

**Duty to Defend and Duty to Indemnify**  
**A Distinction with a Difference**

By

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**INTRODUCTION**

The contractual duties to defend and indemnify are two of the most important types of allocation of risk in construction contracts. A typical contract provision containing a duty to defend and a duty to indemnify states as follows:

To the fullest extent permitted by law . . . (Indemnitor) shall *indemnify, defend* and hold harmless (Indemnified Parties) from and against *any and all liabilities, claims, demands, causes of action, administrative or regulatory proceedings, liens, settlements, judgments and expenses*, including, but not limited to, reasonable attorney's fees and investigative costs, directly or indirectly resulting from . . . injury . . . or property damage *arising out of or in connection with the performance of the Work of (Indemnitor), its agents, servants, employees, or independent contractors retained or hired by (Indemnitor)*. . .

Although these two legal concepts are related and may be contained in the same paragraph, it is important to distinguish between the duty to defend and the duty to indemnify. A duty to defend is a separate, independent obligation from a contractual duty to indemnify. *Ashton Park Trace Apts. v. City of Decatur*, 2015 U.S. Dist. LEXIS 185688, \*14 (N.D. Ga. 2015); see *ALEA London Ltd. v. Woodcock*, 286 Ga. App. 572, 578-79 (2007).

Attorneys representing a party with a contract containing a duty to defend and indemnify provision should diligently analyze the distinct applications, triggers, rights, and obligations of these two separate legal concepts.

## **DUTY TO DEFEND**

The duty to defend is broader than the duty to indemnify. When a contract requires a party to provide a defense to a claim made by a third party, that obligation arises immediately when such allegations are raised in a complaint. As a result, the duty to defend is triggered much earlier than the duty to indemnify, which is only triggered once the indemnitee is determined to be liable for damages. *Ashton Park Trace Apts.*, 2015 U.S. Dist. LEXIS 185688 at \*14.

The duty to defend may be triggered even by groundless third party allegations. *Penn-America Ins. Co. v. Disabled American Veterans, Inc.*, 268 Ga. 564, 565 (1997); *see also Ashton Park Trace Apts.*, 2015 U.S. Dist. LEXIS 185688 at \*13 (applying insurance law tenants to the interpretation of a duty to defend and a duty to indemnify in a construction contract). Further, a duty to defend exists if the facts as alleged in the complaint *even arguably* bring the occurrence within coverage under the contract. *BBL-McCarthy, LLC v. Baldwin Paving Company*, 285 Ga. App. 494, 497 (2007).

These distinctions are important because they result in the duty to defend arising earlier and more often than the duty to indemnify. Additionally, breach of one duty does not affect the other. Where a party breaches a contract by failing to defend, the nonbreaching party is only entitled to the cost of defense; it is not entitled to greater indemnity. *Colonial Oil Indus. v. Underwriters Subscribing to Policy Nos. To31504670 & To31504671*, 268 Ga. 561, 563 (Ga. 1997).

## **DUTY TO INDEMNIFY**

Although the duty to indemnify is narrower than the duty to defend, applying less frequently, the language of the duty to indemnify is given broad construction by Georgia courts.

The duty to indemnify is only truly limited in certain contracts related to construction, and by the language of each individual indemnity provision.

*a. The language “arising out of” is broadly construed in indemnity provisions.*

Georgia courts have held that the term “arising out of,” in an indemnification provision like the one stated-above, means “*almost any causal connection or relationship.*” *BBL-McCarthy*, 285 Ga. App. at 501. The claims need only have *a causal connection* to the work that the indemnitor contracted to perform, to trigger the indemnification provision.

In *JNJ Foundation Specialists* the Court of Appeals of Georgia held that a car accident claim arose out of the work of a contractor hired to pour sidewalks for a subdivision developer. *JNJ Foundation Specialists, Inc. v. D.R. Horton, Inc.*, 311 Ga. App. 269, 270-71 (2011). The contract between the parties contained an indemnification provision requiring the contractor to indemnify the developer against any claims “arising out of” the contractor’s work. *Id.* When a driver crashed into a traffic barrel near the work site, the contractor refused to indemnify the developer against the driver’s claim. *Id.* The contractor argued that the injury did not arise out of its work because there was no evidence that it placed the barrels in the road or that the barrel placement was the proximate cause of harm. *Id.* The court affirmed the developer’s motion for summary judgment against the contractor. *Id.* The court reasoned that the contractor’s reading of its duty to indemnify was too narrow because

[u]nder Georgia law pertaining to indemnity provisions, arising out of [means] had its origins in, grew out of, or flowed from. Importantly, the term arising out of does not mean proximate cause in the strict legal sense, nor [does it] require a finding that the injury was directly and proximately caused by the insured’s actions. Almost any causal connection or relationship will do.

*Id.* (punctuation omitted). The Court found that there was evidence that the contractor placed the construction barrels in the roadway to close a road lane for a concrete delivery, and

that the contractor was on-site, pouring the sidewalk at the time of the collision. *Id.* at 270-71. The claim alleged an unknown defendant created a hazard by closing the lane without proper signage or warnings. *Id.* at 271. As a result, the court concluded that the claim arose out of the contractor's work, and the contractor was required to indemnify the developer. *Id.* at 271.

*b. The duty to indemnify does not require a finding of fault or negligence to be triggered.*

Georgia courts have stated that as long as the claim partly arises out of the indemnitor's work, the division of fault or actual cause of the injury does not matter for the purpose of indemnity. *BBL-McCarthy*, 285 Ga. App. at 687-88. A finding of fault or negligence by the indemnitor is not necessary to trigger the duty to indemnify. *Id.*

In *BBL-McCarthy*, the Court of Appeals of Georgia held that a general contractor had the right to recover settlement payments made to injured parties from two subcontractors and their respective insurers. *Id.* at 494-96. Both subcontracts' indemnification provisions were similar to the one stated above. Two subcontractors were hired by a general contractor to construct a deceleration lane leading to a project driveway -- one subcontractor to grade the deceleration lane and the other to pave it. *Id.* at 495. Two vehicles collided near the construction project and deceleration lane, killing four people and seriously injuring another. *Id.* at 496. The injured parties' made claims of negligent management and negligent construction against the general contractor and the subcontractors. *Id.* The injured parties settled with the general contractor and the subcontractors, and the general contractor filed a lawsuit against the subcontractors seeking to recover the defense costs it incurred and indemnity for settlement payments it made to the injured parties. *Id.* at 496-97. Each subcontractor's contract had an indemnification provision requiring the subcontractor to indemnify the general contractor against any claims "arising out of" the subcontractor's work. *Id.* at 495-96. The Court of Appeals held that each subcontractor

was contractually obligated to indemnify the general contractor because the broad scope of the term “*arising from*” as adopted by Georgia courts. *Id.* at 501. The Court of Appeals reasoned that the language “arising out of” includes claims of negligent supervision and culpable conduct. *Id.* Therefore, an indemnification provision applies to claims arising out of an indemnitor’s work regardless of any specific division of fault between the indemnitor and indemnitee. *Id.* at 501. The claims in *BBL-McCarthy* arose out of the subcontractors’ work, so the division of fault or actual cause of the injury did not matter for the purpose of indemnity. *Id.* at 500-01. Further, the court reasoned “[the contractor] specifically contracted for indemnification on even those claims . . . for which it may have been partially responsible with the subcontractors as a joint tortfeasor.” *Id.* at 499-501. Thus, a finding of sole fault or negligence by the indemnitor was not required to trigger the subcontractor’s duty to indemnify.

*c. The scope of a duty to indemnify is limited to the scope of the indemnitor’s work.*

Where a claim of injury bears no causal connection to the indemnitor’s work, then the duty to indemnify does not apply. In *Ashton Park Trace Apartments, LLC v. City of Decatur, Georgia, et al.*, a property owner adjacent to the City of Decatur’s Beacon Municipal Complex Redevelopment Project sued the owner of the project, the general contractor, and the architect for claims arising out of the design and construction of the municipal complex. *Ashton Park Trace Apartments, LLC v. City of Decatur, Georgia, et al.*, 2015 U.S. Dist. LEXIS 185688, \*4-6 (2015). The contractor served as the construction manager of the project. *Id.* at \*6. The contract between the contractor and the owner required the contractor to indemnify the owner and the architect against claims “arising out of or resulting from performance of” the contractor’s work. *Id.* at \*9. The architect filed a motion for partial summary judgment against the contractor seeking to have the contractor indemnify it against the adjacent property owner’s claims. *Id.* at

\*11-12. The District Court denied the architect's motion for partial summary judgment. *Id.* at \*20. The court reasoned that the language of the indemnity provision limited the contractor's duty to indemnify the architect to claims arising out of the contractor's work. *Id.* at \*19. Two of the claims against the architect arose out of the architect's architectural services, and not the contractor's work. *Id.* Consequently, those claims were outside the scope of the indemnity provision and did not trigger the contractor's duty to indemnify. *Id.*

*d. The specific language of a duty to indemnify provision limits the types of claims to which it applies.*

A contractual indemnification provision may be limited by its language to negligence claims, as opposed to breach of contract claims. For example, an indemnification provision stating "[indemnitor] will indemnify, defend, and hold harmless [indemnitee] ... from all claims, losses, damages, costs, liabilities or expense, including attorneys' fees, caused by or resulting from negligence or willful misconduct of [the indemnitor]" is only triggered by an action for negligence or willful misconduct, not breach of contract. In denying a post-trial motion for attorney's fees based on an indemnification provision with the language above, the court in *Georgia Operators Self-Insurers Fund v. PMA Management Corp.*, held that "the indemnification clause of the contract does not apply here for the simple reason that this is not an action for 'negligence or willful misconduct.'" *Georgia Operators Self-Insurers Fund v. PMA Management Corp.*, 143 F. Supp. 3d. 1317, 1347 (N.D. Ga. 2015). The plaintiff's negligence claims had been dismissed leaving only breach of contract claims. *Id.*

Following the Northern District's decision in *Georgia Operators Self-Insurers Fund*, the Middle District, in *Georgia-Pacific Cedar Springs LLC v. Mor PPM, Inc.*, addressed a similar indemnity provision. *Georgia-Pacific Cedar Springs LLC v. Mor PPM, Inc.*, 2016 U.S. Dist. LEXIS 120256 (2016). An owner hired a contractor to replace the floor in the owner's pulp and

paper mill. *Id.* at \*3. As in *Georgia Operators Self-Insurers Fund*, the parties' contract contained an indemnity provision limited to injury "cause in whole or in part by any willful or negligent acts or omissions of the Contractor ... ." *Id.* at \*2-4. The contractor damaged tubes and other components within the boiler at the mill, during the course of its work. *Id.* at \*4-5. The owner made negligence and breach of contract claims against the contractor. *Id.* at \*20. The contractor moved for summary judgment against the owner's claim for attorneys' fees, but the district court denied the motion. *Id.* at \*17. The court reasoned that the attorneys' fees related to its negligence claims, not only its breach of contract claims, and therefore fell within the scope of the indemnity clause. *Id.* at \*17-20.

The contractor argued that "the purpose of an indemnity clause in a contract is not to protect the parties to the contract from legal action by each other to enforce the contract." *Id.* at 20 (quoting *SRG Consulting, Inc. v. Eagle Hosp. Physicians, LLC*, 282 Ga. App. 842, 845 (2006)). The court rejected the contractor's argument for two reasons. First, "indemnity provisions are not categorically limited to the recovery of losses for third parties. The Supreme court of Georgia defines 'indemnity' as 'to reimburse another for a loss suffered because of a third party's or one's own act or default.'" *Id.* at 18. (citation omitted) (emphasis added). Second, the language of the indemnity provision unambiguously stated that it applied to claims for negligence, which the owner alleged (as well as its breach of contract claims). *Id.* at \*17-20.

### **CONTRACTS CONTRAVENING PUBLIC POLICY**

One of the only limits on the duties to defend and indemnify in construction contracts is found in Georgia's anti-indemnity statute, O.C.G.A. §13-8-2(b) and (c). According to this statute, a provision containing the duty to indemnify, or the duty to defend, or an obligation to insure, in connection with an agreement related to construction or professional services, is

against public policy and void and unenforceable if it can be interpreted to protect a party for that party's own sole negligence. O.C.G.A. §13-8-2 (b) and (c). This limit on risk allocations applies to a broad range of construction project contracts, and may be triggered by contract language commonly used in provisions containing the duties to defend and indemnify.

In *Kennedy Dev. Co. v. Camp*, the Supreme Court of Georgia held that an indemnity clause in an assignment and assumption agreement was subject to O.C.G.A. §13-8-2(b). *Kennedy Dev. Co. v. Camp*, 290 Ga. 257, 257 (Ga. 2011). A developer of a new subdivision had a contract to use another subdivision's detention pond. *Id.* The increased use of the detention pond resulted in a significant increase in the amount of excess stormwater which drained across an adjacent land owner's property. *Id.* The adjacent land owner sued the developer. *Id.* However, the developer had entered into an assignment and assumption agreement with the new subdivision's homeowners' association. *Id.* The agreement contained a provision obligating the homeowners' association to defend and indemnify the developer. *Id.* at 258. The agreement also transferred responsibility for the management, operation, and repair of the newly developed subdivision to its homeowners' association. *Id.* at 257 and 260. The court held that the assignment and assumption agreement was sufficiently related to construction to make it subject to O.C.G.A. §13-8-2(b). The court reasoned that Georgia courts have consistently construed O.C.G.A. § 13-8-2(b) expansively, even applying the statute to "commercial and residential lease agreements bearing little or no relationship to any ostensible building construction." *Id.* at 259-60. So, although the assignment agreement did not itself set forth the terms of construction, the fact that past construction rights and responsibilities were assigned and assumed through it caused O.C.G.A. §13-8-2(b) to apply.



Further, in *Kennedy Dev. Co. v. Camp*, the court held that the provision containing the duty to defend and the duty to indemnify violated O.C.G.A. §13-8-2 and was void for violating public policy. *Id.* at 261. The provision in the assignment agreement used the language “any and all” claims, and made no reference to the origin of the claim or who was at fault for the claim. *Id.* at 259. The court construed this language and lack of specificity to mean that the provision was broad enough to protect the developer from claims arising from its own sole negligence. *Id.* at 260-61. In part because of the commonly used language “any and all claims” the developer lost its right to be defended and indemnified by the homeowners’ association. *Id.*

## **CONCLUSION**

The duty to defend and the duty to indemnify are significant legal concepts in the construction industry with nuanced applications and triggers, and important related rights and liabilities. Counsel representing developers, contractors and design professionals should carefully analyze these contractual provisions at all stages of the representation.