

# Indemnity and Other Risk Shifting Contract Clauses: Lessons for the Geotechnical Engineer

Presented at



By: Garry R. Boehlert, Esq.

SAUL EWING  
ARNSTEIN  
& LEHR<sup>LLP</sup>

# Presenter

**Garry R. Boehlert,  
Esq.**



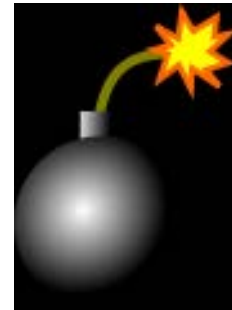
**Partner  
Saul Ewing Arnstein  
& Lehr LLP**

Garry Boehlert focuses his practice on infrastructure projects. Garry has represented engineering and construction firms on complex design-build projects. He regularly assists owners, contractors, geotechnical engineers, specialty subcontractors and engineering/design firms with the drafting, review and negotiation of contracts. He also is effective in the resolution of disputes that frequently arise on infrastructure projects, such as subsurface claims and demands associated with delay, defective work, extra work, incomplete or defective design, acceleration, loss of labor productivity, equipment pricing, alleged defective pricing and lost profits.

When it comes to subsurface engagements, Mr. Boehlert has addressed the full gamut of issues – tunneling, foundation/slurry wall work, subsurface profiles, ground water, highway construction, bridge design/construction, and structural failures. A number of his engagements have involved differing site conditions.

Prior to entering law, Garry worked on infrastructure projects such as the Trans-Alaska Pipeline and construction of an interstate highway, gaining hands-on construction experience.

# Q: What is Indemnification?



- Indemnification is a duty to either **pay for another's loss or assume their liability**
- In plain English, indemnity is an obligation by one party to make another whole for loss incurred to a third party
- **The essence of indemnification is the shifting of loss**
- The Common Law expected each party to be responsible for their own negligence, no more
- As construction projects got more and more complex owners have asked engineering firms and contractors to indemnify them
- General contractors, in turn, began adding increasingly complex indemnification clauses to their subcontracts

# Who Are The Parties To An Indemnity Contract?

- There are two parties to the contract:
  - The *indemnitee* -- the party whose loss or risk is transferred to another party (owner or general contractor in subcontract settings)
  - The *indemnitor* – the party that has promised to assume the indemnitee's risk or loss (general contractor or subcontractor in subcontract settings)
- The duty of indemnity is generally triggered by a third party when they make a claim for personal injury or property damage against the indemnitee
- Increasingly, indemnity is being requested by Owners from engineers and contractors for first party claims – even for breach of contract actions between the parties to the contract

# How is Risk Shifted Between The Parties?

- Risk is shifted by the **express and unique language of the parties' contract**
- The indemnity provision is often that lengthy and densely worded clause that most people would like to ignore – because it deals with possible problems in the future
- Indemnity deals with the transfer of loss in its entirety
- Indemnity, unlike contribution, does not contemplate the partial shifting of losses

# Are All Contractual Indemnity Obligations The Same?

A: **No!!!**

- When a Court construes an indemnity contract, it attempts to reimburse all losses, damages or liabilities that reasonably appear to have been within the intention of the parties
- The precise text of the contract provision governs the scope and reach of the indemnity obligation

# How Are Indemnity Clauses Categorized?

## A: They Can Be **Broad** or **Narrow**

- **Narrow** clauses are generally triggered only by **negligence or fault** on the part of the indemnitor
  - Fault arising from the indemnitor's "acts or omissions"
- **Broad** clauses are sometimes known as "work-related" and can even cover instances where the indemnitee is partially or wholly negligent
  - The claim need only "arise out of", "be occasioned by", "be due to" or "in connection with" the indemnitor's work on the project

# When Does A Cause of Action For Indemnity Accrue?

## A: It Depends

- Some clauses require indemnity only after the indemnitee has **actually incurred a loss** (settled or satisfied a judgment)
- However, when the indemnitor has agreed to indemnify against **liability** the indemnitor may be required to perform even before payment has been made
- Words such as “liabilities” and “hold harmless” suggest that the clause was intended to cover both loss and liability
- When the contract is silent, the default rule is that it covers only loss



# Is a Duty of Indemnity the Same as a Duty to Defend?

## A. No

- Duty to Defend a party from a claim or lawsuit is a distinct and separate duty from the duty to Indemnify
- Some contracts will specifically grant the indemnitee the authority to participate in its own defense
- If the contract is silent on the indemnitee's participation in defending itself, the indemnitor generally retains the right to provide the defense

# What is the Duration of an Obligation to Indemnify?

## A. This is an area where things can get scary

- The obligation lasts for a duration either expressly or impliedly provided for in the contract
- If the clause is based on loss, it could possibly last forever
- If no end date is specified in the contract and the language is unclear, Courts will consider the circumstances and nature of the contract to determine when the obligation should cease
- **Statutes of Limitation** can help – however, they can be over-ridden by the language of the indemnity clause
- **Statues of Repose** can help – however, may not be applicable if clause does not require negligent or deficient work

# Can an Owner Require that A Contractor Indemnify It Against its Own Negligence?

## A. Yes and No

- Most states have an Anti-Indemnification Statute
  - For Public Policy reasons, owners and general contractors should not be shielded from the effects of their own negligence
  - Particularly if bodily injury results
  - A party with greatly superior bargaining power should not be allowed to use it to transfer a disproportionate amount of risk to the weaker party
- So why isn't this the end of the story?

# Some Courts Will Read Any Anti-Indemnification Statute Very Narrowly

- The Court will consider that the general rule is that a party *can* contract away its negligence; since the statute changes this default rule, it should be read very narrowly
  - It can be up to you to show that the statute applies
- The Court may consider that the contract is not an indemnity agreement at all
  - See e.g. *Smith v. Seaboard Coast Line R. Co.*, 639 F.2d 1235 (5th Cir. 1981) (contract was a “lease”, not a contract involving “construction or maintenance”, and therefore Anti-Indemnity Statute did not apply)

# Q: Even if These Statutes Apply, Who Decides “Sole Negligence”?

- Anti-Indemnification Statutes typically bar any contract requiring one party to indemnify losses covered by the other’s “sole” negligence
- But this can lead to satellite litigation to determine if the other’s “sole” negligence is at issue
- Other courts will look closely to the underlying Complaint – so indemnification is in the hands of the Plaintiff’s attorney, who may not use the “magic words” – “sole negligence”
- Other courts will attempt to apportion negligence, and require indemnification for losses arguably *not* the result of the other party’s sole negligence.

# First Party Claims – Including Indemnity for Breach of Contract

- When indemnity is mentioned, we usually think of protection from third party claims asserted by parties with whom they have no contractual privity
- However, depending on the language used, indemnity provisions also can cover first party claims asserted by parties in privity of contract
- To the surprise of many, such clauses may cover actions for breach of contract in addition to claims for negligence
- The wording of the indemnity clause determines the scope of coverage

# Recovery of Attorneys' Fees Under Indemnity Provisions

- Most states follow the common law "American Rule" which provides that a prevailing party generally must bear its own attorneys' fees.
- An exception in many states is the ability of an indemnitee to recover attorneys' fees incurred in defending against a third party claim.
- Another exception to the American Rule under which a prevailing party may be awarded attorneys' fees is when the parties have a contractual agreement to that effect.
- Increasingly, courts are looking to indemnity clauses in deciding whether the parties have agreed that attorneys' fees will be recoverable in first-party actions. Recent decisions from the Courts of Appeals of Maryland and the District of Columbia have given broad interpretation to indemnity provisions, allowing the recovery of attorneys' fees in first-party breach of contract actions.
- Another important consideration, especially for designers, is that reimbursement of an adversary's attorneys' fees may not be insurable under a standard errors and omissions policy.

# Limitations on Liability

## EXAMPLE CLAUSE

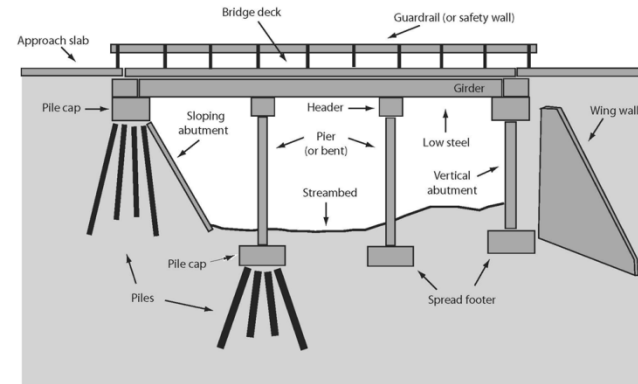
To the fullest extent permitted by law, **the total liability of Geotechnical Engineer**, its officers, members, directors, agents, consultants, and employees, to Owner, and to anyone claiming by, through or under Owner, for any and all injuries, claims, losses, expenses or damages whatsoever (including attorneys' fees and costs) from any cause or causes whatsoever, including but not limited to negligence, errors, omissions, strict liability, breach of contract and/or breach of warranty **shall not exceed the total compensation received by Engineer under this Agreement or \$50,000 whichever is less**. Upon Owner's request, Engineer may negotiate an increase to this limitation in exchange for an additional agreed consideration for the increased limit.



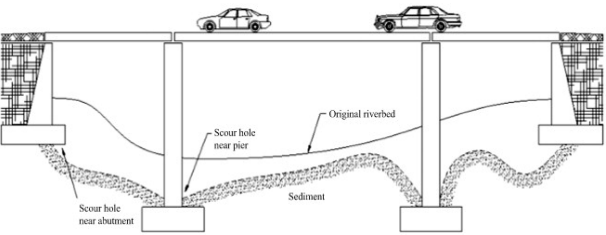
# Case Study – Lesson Learned

## Let's Put Some of this Information to Use

- A New Bridge Is Being Built In Your Area
- You're The Go-To Geotechnical Engineer
- You Bid, Negotiate, Seal the Deal, And Ink the Contract for Geotechnical Services
- You Do A Great Job, Your Work Is Accepted And You Get Paid
- Time To Move On – Right?



# NOT SO FAST



- Years later, concrete in the bridge piers begins to crack
- The bridge is closed for inspection and repairs

- The state sues the general contractor seeking damages
- Site-work and geotechnical issues don't appear to have anything to do with the cracking – but you get served with a court document demanding you defend and indemnify the general contractor

CV-10 (Rev. 12/16) CIVIL COVER SHEET

The filer certifies that this filing complies with the provisions of the Judicial Branch of the State of Oregon regarding the filing and service of pleadings or other papers as required by law, except as provided for below in a court order. This form, approved by the Judicial Conference of the United States on September 17, 2010, is required by the Rules of the Court for the purpose of reducing the work and cost to the parties. USE OTHER FORMS FOR THE RETURN OF THIS COVER SHEET.

I. (a) PLAINTIFFS (b) County of Residence of First Listed Plaintiff (c) Plaintiff (d) Attorney's Firm Name, Address, and Telephone Number

II. BASIS OF JURISDICTION (Place in "C" on One Box Only) (a) U.S. Government Plaintiff (b) Federal Question (c) U.S. Government Defendant (d) Diversity (e) Plaintiff's Choice of Forum (f) Defendant's Choice of Forum

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place in "C" on One Box for Plaintiff (the Plaintiff's Case Only) and the Box for Defendant (the Defendant's Case Only))

IV. NATURE OF SUIT (Place in "C" on One Box Only)

PROPERTY	REAL PROPERTY	PERSONAL PROPERTY	OTHER	PROPERTY RIGHTS	PROPERTY RIGHTS	PROPERTY RIGHTS	PROPERTY RIGHTS
710 Real Estate	711 Real Estate	712 Real Estate	713 Real Estate	714 Real Estate	715 Real Estate	716 Real Estate	717 Real Estate
718 Real Estate	719 Real Estate	720 Real Estate	721 Real Estate	722 Real Estate	723 Real Estate	724 Real Estate	725 Real Estate
726 Real Estate	727 Real Estate	728 Real Estate	729 Real Estate	730 Real Estate	731 Real Estate	732 Real Estate	733 Real Estate
734 Real Estate	735 Real Estate	736 Real Estate	737 Real Estate	738 Real Estate	739 Real Estate	740 Real Estate	741 Real Estate
742 Real Estate	743 Real Estate	744 Real Estate	745 Real Estate	746 Real Estate	747 Real Estate	748 Real Estate	749 Real Estate
750 Real Estate	751 Real Estate	752 Real Estate	753 Real Estate	754 Real Estate	755 Real Estate	756 Real Estate	757 Real Estate
758 Real Estate	759 Real Estate	760 Real Estate	761 Real Estate	762 Real Estate	763 Real Estate	764 Real Estate	765 Real Estate
766 Real Estate	767 Real Estate	768 Real Estate	769 Real Estate	770 Real Estate	771 Real Estate	772 Real Estate	773 Real Estate
774 Real Estate	775 Real Estate	776 Real Estate	777 Real Estate	778 Real Estate	779 Real Estate	780 Real Estate	781 Real Estate
782 Real Estate	783 Real Estate	784 Real Estate	785 Real Estate	786 Real Estate	787 Real Estate	788 Real Estate	789 Real Estate
790 Real Estate	791 Real Estate	792 Real Estate	793 Real Estate	794 Real Estate	795 Real Estate	796 Real Estate	797 Real Estate
798 Real Estate	799 Real Estate	800 Real Estate	801 Real Estate	802 Real Estate	803 Real Estate	804 Real Estate	805 Real Estate
806 Real Estate	807 Real Estate	808 Real Estate	809 Real Estate	810 Real Estate	811 Real Estate	812 Real Estate	813 Real Estate
814 Real Estate	815 Real Estate	816 Real Estate	817 Real Estate	818 Real Estate	819 Real Estate	820 Real Estate	821 Real Estate
822 Real Estate	823 Real Estate	824 Real Estate	825 Real Estate	826 Real Estate	827 Real Estate	828 Real Estate	829 Real Estate
830 Real Estate	831 Real Estate	832 Real Estate	833 Real Estate	834 Real Estate	835 Real Estate	836 Real Estate	837 Real Estate
838 Real Estate	839 Real Estate	840 Real Estate	841 Real Estate	842 Real Estate	843 Real Estate	844 Real Estate	845 Real Estate
846 Real Estate	847 Real Estate	848 Real Estate	849 Real Estate	850 Real Estate	851 Real Estate	852 Real Estate	853 Real Estate
854 Real Estate	855 Real Estate	856 Real Estate	857 Real Estate	858 Real Estate	859 Real Estate	860 Real Estate	861 Real Estate
862 Real Estate	863 Real Estate	864 Real Estate	865 Real Estate	866 Real Estate	867 Real Estate	868 Real Estate	869 Real Estate
870 Real Estate	871 Real Estate	872 Real Estate	873 Real Estate	874 Real Estate	875 Real Estate	876 Real Estate	877 Real Estate
878 Real Estate	879 Real Estate	880 Real Estate	881 Real Estate	882 Real Estate	883 Real Estate	884 Real Estate	885 Real Estate
886 Real Estate	887 Real Estate	888 Real Estate	889 Real Estate	890 Real Estate	891 Real Estate	892 Real Estate	893 Real Estate
894 Real Estate	895 Real Estate	896 Real Estate	897 Real Estate	898 Real Estate	899 Real Estate	900 Real Estate	901 Real Estate
902 Real Estate	903 Real Estate	904 Real Estate	905 Real Estate	906 Real Estate	907 Real Estate	908 Real Estate	909 Real Estate
910 Real Estate	911 Real Estate	912 Real Estate	913 Real Estate	914 Real Estate	915 Real Estate	916 Real Estate	917 Real Estate
918 Real Estate	919 Real Estate	920 Real Estate	921 Real Estate	922 Real Estate	923 Real Estate	924 Real Estate	925 Real Estate
926 Real Estate	927 Real Estate	928 Real Estate	929 Real Estate	930 Real Estate	931 Real Estate	932 Real Estate	933 Real Estate
934 Real Estate	935 Real Estate	936 Real Estate	937 Real Estate	938 Real Estate	939 Real Estate	940 Real Estate	941 Real Estate
942 Real Estate	943 Real Estate	944 Real Estate	945 Real Estate	946 Real Estate	947 Real Estate	948 Real Estate	949 Real Estate
950 Real Estate	951 Real Estate	952 Real Estate	953 Real Estate	954 Real Estate	955 Real Estate	956 Real Estate	957 Real Estate
958 Real Estate	959 Real Estate	960 Real Estate	961 Real Estate	962 Real Estate	963 Real Estate	964 Real Estate	965 Real Estate
966 Real Estate	967 Real Estate	968 Real Estate	969 Real Estate	970 Real Estate	971 Real Estate	972 Real Estate	973 Real Estate
974 Real Estate	975 Real Estate	976 Real Estate	977 Real Estate	978 Real Estate	979 Real Estate	980 Real Estate	981 Real Estate
982 Real Estate	983 Real Estate	984 Real Estate	985 Real Estate	986 Real Estate	987 Real Estate	988 Real Estate	989 Real Estate
990 Real Estate	991 Real Estate	992 Real Estate	993 Real Estate	994 Real Estate	995 Real Estate	996 Real Estate	997 Real Estate
998 Real Estate	999 Real Estate	1000 Real Estate					

V. OREGON (Place in "C" on One Box Only) (a) Original Plaintiff (b) Counter Plaintiff (c) Defendant (d) Counter Defendant (e) Third Party Plaintiff (f) Third Party Defendant (g) Intervenor Plaintiff (h) Intervenor Defendant (i) Amended Plaintiff (j) Amended Defendant (k) Amended Plaintiff/Defendant (l) Amended Plaintiff/Counter Plaintiff (m) Amended Plaintiff/Counter Defendant (n) Amended Defendant/Counter Plaintiff (o) Amended Defendant/Counter Defendant (p) Amended Plaintiff/Counter Plaintiff/Counter Defendant (q) Amended Defendant/Counter Plaintiff/Counter Defendant (r) Amended Plaintiff/Counter Plaintiff/Counter Defendant/Counter Plaintiff (s) Amended Plaintiff/Counter Plaintiff/Counter Defendant/Counter Defendant (t) Amended Defendant/Counter Plaintiff/Counter Defendant/Counter Plaintiff (u) Amended Defendant/Counter Plaintiff/Counter Defendant/Counter Defendant (v) Amended Plaintiff/Counter Plaintiff/Counter Defendant/Counter Plaintiff/Counter Defendant (w) Amended Plaintiff/Counter Plaintiff/Counter Defendant/Counter Plaintiff/Counter Defendant/Counter Plaintiff (x) Amended Plaintiff/Counter Plaintiff/Counter Defendant/Counter Plaintiff/Counter Defendant/Counter Defendant (y) Amended Defendant/Counter Plaintiff/Counter Defendant/Counter Plaintiff/Counter Defendant/Counter Plaintiff (z) Amended Defendant/Counter Plaintiff/Counter Defendant/Counter Plaintiff/Counter Defendant/Counter Defendant

VI. CAUSE OF ACTION (Brief description of cause)

VII. REQUESTED IN COMPLAINT (Under F.R.C.P. 2) (a) CHECK IF THIS IS A CLASS ACTION (b) DEMAND (c) CHECK YES only if demanded in complaint (d) JURY DEMAND (e) Yes (f) No

VIII. RELATED CASE(S) (a) IF ANY (b) NUMBER OF ATTY OF RECORD (c) DOCKET NUMBER

DATE (a) MONTH (b) DAY (c) YEAR

FOR OFFICE USE ONLY (a) RECEIPT (b) AMOUNT (c) APPLYING OFF (d) FEE (e) MAIL ROOM

**SAUL EWING  
ARNSTEIN  
& LEHR LLP**

- **The general contractor points to “boilerplate” in your contract that he says requires you to defend and indemnify them and the owner from any claims “related to” the Project**



- **The general contractor hires an expensive law firm that bills hundreds of dollars an hour.**
- **The general contractor sends you its legal bills for payment**
- **There appears to be no end in sight**



# What Went Wrong?

## A: It starts with the contract

- It obliged you, as the geotechnical engineer, to indemnify for **any** claim **related** to the Project
- **“Project”** was defined as the whole construction, not just your component
- **“Related to”** means virtually any claim connected to the bridge
- The clause is written in a way that suggests that you have to defend even if the claim is the result of the state’s or general contractor’s **“sole”** negligence
- Even if state law prohibits this, then you must defend until it is established that the claim was the result of the state’s or general contractor’s **“sole”** negligence

# What Might Be Considered “Fair” Or “Unfair” Indemnification Provisions?

## “Fair”

- You agree to **indemnify**
- The owner and/or general contractor
- For claims arising out of **your** negligence or defective work on the Project
- Including a **proportionate share** of liability
- Ideally capped at a dollar amount and limited in time

## Should Give You Pause

- You must **defend** and indemnify
- The owner and/or general contractor
- For claims “**relating to**” or “**arising out of**” “the Project”
- Including where the owner or general contractor’s **sole negligence** is at issue
- No time or cost limitations

# How Can Geotechnical Engineers Protect Themselves When it Comes to Indemnification Obligations?

1. Account for indemnification obligations in your negotiating checklist, and factor them into your pricing
2. Determine if you are willing to indemnify another party's negligence, and if so, to what extent
3. Consult with counsel on applicable statutes and appropriate contract language
4. Ensure field employees are trained to check with superiors before signing forms with "boilerplate legalese" that will implicate indemnification
5. Check with your insurance broker and bonding company to determine if the proposed clause fits with your insurance and surety obligations

# LESSONS LEARNED

6. Consider the indemnification implications of choice-of-law or choice-of-venue provisions in your contract
7. Consider the indemnification implications on the recoverability of attorneys' fees – especially for first party claims
8. Consider duration: seek a time restriction for your indemnification obligation
9. See if you can negotiate a cap on the dollar amount of your indemnification obligation
10. Negotiate for ability to control the defense and defense costs if you have agreed to defend

# Questions?



# DISCLAIMER

The content of this presentation has been prepared by Saul Ewing Arnstein & Lehr LLP for information purposes only. The provision and receipt of the information and presentation materials should not be considered legal advice, does not create a lawyer-client relationship, and should not be acted on without seeking professional counsel who have been informed of the specific facts. Should you wish to contact the presenter to obtain more information regarding your company's particular circumstances, it may be appropriate to enter into an attorney/client relationship.

# CONTACT INFORMATION

Garry R. Boehlert, Esq.  
**Saul Ewing Arnstein & Lehr LLP**  
1919 Pennsylvania Avenue, N.W.  
Suite 550  
Washington, DC 20006  
Phone: 202.295.6617  
Fax: 202.295.6717  
Email: [garry.boehlert@saul.com](mailto:garry.boehlert@saul.com)  
Website: [www.saul.com](http://www.saul.com)

SAUL EWING  
ARNSTEIN  
& LEHR<sup>LLP</sup>