

Words Matter: Practical Application of the Contractual Duty to Defend and Indemnify

By Erin Bucksbaum and Quinn Kelley

In today's litigious society, risk allocation is an important consideration. Practically every agreement contains a promise by one or both of the parties to "defend and indemnify" the other party against claims and losses arising from a variety of situations. Small changes in the wording can lead to drastically different contractual interpretations. In fact, the ability to allocate risk under these contract provisions can often depend on one word or phrase.

While, the words "defend and indemnify" are often said in the same breath, the duty to defend and the duty to indemnify are treated separately under the law. Although each indemnity provision is unique, precedent from New Hampshire and surrounding jurisdictions provides guidance as to how particular provisions are likely to be interpreted.

The Duty to Defend

The duty to defend is broad but not unlimited. Specific contractual language of the insurance policy or separate agreement between two parties determines the extent of the obligation.

Generally, if there is any possibility that the carrier may be obligated to pay damages, there is a duty to defend. 123 N.H. 148 (1983). When considering whether defense is owed, courts have interpreted "any possibility" to require a creative interpretation of a plaintiff's claims. See *Todd v. Vt. Mut. Ins. Co.*, 168 N.H. 754 (2016).

For example, because a plaintiff's claim for interference with a real estate sale could potentially give rise to a claim for emotional distress, the obligation to defend against all of the claims may be triggered under the personal injury provision of a homeowners' policy. See *Harlor v. Amica Mut. Ins. Co.*, 150 A.3d 793 (Sup. Ct. Me. 2016).

Similarly, a recent New York decision found that because the insurance company did not provide conclusive evidence that the bad actor was not employed by the insured, they were required to treat the claim as covered under the policy. *Combs v. Superintendent of Financial Services*, 2019 WL 149466 (NY Supreme Ct., App. Div., January 10, 2019).

Certain language may unintentionally



give rise to additional duties. For example, the New Hampshire Court recently ruled that an insured party was entitled to costs associated with the defense of a declaratory judgment action under the policy because the settlement agreement between the parties routinely referred to the prior declaratory judgment action as a "claim." *In the Matter of Liquidation of the Home Ins. Co.* (N.H. Oct. 27, 2017). In contrast, courts have been hesitant to extend a contractual duty to defend to the prosecution of related counter-claims. *Mount Vernon Fire Ins. Co. v. Visionaid, Inc.*, 477 Mass. 343 (2017).

The Duty to Indemnify

The law surrounding interpretation of indemnity provisions is well settled in New Hampshire. Courts first look at the ordinary meaning of the language, but when the language is ambiguous, the courts look to the parties' intent at the time the agreement was made to determine the meaning of the contractual language. See *Kessler v. Gleich*, 161 N.H. 104, 108 (2010).

The New Hampshire Supreme Court has consistently interpreted the term "arising out of" broadly in favor of indemnity. However, there are some areas where the

outcome of the court's interpretation is less clear.

Grey Area # 1 – Indemnification for Party's Own Negligence

Courts construe express indemnity agreements strictly when they purport to shift responsibility for an individual's own negligence to another. *Merrimack School District*, 140 N.H. 9 (1995). Interpretation often comes down to a balancing of factors to determine the intent of the parties. *Id.*

Some of the most contentious litigation occurs in the scope of an ordinary business deal. Recently, a New Hampshire Superior court construed "occasioned by," more narrowly than "arising out of," and therefore found that indemnification was not owed in a claim that arose from the allegedly negligent maintenance of the equipment because the injury was not solely "caused by" the use of the equipment. *McAuley v. Balcom Brothers, et al* (2018).

Indemnity agreements in construction contracts can also lead to potential pitfalls. In the construction context, an indemnity provision requiring indemnity for injury or property damage not caused by the indemnitor is void. See N.H. RSA

338-A:2. However, there is no case law interpreting this statute, and it is unclear if courts will narrowly interpret clauses that do not contemplate fault, such as indemnity for claims "arising out of" work at a construction site, or completely invalidate those clauses.

Grey Area # 2 – Defining Terms with Legal Significance

Disputes often arise when parties attempt to limit their obligations to particular circumstances. Indemnification clauses that hinge on words with specific legal significance can lead to additional interpretation problems. For example, it is not uncommon for parties to limit their obligation to indemnify to actions which constitute "gross negligence," even though New Hampshire does not recognize a common law cause of action for "gross negligence." *Barnes v. N.H. Karting Ass'n*, 128 N.H. 102, 108 (1986).

Although it is unclear under New Hampshire law how the court would enforce provisions based on a "gross negligence" standard, the limited precedent suggests that the courts would apply a higher standard of conduct before finding that indemnification is owed. See *Kessler v. Gleich*, 161 N.H. 210 (2010); see also *Woodsville Gaur. Sav. Bank v. Passumpsic Sav. Bank*, (N.H. Super., Nov. 1, 2016.)

Conclusion

Due to the potential ability to shift financial and legal responsibility, it is important to painstakingly analyze these defense and indemnity provisions whenever they arise, especially in cases where multiple parties are involved. A thorough analysis may help to determine the true obligations or defenses available to your client. At the same time, when drafting these agreements, it may be worth reevaluating standard "boiler plate" language to ensure that the indemnity provisions in your client's agreements are actually allocating responsibility the parties intend.

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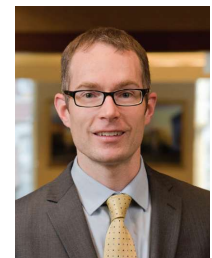
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