

HOLMES MURPHY. THINKING AHEAD

**INDEMNIFICATION
DEMYSTIFICATION**

PRESENTERS

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OUR AGENDA

- 537A.5
- VALUE OF A MUTUAL INDEMNITY ... OR NOT?
- INTERPRETATIONS OF INDEMNITY CLAUSES. IS IT LEGAL? IS IT INSURABLE?
- WRAP UP- ROLE PLAYING, SCRIPT OF AN ENGINEER INFORMING A CLIENT THAT THEIR INDEMNITY LANGUAGE MAY NOT BE LEGAL

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HOLMES MURPHY. THINKING AHEAD

537A.5

537A.5

**IOWA JOINS THE MAJORITY
WITH ITS FIRST
ANTI-INDEMNITY STATUTE**

HERE'S WHAT IT DID

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I CONTRACTS, §537A.5

537A.5 Indemnity agreements — construction contracts.

1. As used in this section, "construction contract" means an agreement relating to the construction, alteration, improvement, development, demolition, excavation, rehabilitation, maintenance, or repair of buildings, water or sewage treatment plants, power plants, or any other improvements to real property in this state, including shafts, wells, and structures, whether on ground, above ground, or underground, and includes agreements for architectural services, design services, engineering services, construction services, construction management services, development services, maintenance services, material purchases, equipment rental, and labor. "Construction contract" includes all public, private, foreign, or domestic agreements as described in this subsection other than such public agreements relating to highways, roads, and streets.

2. Except as excluded under subsection 3, a provision in a construction contract that requires one party to the construction contract to indemnify, hold harmless, or defend any other party to the construction contract, including the indemnitee's employees, consultants, agents, or others for whom the indemnitee is responsible, against liability, claims, damages, losses, or expenses, including attorney fees, to the extent caused by or resulting from the negligent act or omission of the indemnitee or of the indemnitee's employees, consultants, agents, or others for whom the indemnitee is responsible, is void and unenforceable as contrary to public policy.


3. This section does not apply to the indemnification of a surety by a principal on any surety bond, an insurer's obligation to its insureds under any insurance policy or agreement, a borrower's obligations to its lender, or any obligation of strict liability otherwise imposed by law.

2011 Acts, ch 33, §1; 2011 Acts, ch 131, §99, 158

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Indemnification

- What is indemnification?
- What to ask:
 - ✓ Is there a duty to defend?
 - ✓ Who is indemnified?
 - ✓ Who's actions trigger the duty?
 - ✓ What is indemnified? Negligence? Other actions?
- Always make sure:
 - ✓ Only the insured's negligence or that of its subconsultants triggers
 - ✓ It does not apply to the contractor's or owner's actions
 - ✓ Everyone is responsible for their own negligence
 - ✓ No duty to defend



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INDEMNITY

IOWA COURTS HOLD THAT A PARTY WILL NOT BE INDEMNIFIED FOR ITS OWN NEGLIGENCE UNLESS THE AGREEMENT PROVIDES FOR CLEAR AND UNEQUIVOCAL LANGUAGE

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WHAT DOES THE LAW COVER

- SECTION 537A.5 ONLY APPLIES TO CONSTRUCTION CONTRACTS
- IT APPLIES EQUALLY TO BOTH PUBLIC AND PRIVATE CONSTRUCTION PROJECTS IN IOWA
- IT RENDERS VOID NOT JUST BROAD-FORM INDEMNITY BUT INTERMEDIATE-FORM INDEMNITY TO THE EXTENT IT REQUIRES INDEMNITY FOR INDEMNITEE'S NEGLIGENCE
- DOES NOT APPLY TO PUBLIC CONSTRUCTION FOR HIGHWAYS, ROADS AND STREETS.

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CITY OF DES MOINES

For professional service agreements with a total estimated cost to the CITY of \$500,000 or more, delete the second paragraph of Section 3 above and replace it with the following:

For professional services rendered, to the fullest extent permitted by law, Consultant agrees to defend, pay on behalf of, indemnify, and hold harmless the CITY against any and all claims, demands, suits, damages or losses, together with any and all outlay and expense connected therewith including, but not limited to, attorneys' fees and court costs and economic damages that may be asserted or claimed against, recovered from or suffered by the CITY that arise out of any negligent act, error or omission of the Consultant, except to the extent caused by or resulting from the negligent act or omission of the CITY or the CITY'S employees, consultants, agents or others for whom the CITY is responsible.

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DEFEND? THEY CAN'T SAY THAT... CAN THEY?



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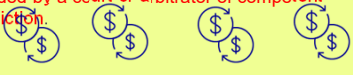
ATTORNEY FEES

- GENERALLY, ATTORNEY FEES ARE ONLY ALLOWED UNDER IOWA LAW IF PERMITTED BY A CONTRACT OR STATUTE.
- IOWA'S MECHANICS LIEN STATUTE ALLOWS A CLAIMANT TO RECOVER FEES
- EACH STATE'S LAWS ARE DIFFERENT, SO ENTITLEMENT TO ATTORNEY FEES CAN VARY FROM STATE TO STATE

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Indemnification and the Definition Of Damages

DAMAGES shall also include the **INSURED'S legal obligation to reimburse** any person or entity for their **reasonable defense costs**, but only to the extent caused by an **actual negligent act, error or omission** in the performance of **PROFESSIONAL SERVICES** to which this Policy applies, and only if such defense costs are awarded by a **court or arbitrator of competent jurisdiction**.



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VALUE OF A MUTUAL INDEMNITY ... OR NOT?


VALUE OF MUTUAL INDEMNITY

9. **MUTUAL INDEMNIFICATION:** The Professional and the Client mutually agree, to the fullest extent permitted by law, to indemnify and hold each other harmless from any and all damages, liabilities or costs, including reasonable attorneys' fees and defense costs, arising from their own negligent acts, errors or omissions, or willful misconduct in the performance of their services, duties and responsibilities under this Agreement, to the extent that each party is responsible for such damages, liabilities and costs on a comparative basis of fault.

10. **MUTUAL WAIVERS:** Notwithstanding any other provision of this Agreement, and to the fullest extent permitted by law, neither the Client nor the Professional, their respective officers, directors, partners, employees, contractors or subcontractors shall be liable to the other or shall make any claim for any incidental, indirect or consequential damages arising out of or connected in any way to the Project or to this Agreement.

11. **LIMITATION:** In allocating the risks of this Project and notwithstanding any other provision of this Agreement, the Client agrees to limit, to the maximum extent permitted by law, the Professional's liability for the Client's damages to the aggregate sum of the Professional's fee for this Project. This limitation shall apply regardless of the cause of action or legal theory pled or asserted.

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OR NOT.....Bad Mutual Indemnity Provision

"Consultant shall defend, indemnify and save harmless the Client, and its officers, directors, employees and agents, from and against all claims, demands, causes of action, allegations, liability, loss, cost or expense (including attorneys' fees), arising out of or relating to, in whole or in part, Consultant's services, whether caused by or contributed to by the Client or any other party, unless caused by the sole negligence of the Client."

"Client shall defend, indemnify and save harmless the Consultant, and its officers, directors, employees and agents, from and against all claims, demands, causes of action, allegations, liability, loss, cost or expense (including attorneys' fees), arising out of or relating to, in whole or in part, whether caused by or contributed to by the Consultant or any other party, unless caused by the sole negligence of the Consultant."

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INDEMNIFICATION LEGAL? INSURABLE?

11.1 **Infringement.**

11.2 **Personal Injury and Property Damage.** Contractor, at its own expense, shall defend, protect, indemnify and hold the Company Group harmless from and against all Claims/Liabilities based upon personal injury and/or death, property damage and breaches of confidentiality arising out of or in any way incident to Contractor's performance of this Agreement, or otherwise in connection with the acts or omissions of Contractor, its employees, agents or contractors, provided however that excluded from Contractor's duty to indemnify and hold harmless are Claims/Liabilities that are solely caused by the negligence or willful misconduct of the Company Group and/or its employees, agents, and contractors. To the extent necessary to permit Company Group to enforce any term, clause, or condition of this Agreement, Contractor agrees that with respect to any Claims brought against Company Group, Contractor will and does hereby waive as to Company Group any defense it may have by the workers' compensation laws of any state. ~~IT IS THE EXPRESS INTENT OF THE PARTIES THAT THE BUSINESS AND PROFESSIONAL LIABILITY, CONTRACTORS' OBLIGATIONS TO DEFEND, PROTECT, INDEMNIFY, AND HOLD HARMLESS WILL INCLUDE, BUT NOT BE LIMITED TO, CLAIMS ARISING OUT OF OR RESULTING FROM COMPANY GROUPS' CONCURRENT OR SOLE (A) NEGLIGENCE OF ANY TYPE OR DEGREE, (B) STRICT LIABILITY, (C) TORTS, OR (D) OTHER FAULT OF ANY NATURE.~~

Notwithstanding the actual or alleged negligence or fault of any Company Group member, until such time as a court of competent jurisdiction or a third party, agreed upon by Company and Contractor, has determined the percentage of fault ("fault" for purposes of this article, includes, but is not limited to, strict liability, third party contractual liability, negligence or willful misconduct) of the Company Group member, Contractor (including its suppliers, vendors or subcontractors of any tier), and/or Contractor's insurer, shall defend and continue to protect, defend, indemnify and hold the Company Group harmless pursuant to the terms of this section. If the aforementioned court, or independent third party, agree by Company and Contractor, makes a final determination that any Company Group member was partially or solely at fault, then (a) Contractor's duty to indemnify and hold harmless shall not apply to the extent of any Company Group's percentage of fault, and (b) the Company Group shall reimburse Contractor to the extent of any Company Group's percentage of fault for those defense costs and indemnity payments that were made for the benefit of such Company Group prior to the final determination of fault.


~~IT IS THE EXPRESS INTENT OF THE PARTIES THAT FOR THE PURPOSES OF THIS SECTION, CONTRACTOR'S OBLIGATIONS TO DEFEND, PROTECT, INDEMNIFY, AND HOLD HARMLESS WILL INCLUDE, BUT NOT BE LIMITED TO, CLAIMS ARISING OUT OF OR RESULTING FROM COMPANY GROUP'S CONCURRENT OR SOLE (A) NEGLIGENCE OF ANY TYPE OR DEGREE, (B) STRICT LIABILITY, (C) TORTS, OR (D) OTHER FAULT OF ANY NATURE.~~

Englewood, ACTE 1 Please note that this exclusion only applies to the duty to indemnify and not the duty to defend.

Englewood, ACTE 2 I have revised this language to the end, with my redline, what remains Contractor's broadest duty to defend.

Englewood, ACTE 3 This is the additional language you proposed to use with my redline.

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11.1 Infringement.

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Notwithstanding the actual or alleged negligence or fault of any Company Group member, until such time as a court of competent jurisdiction or a third party, agreed upon by Company and Contractor, has determined the percentage of fault ("Fault" for purposes of this article, includes, but is not limited to, strict liability, Third Party contractual liability, negligence or willful misconduct) of the Company Group member, Contractor (including its suppliers, vendors or subcontractors of any tier), and/or Contractor's insurer, shall ~~defend and~~ continue to ~~protect, defend, indemnify and hold the Company Group harmless~~ pursuant to the terms of this section. If the aforementioned court, or independent third party, agreed by Company and Contractor, renders a final determination that any Company Group member was partially or solely at fault, then ~~(a) Contractor's duty to indemnify and hold harmless does not apply to the extent of any Company Group's percentage of fault, and (b) the Company Group shall reimburse Contractor to the extent of any Company Group's percentage of fault for those defense costs and indemnity payments that were made for the benefit of such Company Group prior to the final determination of fault.~~


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XL CONTRACT GUIDE

THE CONSULTANT AGREES, TO THE FULLEST EXTENT PERMITTED BY LAW, TO INDEMNIFY AND HOLD HARMLESS THE CLIENT, ITS OFFICERS, DIRECTORS AND EMPLOYEES (COLLECTIVELY, CLIENT) AGAINST ALL DAMAGES, LIABILITIES OR COSTS, INCLUDING REASONABLE ATTORNEYS' FEES AND DEFENSE COSTS, TO THE EXTENT CAUSED BY THE CONSULTANT'S NEGLIGENT PERFORMANCE OF PROFESSIONAL SERVICES UNDER THIS AGREEMENT AND THAT OF ITS SUBCONSULTANTS OR ANYONE FOR WHOM THE CONSULTANT IS LEGALLY LIABLE.

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 HOLMES MURPHY. THINKING AHEAD

**WRAP UP
ROLE PLAYING, SCRIPT OF AN
ENGINEER INFORMING A CLIENT
THAT THEIR INDEMNITY LANGUAGE
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QUESTIONS?

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