

LEGAL ADVISORY

Office of the General Counsel

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SUMMARY

A recent court ruling reaffirms that contractual indemnification is an essential tool to minimize financial risk in business transactions.

If you have questions regarding indemnification provisions or other ways to reduce risk in commercial contracts, please contact:

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This legal advisory is issued by the Office of the General Counsel to provide updates regarding important legal and regulatory developments that affect the University. For additional information or assistance with a specific legal matter, please contact the Office of the General Counsel.

CALIFORNIA CASES REAFFIRM THE VALUE OF CONTRACTUAL INDEMNIFICATION

Nearly every University contract contains an indemnification clause. Use of indemnification provisions in commercial contracts helps minimize the University's financial risk in business transactions. A recent California case reaffirmed the value of contractual indemnification in reducing the University's financial risk.

Indemnification applies when a *third party* suffers a loss (e.g., bodily injury, property damage, or financial loss) as a result of the performance of the contract. For purposes of illustration, assume the University purchases a piece of laboratory equipment from a vendor, and the University's contract with the vendor contains a one-way indemnification provision favoring the University. If a student is injured while using the equipment in class, the student may present the University with a claim for payment or name the University as a defendant in a personal injury lawsuit. Depending on the wording of the indemnification provision, the vendor may be required to conduct the University's defense or, alternatively, to pay the attorneys' fees associated with the University's defense of the claim. In addition, the vendor would be required to fund any settlement or judgment, thereby making the University whole from any financial cost associated with the student's claim.

In some cases, contracting parties have refused to defend third party claims at the outset of a lawsuit and have instead resolved indemnification rights as the third party claims are resolved. However, California court cases clarify that the duty to defend arises from the inception of the third party claim, greatly enhancing the benefit of indemnification clauses. *Crawford et al. v. Weather Shield Mfg., Inc.* (2008) 44 Cal.4th 541 (holding subcontractor had an affirmative responsibility to provide the defense from the outset of an action initiated by a third party). The California Court of Appeal reinforced this obligation recently in *Universal Development, L.P. v. CH2M Hill* (2010) 181 Cal.App.4th 10 (holding a design professional was required to defend a third party suit against a developer pursuant to the indemnification provision even though the design professional was not negligent). As a result, if the University is sued on a claim covered by a contractual indemnification provision, it is in a better position to secure protection from the indemnifying party at outset of the claim.

If you have questions regarding indemnification provisions or their application in commercial contracts, please contact the Office of the General Counsel.