


Indemnity and Duty to Defend

Issues that arise from these
terms:

A discussion of the good, the
bad and the ugly.

Indemnity and Duty to Defend

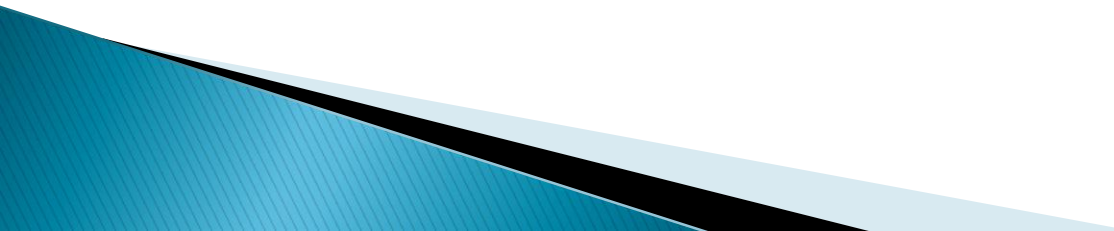
- ▶ Both terms are risk-shifting/risk-allocation devices routinely used in contract documents.
 - ▶ Parties must carefully consider the circumstances and conditions to which these concepts may be applied.
 - ▶ Design professionals are often on the “losing” end of these key contract terms, especially as concerns public clients.
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What does “indemnification” mean?

▶ In • dem • ni • fy:


- ▶ To compensate someone for hurt, loss or damage.
- ▶ Put simply, to pay money for injuries suffered.

What does “duty to defend” mean?

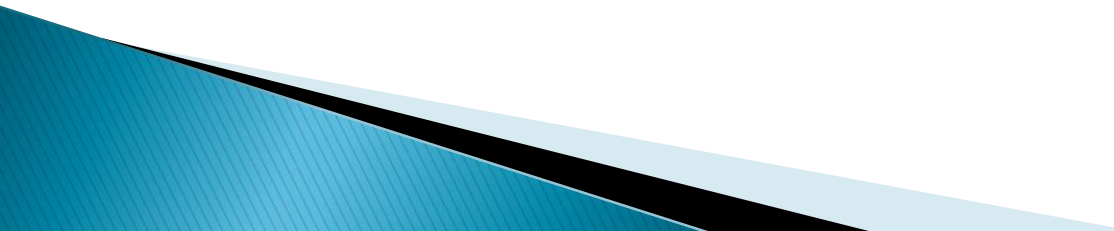
- ▶ The requirement to pay money for another party’s *legal* expenses, including:
 - Attorneys’ fees
 - Court costs
 - Expert fees
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A common expression:

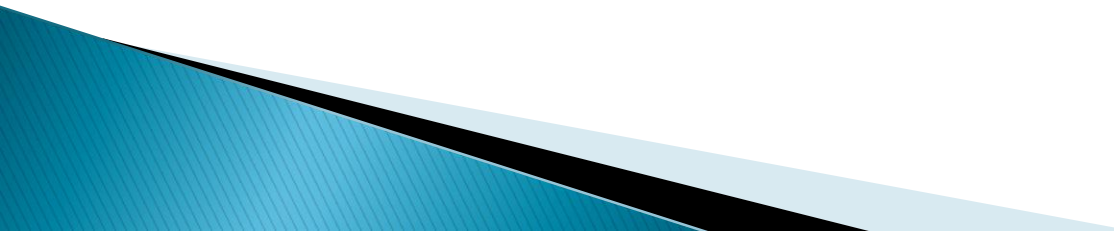
“Engineer shall defend, indemnify and hold Client harmless”

- ▶ **Defend:** Engineer will step into the Client’s shoes, hire an attorney, and pay legal fees regardless of the merits of the claim.
 - ▶ **Indemnify:** Engineer will pay any judgment entered against the Client.
 - ▶ **Hold Harmless:** Engineer releases the Client from any liability for third party claims.
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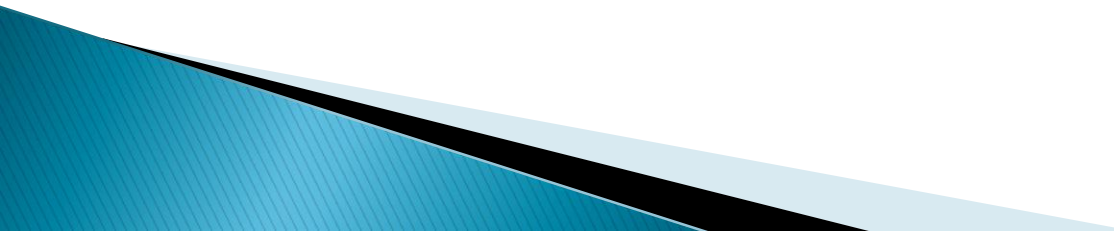
What triggers duty to defend?

- ▶ A claim asserted against Client:
 - By Contractor
 - By Injured Worker
 - By any Third Party
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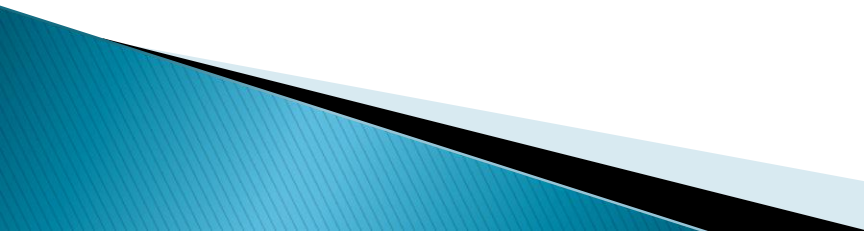
What type of claims trigger duty to defend or duty to indemnify?

- ▶ Depends on language of contract
 - ▶ Could be ANY CLAIM whatsoever, regardless of fault (including DSC claim)
 - ▶ Could be LIMITED TO CLAIMS arising out of Engineer Errors
 - ▶ Could be LIMITED TO CLAIMS of bodily injury or property damage and NOT economic loss
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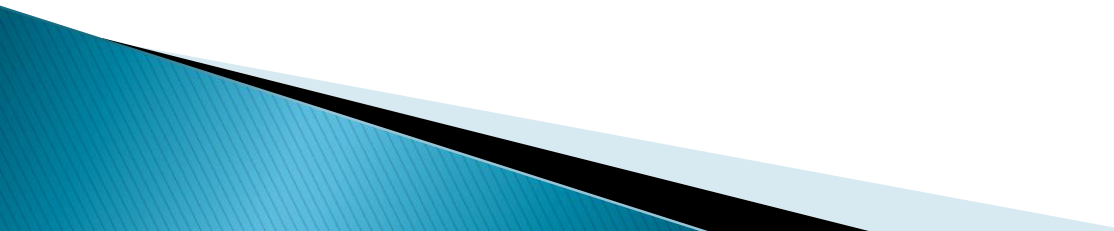
“The Ugly”

- ▶ Consultant shall **defend, indemnify,** and hold the Client harmless from any and all claims including all legal costs and attorney fees, *arising out of or in connection with* the Consultant's performance of this Agreement.
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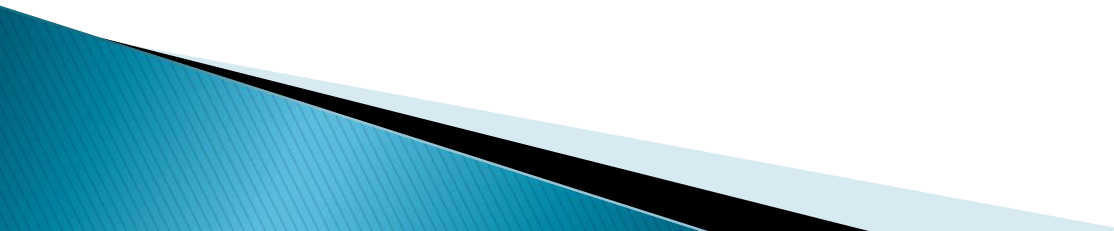
Problems with this Indemnification Clause

- ▶ Clause imposes an unqualified duty to pay the Client's legal fees to defend against a Contractor's claim.
 - ▶ Clause also requires Engineer to pay damages assessed against the Client, regardless of Engineer's fault.
 - ▶ This is an uninsured "contractual liability."
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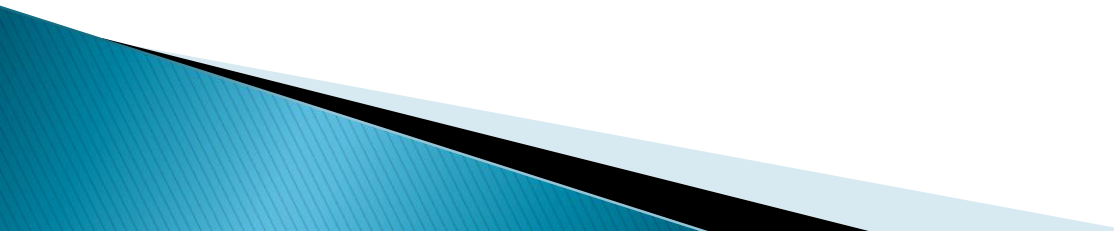
Arguments Against Duty to Defend

- ▶ Engineer had no control over selection of contractor
 - ▶ Inherent conflict of interest – Client's defenses may implicate Engineer's work and/or compromise Engineer's own defenses
 - ▶ Client will need Engineer's assistance to defeat claim
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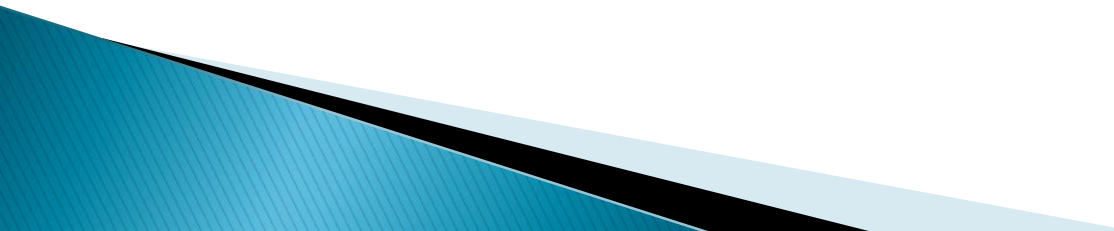
Arguments Against Duty to Defend (cont.)

- ▶ Defense obligation is not covered by professional liability insurance
 - ▶ Offer reimbursement of legal fees/costs to extent third party prevails on claim attributable to Engineering error (covered by insurance)
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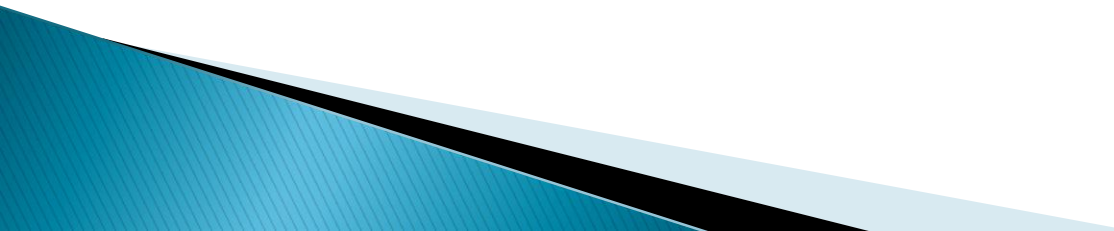
“The Bad”

- ▶ Consultant shall **defend, indemnify,** and hold the Client harmless from any and all claims, including all legal costs and attorney fees, arising out of or in connection with the Consultant's performance of this Agreement, *except for the sole negligence of the Client.*
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“The Good”

- ▶ No duty to defend – period!
 - ▶ Duty to indemnify specifically limited to Engineer’s *negligence* (and therefore excludes breach of contract or other legal claims)
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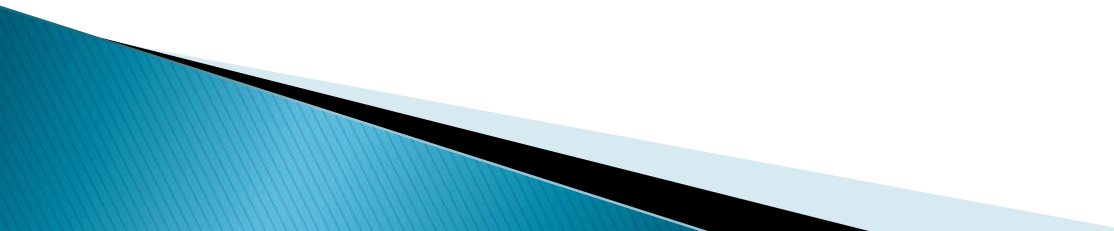
“The Good” (cont.)

- ▶ Limits indemnity obligation for concurrent negligence only to that which is proportional to fault.
 - ▶ Identifies that indemnity obligation is not triggered until claim is adjudicated to trial verdict or arbitration award.
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SOLE NEGLIGENCE

- ▶ Any agreement to pay damages arising out of bodily injury or property damage caused by sole negligence of another is against public policy.

CONCURRENT NEGLIGENCE

- ▶ An agreement to pay damages arising from bodily injury or property damage caused by the concurrent negligence of a Client and an Engineer is valid to the extent of the Engineer's negligence if the agreement expressly provides for proportionate fault in instances of concurrent negligence.
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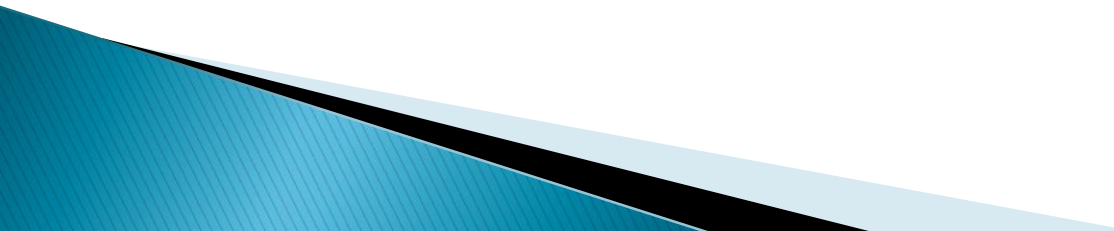
Anti-Indemnity Statutes

- ▶ A [contract] ... for [design] services ... purporting to indemnify, *including the duty and cost to defend*, against liability for damages arising out of such services or out of bodily injury to persons or damage to property:
 - Caused by ... the sole negligence [of DP]... is against public policy and is void and unenforceable;
 - Caused by ... the concurrent negligence of [DP and indemnitor] is valid and enforceable only to the extent of the [DP's] negligence and only if the agreement specifically and expressly provides therefor, ...and the waiver was mutually negotiated by the parties.

“Pretty good”

- ▶ For any losses that arise from any error, omission or other malpractice in the exercise of CONSULTANT’s professional judgment, CONSULTANT shall defend, indemnify, and hold the OWNER harmless from all such losses to the extent caused by, or alleged to be caused by, any negligent act or omission of CONSULTANT. The obligation to indemnify under this subparagraph does not extend to losses caused by the negligence (whether sole, concurrent or contributory) of the OWNER.

“The Really Good”

- ▶ CONSULTANT will indemnify Client from any liability it has to a third party for damages arising out of a death, bodily injury or property damage to the extent the damages are proven to be caused by the sole negligence of CONSULTANT, its agents or its employees.
 - ▶ For any such liabilities caused by the concurrent negligence of CONSULTANT and other persons, including the Client, the duty to indemnify shall apply only to the extent of CONSULTANT's proven negligence.
 - ▶ CONSULTANT shall have no duty to defend the Client in litigation or any legal proceedings but shall reimburse the Client for reasonable legal fees and costs the Client incurs if Client is obligated to pay damages because of the negligence of the CONSULTANT.
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“The really bad”

▶ CA – *UDC v. CH2M HILL*

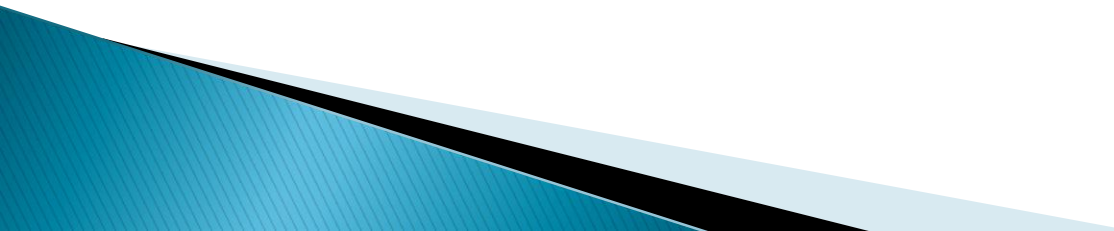
- Engineer under contract to Developer; lawsuit brought by HOA against Developer, who joined Engineer, alleging negligence.
- Engineer’s contract with Developer contained “duty to defend” clause.
- Engineer refused to accept tender of defense.

“The really bad” (cont.)

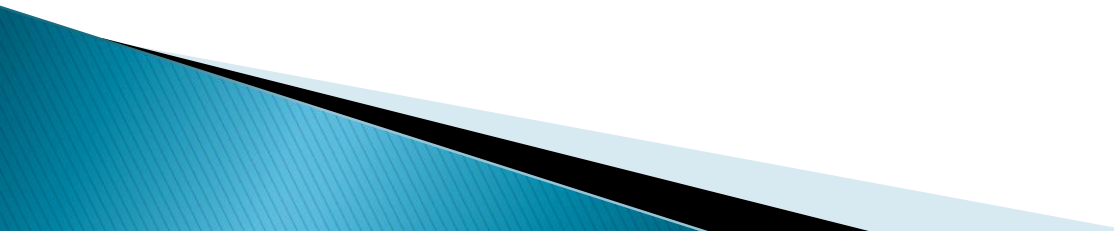
▶ CA – *UDC v. CH2M HILL*

- Jury unanimously found that Engineer was not negligent and was not in breach of contract.
- Appellate court found that nonetheless, Engineer was still required to defend Developer.
- Key point – the DtD clause did not specify that the duty was only triggered by a specific claim by third party against the Engineer; merely referred to “any claim”.

Checklist:

1. Does clause include a duty to defend the Client in litigation?
 2. Is duty to indemnify limited to instances of negligence or a breach of standard of care?
 3. Does indemnification cover claims for personal injuries and claims for economic losses?
 4. Does clause separately address sole negligence and concurrent negligence?
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Additional concerns:

- ▶ Mutuality of Indemnity Obligation
 - what's good for the goose, is good for the gander
 - ▶ Waiver of Worker Compensation Immunity
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Questions?

| skellengerbender |

ATTORNEYS