GREGORY S. MARTIN & ASSOCIATES, P.A.

ATTORNEYS AT LAW

Law Update September 2015

You Win… But, You Still Lose. The "Duty to Defend" and What it Means to You.

After a long trial, you are proven to be correct. You have committed no breach, no error, no wrong and yet, you owe attorney's fees to the other side. How is that even possible? The "duty to defend" is the answer. "But, I only agreed to pay for the damages that I caused. I did not agree to pay for their lawyer." Unfortunately, you may have, in fact, agreed when you signed your contract.

Most industry contracts contain an indemnification provision; a provision in which one party agrees to pay for the damages it causes to another party. In other words, it is a promise to hold the other party "harmless" from damages the first party causes.[1] Often buried in the indemnification provision is the obligation or duty to defend. A typical provision may read, "ABC, Inc. shall indemnify, defend, and hold harmless the Owner and XYZ, Inc. … from all claims … arising out of or relating to ABC, Inc.'s negligence…." That one word – defend – opens Pandora's Box and exposes the indemnitor (the entity making the promise to indemnify) to liability beyond the damages they directly cause. The indemnitor may be responsible for the other side's attorney's fees.

The legal theory underlying this apparent anomaly – you win, but you still owe attorney's fees – is explained as follows. When a lawsuit is filed, it includes allegations (statements) which the plaintiff believes proves that they are entitled to damages. The duty to defend is triggered based upon the allegations made in the complaint; not whether those allegations are later proved to be correct. Therefore, even if the allegations are proven to be wrong, an obligation to pay to defense cost remains.

A case out of California describes how this may unfold.[2] A homeowner's association sued a developer for damages and generally alleged that the damages were caused by the designer. The designer later proved that it was not the cause of the association's damages. Nevertheless, because the designer had agreed in the indemnification provision to defend the developer, the designer was responsible for the developer's legal fees and costs incurred for defending against the association's claim.

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1. *A later article will address the breadth of indemnification provisions including being responsible for the other party's negligence*
2. *UDC-Universal Development L.P. v. CH2M Hill* (2010) 181 Cal.App.4th10.

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What This Means For You

Read and understand your contract before you sign it. Contracts are about risk; the risk of paying more than the contract is worth, for example. You may decide to agree to defend the other party, but know what that may mean if the relationship sours.

SIDE BAR

October 8th Greg Martin — panel moderator
"Who owns the Risk?" Florida DBIA annual conference. For more information on the conference go to FLDBIA's website at: www.fldbia.org/annual_conference.php

Serving the Construction Industry

The attorneys of Gregory S. Martin & Associates are dedicated to representing those in the construction industry. Having represented national and international owners, contractors, design professionals and their carriers in Florida and throughout the country, our attorneys are committed to the highest professional standards and service. Mr. Martin and the members of his team have litigated multi-million dollar disputes involving, among others, construction and design defects, extra work, differing site conditions, schedule delays and acceleration, contract payment disputes, construction and mechanics' liens, payment/performance bonds and bid protests.

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