

Duty to Defend vs Indemnify:

The term indemnify is generally interpreted as imposing an obligation on one party (the indemnitor) to pay or compensate the other party (the indemnitee) for certain legal liabilities or losses, but that obligation does not typically arise until the end of a case when the indemnitee has had a judgment entered against it for damages or has made payments or suffered actual loss. The term defend, on the other hand, usually imposes an independent duty to either actively defend or fund the defense of any claim brought against the indemnitee that falls within the scope of the indemnification provision. The duty to defend is a promise to render, or fund, the service of providing a defense on the indemnitee's behalf--a duty that usually arises as soon as a claim is made against the indemnitee and may continue until the claim has been resolved. (Indemnity vs. Duty to Defend: Know the Differences and Potential Critical Variations in State Law, Steven McChristian 2019)

It is important to understand that the duty to defend does not depend on the outcome of the claim, whereas the duty to indemnify does not arise unless the outcome of the claim is adverse. The duty to defend and duty to indemnify are separate and distinct obligations. Because the duty to defend and the duty to indemnify are distinct obligations, the contract may impose a duty to defend the underlying claim even in the absence of a duty to indemnify. (Hollingsworth v. Chrysler Corp. (Del. 1965) 208 A.2d 61.) In other words, the contractual duty to defend a claim may be broader than, and arise more often than, the duty to provide indemnity from a loss or judgment. (*Id.*).

Current State of Illinois Law

The Illinois Anti-Indemnity Act states:

"With respect to contracts or agreements, either public or private, for the construction, alteration, repair or maintenance of a building, structure, highway bridge, viaducts or other work dealing with construction, or for any moving, demolition or excavation connected therewith, 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."

With regards to a duty to defend within the contract Illinois case law states:

No Defense Duty: The appellate court in *Gust K Newberg Construction Co. v Fischbach, Moore & Morrissey, Inc.*, 196 N.E.2d 513 (Ill. App. Ct. 1964), declined to impose a defense duty independent of indemnification liability where the contract was silent regarding defense obligations. General indemnification by subcontractor for its negligence required it to reimburse the contractor for its costs and attorney's fees caused by subcontractor's negligence; but did not require subcontractor to defend suit brought by subcontractor's employee against general contractor.

This means that in order for a duty to defend to be recognized in a contract, it must be specifically included within the contract. Absent its inclusion, Illinois law does not recognize a duty to defend.

Why is this a problem for Design Professionals in Public Contracts?

As a design professional, contracts with public clients often requires indemnification of the client. Indemnifying simply means to compensate the client for a loss. Reasonable indemnification requires the design professional to compensate the government for a loss due to our negligence. That should be allowed in contracts.

Unreasonable indemnification would be compensating the government for a loss when the design professional did nothing wrong or even for someone else's negligence. That should not be allowed in contracts. Illinois law does not allow a party to indemnify another for that party's negligence.

Even more unfair, are duty to defend clauses. A government contract shouldn't require a design professional to pay the legal expenses to defend the government when the professional did nothing wrong. Further, a contractual obligation that requires a design professional to provide a defense is not insurable under a design professionals insurance policy. See below an excerpt from a professional liability insurance policy stating that assumed contractual obligations such as a duty to defend is uninsurable.

4. Contractual Liability

That part of any CLAIM(S) based upon or arising from liability of the INSURED assumed under any contract or agreement.

This exclusion does not apply to liability for DAMAGES arising from a WRONGFUL ACT(S), POLLUTION CONDITIONS, or NETWORK SECURITY COMPROMISE for which the INSURED would have been liable for in the absence of such contract or agreement.

The law requires the design professional to bear responsibility for damages caused by its own professional liability and negligence. Professional liability insurance provides coverage to compensate injured parties for such damages. Professional liability insurance will not cover costs for indemnification beyond their negligence. So public contracts shouldn't require it.

Conclusion:

As a matter of fairness, design professionals should not be asked to indemnify and defend a public client for claims and/or losses that was not caused by the design professional, cannot be insured against, and were caused by factors beyond the design professional's control.