.

Settlement was reached between all defendants and HOA including release of all cross claims except CH2M Hill.
UDC argued that CH2M Hill was liable for UDC’s defense costs under its agreement to defend and indemnify UDC.

CH2M Hill argued that the parties’ contract called for a defense only when the underlying claims arose out of CH2M Hill’s negligence.

One week earlier, the Supreme Court had issued its opinion in Crawford vs Weather Shield Mfg. holding that contractual indemnitor incurs a duty to defend the indemnitee as soon as the indemnitee tenders its defense to the indemnitor.
The jury was given a special verdict form on which to record its findings as to whether any party had been negligent and whether CH2M Hill had breached its contract with UDC.

It was unanimously found that CH2M Hill had NOT been negligent and had NOT breached the contract.

Then the trial court took up the issue of CH2M Hill’s duty to defend UDC in light of the jury’s finding that CH2M Hill had NOT been negligent...
• **OUTCOME:**

The Trial Court found that it was only the duty to indemnify that depended on the finding of negligence. The separate duty to defend agreed to in the contract must occur before the duty to indemnify arises. “Otherwise, you wouldn’t need the duty to defend” (because the duty to indemnify would include costs associated with the defense of the lawsuit as long as it were negligent)
NEGLIGENCE

• Failure to meet the standard of care.

• Standard of care:
  • The design professional is held to use the same degree of care as is ordinarily practiced by other similarly situated design professionals in that discipline.

• No legal requirement for perfection
NEGLIGENCE

- M Civ JI 25.31 Negligent Design

- The defendant had a duty to use reasonable care at the time of design of xxxx so as to eliminate unreasonable risks of harm or injury that were reasonably foreseeable.

- Reasonable care means that degree of care that a reasonably prudent designer would exercise under the circumstances that you find existed in this case. It is for you to decide, based on the evidence, what a reasonably prudent designer would do or would not do under those circumstances.

- A failure to fulfill the duty to use reasonable care is negligence...
INDEMNIFICATION:

• Reimbursement (synonym)
• It is insurable to agree by contract to indemnify but only if you have been negligent
• The professional liability policy pays for damages as a result of your negligent acts.
Types of Indemnity

- **Contractual Indemnity**
  - Duty to indemnify created by contract
- **Common Law Indemnity**
  - Duty to indemnify imposed by the court
Types of Contractual Indemnity

- **Broad Form**
  - "in whole or in part"

- **Intermediate Form**
  - "in part"

- **Limited Form**
  - "to the extent"
Rental Car Company fails to Maintain a Rented Vehicle

• **Broad Form Indemnity:**
  • You pay 100% of damages

• **Intermediate Form Indemnity:**
  • You pay nothing

• **Limited Form Indemnity:**
  • You pay nothing
Rental Car Company fails to Maintain a Rented Vehicle  
AND  
You were speeding

- **Broad Form Indemnity:**
  - You pay 100% of damages
- **Intermediate Form Indemnity:**
  - You pay 100% of damages
- **Limited Form Indemnity:**
  - Each pays their proportionate percentage
Indiana **Current** Anti Indemnification Law:

- Indiana Code § 26-2-5.

- Sec. 1. All provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction or design contract except those pertaining to highway contracts, which purport to indemnify the promisee against liability for:
  - (1) death or bodily injury to persons;
  - (2) injury to property;
  - (3) design defects; or
  - (4) any other loss, damage or expense arising under either (1), (2) or (3);

- from the **sole negligence** or willful misconduct of the promisee or the promisee's agents, servants or independent contractors who are directly responsible to the promisee, are against public policy and are void and unenforceable.
"The department may not require a contractor to assume any liability or indemnify the state for any amount greater than the degree of fault of the contractor."

AN ACT to amend the Indiana Code concerning utilities and transportation.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. IC 8-23-2-12.5 is added to the Indiana Code as a new section to read as follows [effective upon passage]: Sec. 12.5. (a) As used in this section, "contractor" refers to a person who provides professional services under a contract with the department.

(b) As used in this section, "professional services" refers to engineering, architectural, or surveying services.

(c) Notwithstanding any provision of IC 26-2-5-1 to the contrary, the department may not require a contractor to assume any liability or indemnify the state for any amount greater than the degree of fault of the contractor.

(d) Any contractual provision in conflict with the prohibitions contained in subsection (c) is void and unenforceable.

SECTION 2. IC 8-23-9-4 is amended to read as follows [effective July 1, 2008]: Sec. 4. Notwithstanding any other
Why isn’t Duty to Defend Insurable

#1-It is excluded under the Professional Liability Policy:

**EXCLUSIONS:**

This policy does not apply to any Claim based upon or arising out of liability assumed by an Insured under any contract or agreement, whether oral or written, except to the extent that the Insured would have been liable in the absence of such contract or agreement.
Why isn’t Duty to Defend Insurable

#2-The Professional Liability Policy requires negligence.

**Insuring Agreement:**
The Insurer shall pay on behalf of the Insured all Damages and Claims Expenses by reason of a Claim first made against the Insured arising out of any negligent act, error or omission in rendering or failing to render Professional Services by the Insured.
Why isn’t Duty to Defend Insurable

#3-You **cannot** add an additional insured to the Professional Liability Policy.

- You **can** add an additional insured to a General Liability Policy.
- Professional Services exclusion on A/E’s General Liability policy.
Why are your clients hesitant to remove “Defend” from the indemnity clause?

- An attorney put it in there and they are not supposed to make any changes.
- Many don’t understand that the majority of your liability falls under your professional liability policy.
- They want it there because they want defense under your general liability policy.
- They have given you a construction contract and don’t realize it is uninsurable.
- They think they are giving something up, but really they are giving up an empty promise.
Talking Points when Negotiating Contracts

- Ask for it-Strike Defend from the indemnity clause OR add in “the duty to defend shall not apply to professional liability claims made against an indemnitee”
- Focus on ALL the many uninsurable clauses in a contract and settle on taking out defend
- Insurance requirements are there for a reason.
- If I sign, I will be in breach of contract.
- Indemnity is what they need.
Introduction of HB 1015 (Torr)

• Add Section 2:
  • Require the professional to defend the promise against a professional liability claim; or
  • Indemnify the promise against liability other than liability for damages and losses arising out of third party claims to the extent the damages and losses are caused by the professional’s willful misconduct or negligence;
• are against public policy and are void and unenforceable
Currently

A girl gets hurt in a park and the mom sues the owner of the park (client) for damages.

The proposed changes will NOT effect this.
With the Proposed Changes

A girl gets hurt in a park and the mom sues the owner of the park (client) for damages.

Client: Indemnify me. You messed up
Design Professional: No coverage. You are a professional. Call your professional liability company.

Design Professional: The insurance company pays damages as a result of my negligence.

Out of Pocket: My deductible. I can afford that. I can stay in business and my client gets indemnified.

Contractor: Defend me per the contract.

General Liability Insurance Policy:
- No problem. Insurance will pay.
- No changes.
What does the opposition say?

• Design Professionals are asking for preferential treatment
• Design Professionals are trying to get out of court costs and legal fees when they are responsible
• Design Professionals are taking away the right to negotiate contracts
• We already have an anti indemnity statute. We don’t need another one!
• Making duty to defend unenforceable will increase their insurance rates
What’s next...

• We continue to negotiate Defend out of our contracts.
• We educate our peers and employees so that collectively everyone understands the issue.
• We talk to our legislators and other associations.
• We try again at next session!