

# The Wrong Words Can Cost You

*Recent Case Showcases Importance Drafting Contracts Correctly When It Comes To Indemnity Provisions*

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Risk allocation is a key source of conflict in virtually all construction projects. Ideally, the parties make a concerted effort to deal with issues of risk allocation during the contract stage, at the onset of the project and before any problems have developed. When these issues are ignored until they come to the fore during construction or after project completion, it is too late to deal with them effectively and costly litigation often ensues.

Two common methods of allocation of risk in construction projects are indemnities and “duty to defend” provisions. If drafted properly, these can be very useful tools in preventing problems down the road. All too often, however, not enough care is put into the drafting of these provisions, as explained by the court in *Brotherhood Mutual Insurance Company v. Ervin Cable Construction, LLC*, 2006 WL 3431915 (N.D.Ill., November 27, 2006).

## INDEMNITY AND “DUTY TO DEFEND” PROVISIONS

Indemnities, or “hold harmless” provisions, assign risks before they occur; basically, a party agrees to make good a loss, damage, or liability incurred by another.

“Duty to defend” provisions often go hand in hand with indemnities. The party assuming the duty essentially has an obligation, before any liability is ever established, to mount and/or fund the protected party’s defense against any claims that fall under the scope of the provision.

One major pitfall in the use of indemnities and “duty to defend” provisions is that, if drafted incorrectly, these can run afoul of state anti-indemnity statutes, which invalidate agreements in construction contracts that attempt to indemnify persons against the consequences of their own negligence. A recent court decision illustrates the types of mistakes that can

be avoided with careful drafting.

## THE BROTHERHOOD CASE

Recently, the federal court for the Northern District of Illinois ruled that a duty to defend that is intertwined with a general indemnity will be voided if the general indemnity is in violation of the Illinois Anti-Indemnity Act (740 ILCS 35/1). In *Brotherhood*, Subcontractor had agreed to indemnify and hold harmless Contractor for claims against Contractor that had been caused by “Subcontractor’s negligence, wrong doing, or other fault even if Contractor or Owner should also be partly at fault.” The court held, however, that the Illinois Anti-Indemnity Act prohibited Contractor from shifting liability for its own negligence to Subcontractor through an indemnity clause. The Act specifies that, in construction contracts “every covenant, promise or agreement to indemnify or hold harmless another person from that person’s own negligence is void as against public policy and wholly unenforceable.” Because the indemnity clause at issue expressly indemnified Contractor for its own negligence, the clause was void and unenforceable.

The *Brotherhood* court also voided the “duty to defend” provision in the contract, after finding that it was too closely linked to the unenforceable indemnity provision. The “duty to defend” provision obligated Subcontractor to “defend Contractor and Owner against any claim, or legal proceeding which may involve Subcontractor’s obligations under [the indemnity clause].” The court held that this wording tied the duty to defend to the indemnification so closely, that the two provisions were effectively “intertwined.” Because the indemnity provision violated the Anti-Indemnity Act, the “duty to defend” provision also violated the Act, and was unenforceable.

LESSONS LEARNED FROM THE  
BROTHERHOOD DECISION

*If drafted correctly, these clauses serve to allocate risk and help parties deal with problems more efficiently.*

Careful drafting of indemnity and “duty to defend” provisions will help prevent conflicts with the Anti-Indemnity Act. The *Brotherhood* decision provides several examples of the type of language to use to avoid having these provisions stricken in court. There are two guidelines to consider when contemplating these types of contract provisions: (1) indemnities should be drafted to cover only negligence by the indemnitor; and (2) the duty to defend should be general in scope and separate from the duty to indemnify.

- Indemnity Provisions Should Cover Only Negligence By The Indemnitor: In dealing with construction contractors, Illinois courts have found indemnification language that purports to indemnify a party for its own negligence to be in violation of the Anti-Indemnity Act. This can easily be avoided by drafting the indemnity provision to cover only negligence on the part of the indemnitor. Language such as “Indemnitor agrees to indemnify and hold harmless Indemnitee for claims resulting from, arising out of, or occurring in connection with Indemnitor’s execution of the work” has been held valid under the Act.
- Duty To Defend Should Be General In Scope And Separate From The Duty To Indemnify: Because courts will invalidate “duty to defend” provisions that are closely tied to indemnification clauses that violate the Anti-Indemnity Act, a careful drafter will separate these two provisions,

**please see Provisions, page 16**

# THE BUILDER

## Milestones, from page 15

Road and Franklin Boulevard. This facility is comprised of two speculative industrial buildings totaling over 359,000 square feet.

McShane and Heitman Architects, inc. are providing design/build construction services for both the speculative and build-to-suit facilities totaling over 950,000 square feet of concurrent construction with an estimated completion date summer of 2007.

Mike Mann joined Assurance Agency, Ltd. as Executive Vice President in December. He is responsible for managing and directing one of Assurance's property and casualty production teams.

Before joining Assurance, Mann was the Regional Marketing Officer for Willis North America's Central Region. He graduated from the University of Illinois with a degree in Political Science in 1986.

BryceDowney, LLC recently welcomed Justin L. Weisberg and Tina M. Paries to its practice in the area of construction law. Weisberg graduated from the University of Illinois in 1987 with a Civil/Structural Engineering degree and graduated from Chicago-Kent College of Law in 1992. He was named an Illinois Super Lawyer in the area of Construction Litigation in 2006. Paries, who lists construction law among her practice areas, graduated from Northern Illinois University in 1991

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## Provisions, from page 4

rather than make them part of the same contract clause. In addition, parties should consider wording the "duty to defend" provision in general terms, such that the duty is triggered when there is potential liability arising from the construction project rather than by virtue of the indemnification obligation.

It is generally good practice to include indemnity and "duty to defend" language in construction contracts. If drafted correctly, these clauses serve to allocate risk and help parties deal with problems more efficiently. You should consult with your attorney when negotiating a contract, to tailor the agreement to your specific needs, and help you avoid any potential pitfalls in the process.

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## Safety, from page 10

- projects have regular overhead hazards and potential eye injuries, safety glasses and hard hats should be in use by all crews. Use of a respirator may also be needed if primer/glue is used in an area without good ventilation.
- Other: Working in a multiple story building, the crew leader should determine safe exits from the building and establish a meeting area for the crew in the event of an emergency.

By taking the time to do a hazard assessment of each job, crews may identify hazards and take corrective action and prevent a tragic injury.

# The Builder

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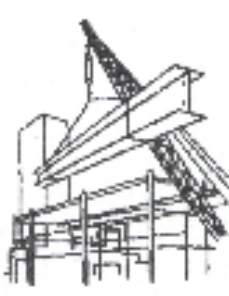
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