

# Indemnification Clauses in Contracts

The Good. The Bad. The Useful.

# Basic Principles

## Indemnification:

An undertaking by one party (the **indemnifying party**) to compensate the other party (the **indemnified party**) for certain costs and expenses, typically regarding third-party claims.

# Basic Principles

Typical indemnification provision:

**Indemnifying party** promises to reimburse indemnified party from and against any and all **recoverable damages** incurred by the indemnified party that are caused by, arise from, or are related to the covered events.

# Defining the Obligation

Obligation to indemnify for damages  
vs.  
Obligation to defend against third-party suits

# Defining the Obligation

Obligation to indemnify:

Indemnifying party agrees to compensate indemnified party for direct claims, third-party claims, or both.

# Defining the Obligation

Obligation to indemnify requires indemnifying party to:

- Reimburse for covered paid costs and expenses (losses)
- Advance payment for covered unpaid costs and expenses (like liabilities) as they are incurred\*

# Defining the Obligation

Obligation to defend has two prongs:

1. Obligation to reimburse for covered paid costs and expenses (losses) and advance payment for covered unpaid costs and expenses (liabilities); and
2. Right to assume and control the defense.

# Defining the Obligation

## EXAMPLE

Party A [indemnifying party] agrees to indemnify and save Party B [indemnified party] harmless against all claims for damages to persons or to property and claims for loss, damage and/or theft growing out of the execution of Party A's work.

Party A also agrees at its own expense to defend any suit or action brought against Party B founded upon the claim of such damage, loss, or theft.

*Crawford v. Weather Shield Mfg. Inc.*, 44 Cal. 4th 541, 187 P.3d 424 (2008)



# Defining the Obligation

## Obligation to “Hold Harmless”

Similar to obligation to indemnify. Requires indemnifying party to:

- Reimburse for covered paid costs and expenses (losses); and
- Advance payment for covered unpaid costs and expenses (like liabilities) as they are incurred.

May act as a release!

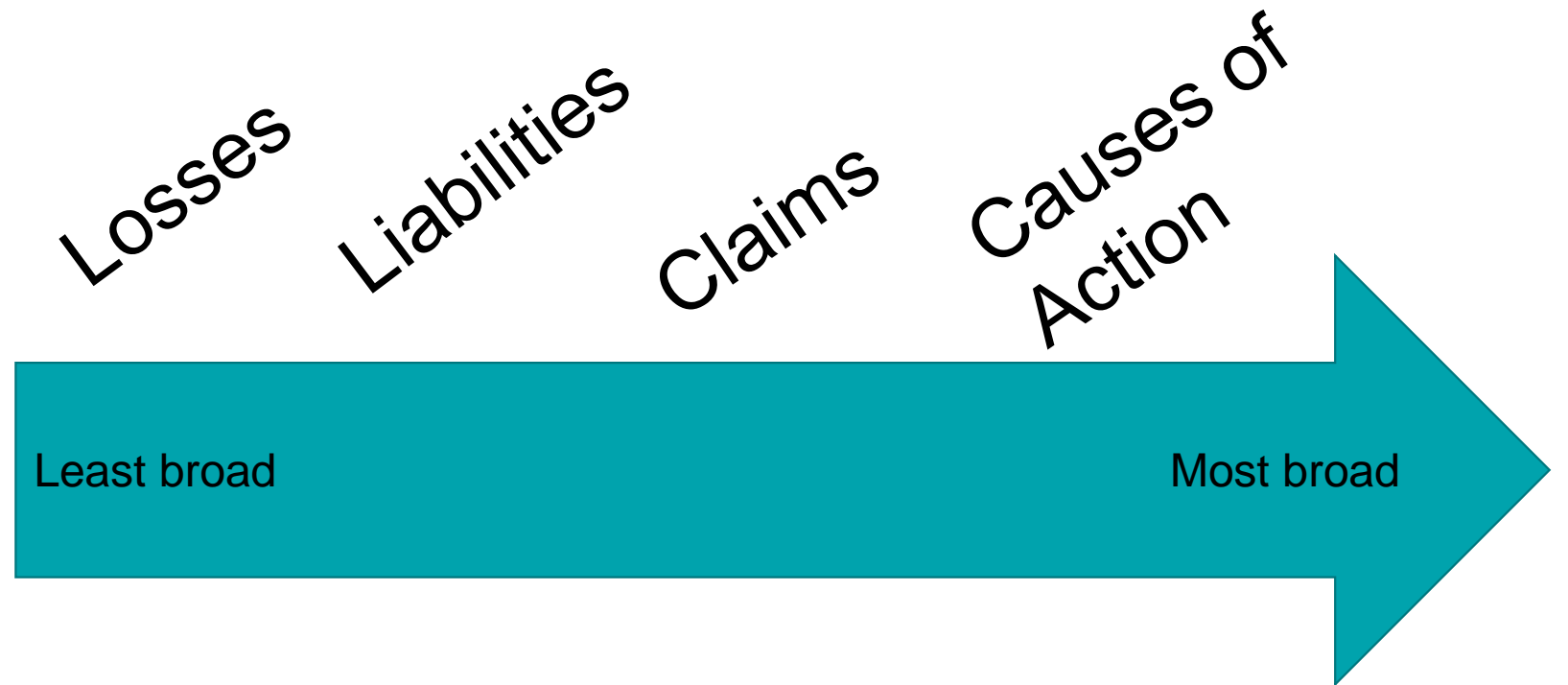
# Defining the Indemnified Parties

- Unilateral indemnification versus mutual indemnification
- Including others (officers, directors, employees, agents)
- Impact of other provisions of the agreement

# Defining the Scope of the Indemnity

- Define the recoverable damages
- Define the covered events that will trigger obligation
- Choose your “linking” words
- Limit the scope of the indemnity (limitations of liability)

# Defining the Recoverable Damages



# Defining the Recoverable Damages

Attorneys' Fees and Out-of-Pocket Expenses

Bottom Line: If you want to recover them, put it in the indemnification clause!

# Defining the Recoverable Damages

## EXAMPLE

Subject to the terms and conditions of this Agreement, Party A shall indemnify, defend, and hold harmless Party B against **any and all losses, damages, liabilities, deficiencies, claims, actions, judgments, settlements, interest, awards, penalties, fines, costs, or expenses of whatever kind, including reasonable attorneys' fees, fees, and the costs of enforcing any right to indemnification under this Agreement and the cost of pursuing any insurance providers, incurred by or awarded against Party B** (collectively, "Losses"), relating to any claim of a third party [or a Party] alleging . . .

# Defining the Covered Events

Generally relate to:

- Indemnifying party's breach of agreement
- Indemnifying party's acts or omissions (even if not breaches) (occurrence-based)

Include two broad categories:

- Direct claims
- Third-party claims

# Defining the Covered Events

- Statutes and/or common law may limit the enforceability of an indemnification provision.
- Provision could be vulnerable to challenge under state law or public policy.
- Watch out for applicable anti-indemnity statutes, especially in the construction context.
- Also watch out for special rules regarding certain types of contracts and activities, i.e., A & E, design defect (construction context).



Linking  
Recoverable  
Damages to  
Covered  
Events

“Related to”

“Arise from”

“Caused by”

“Result from”

“Solely result from”

“To the extent they arise out of”

# Controlling Impact of Indemnity Clause

## Negotiate:

- Exceptions to obligation to indemnify
- Degree of right/obligation to control defense
- Right/obligation to notification of third-party claims
- Indemnification deductibles and caps

# Alternatives to Indemnification Provisions

These provisions can be highly negotiated and sometimes their benefits are not worth the cost.

Instead, parties can consider:

- Relying on state common law or statute
- Providing contractual work-arounds for anticipated problems
- Escrowing part of consideration for payment of potential liabilities that would otherwise be covered by indemnification obligation