

# INDEMNITY – What is it, and how does it work in Arizona?

**By Jack Barone**

Virtually anyone in today's world who has entered into a contract to buy or sell any product or service, or who has leased or rented anything from real property to a vehicle, has likely entered into an indemnity agreement with someone else. As attorneys, many of us spend a substantial portion of our time reviewing contracts and various other agreements, the vast majority of which contain indemnity agreements. But what exactly is "indemnity" and what are the obligations of someone who agrees to indemnify another in Arizona?

Black's Law Dictionary defines indemnity as "the obligation or duty resting on one person to make good any loss or damage another has incurred or may incur by acting at his request or for his benefit; or alternatively, the right which the person suffering the loss or damage is entitled to claim." At its most fundamental level, indemnity refers to a total shifting of the economic loss to the party chiefly or primarily responsible for that loss, rather than to the party contractually responsible.

This shifting of risk of loss can be accomplished in one of several ways. In modern times, where we use written agreements to memorialize virtually every transaction, both in business and personal life, contractual or "express" indemnity is by far the most common. In contractual indemnity, the terms of the indemnity agreement are expressly spelled out, normally in a separate and distinct provision of the contract. In such cases, the scope of the indemnity provision can vary greatly. There is also a scenario in which there may or may not be a written contract between the parties, but in either event, there is no express indemnity provision spelled out, but there is an implied contract for indemnity. An example of "implied" contractual indemnity would be when, under agency theory, an agent, through no wrongdoing of his own, incurs liability for an act he performed on behalf of the principal. Finally, there is common law indemnity, when justice demands that there be a right to indemnity. Such a right could be statutory, or could arise, for example, when liability is imposed on a joint tort-feasor due only to "passive" or "secondary" negligence.

Since the most common form of indemnity is the express contractual indemnity provision, let's consider the impact of the language chosen for such a provision, and how current Arizona law deals with the interpretation of that language. Arizona courts, over time, have laid out a framework for the interpretation of indemnity language. When the language does not address the effect of the indemnitee's own negligence on the duty to indemnify, this is considered "general indemnity" and is to be treated the same as "common law indemnity," which in Arizona is an "all or nothing" proposition. In other words, if the indemnitee is responsible for even 1 percent of the injury or damage, the indemnitor is released from his duty to indemnify. On the other hand, if the language specifically requires the indemnitor to indemnify the indemnitee despite the indemnitee's negligence, then the provision is determined to be "specific" in nature. In that case, the indemnitor is required to indemnify the indemnitee, unless the indemnitee is found to be solely or 100 percent at fault. If the indemnitee is solely at fault, however, then in many instances the duty to indemnify has been statutorily pre-empted as a matter of public policy.

Another frequently litigated issue regarding indemnity language involves when the duty to indemnify actually arises. Does the duty to indemnify arise immediately as the claim is pending, or are damages not recoverable by the indemnitee until after they have become liquidated? On this question, Arizona courts have ruled that when the indemnity language requires indemnification against liability, it applies once liability for the cause of action has been established and the indemnitee is not required to make actual payment before being indemnified. In contrast, indemnification against loss or damages does not apply until the indemnitee has actually paid the obligation for which he seeks indemnity.

An equally important indemnity issue concerns the duty to defend as a component of the duty to indemnify. A general rule of indemnity is that when a claim is made against the indemnitee for which he is entitled to indemnification, then the indemnitor is liable for any reasonable expenses incurred in defending such claim, regardless of whether the indemnitee is ultimately held liable. Arizona courts have held that even in the absence of express language "to defend," an indemnitee is not held harmless unless the indemnitor bears the cost of defending the third-party's claim.

It is not possible to address all of the nuances of indemnity language in a limited forum. Anyone reviewing contracts should pay particular attention to the indemnity provision and understand what it actually means.

Jack Barone is a co-founder of the law firm of Rai & Barone, P.C. Their firm represents clients in the practice areas of construction defect litigation, specializing in subcontractor defense, general liability, business transactions, commercial litigation, and insurance defense of all types. The firm has extensive arbitration, mediation and trial experience. Rai & Barone's goal is to provide expeditious, affordable, and effective representation to its clients. Jack can be reached at (602) 476-7100 or via email at jack.barone@raibarone.com.