

INDEMNITY



INDEMNITY

- Types I, II and III
- *MacDonald & Kruse v. San Jose Steel*, 29 Cal.3d 413 (1972).
- Type I: express statement that indemnitor indemnifies Indemnatee for its own negligence.
- Type II – not cover indemnatee's own negligence.



INDEMNITY

- Active/passive dichotomy not dispositive, but depends upon contract interpretation, and parties' intent. *Rossmoor Sanitation Inc. v. Pylon, Inc.*, 13 Cal.3d 622 (1975).
- "Benefit of bargain" rule can turn Type II into strong indemnity, if indemnitee deprived of benefit of bargain. *Morton Thokol v. Metal Building*, 193 Cal.3d 1025 (1987).



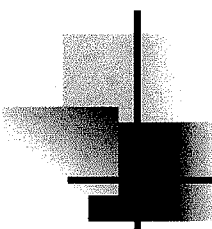
INDEMNITY

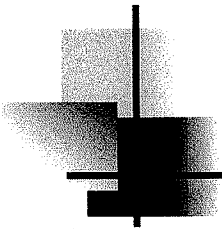
- No mechanical application of Type I or II or III.
- Interpret language per parties' intent. . . . Inquire into circumstances of injury or damage.
- Need clear expression of intent to indemnify under circumstances. *Heppler v. J.M. Peters*, 73 Cal.4th 1265 (1999).



Interpretation of Subcontract Indemnity Clauses

- The Court in *Centex Construction Company v. Dale Tile Company*, 93 Cal. Rptr. 2d 259 (2000), dealt with an indemnity clause in Dale Tile's subcontract agreement. Dale agreed to indemnify the developer with respect to all work which is covered by, or incidental to, the subcontract.
- Dale argued that it was not required to indemnify Centex in the absence of some showing that it had been negligent.
- The Court of Appeal in *Centex* held that the language of the parties' contract imposed no requirement that the developer prove that Dale Tile was negligent.

- 
-
- The Court indicated that the express assumption by Dale of the "risk" attendant to its work on the project, including allegations of negligence, contemplated more than the narrow risk of its own actual negligence or fault.
 - Therefore, the Court held that under the contract (as interpreted), the developer was only required to show that the claim was "connected to" Dale Tile's work; and that it did not grow out of Centex's sole negligence or willful misconduct.
 - The *Centex* Court noted that *Regan Roofing Company*, 24 Cal. App. 4th 425 (1994) was not intended to suggest that an indemnity from a faultless indemnitor was in any manner improper or unusual.

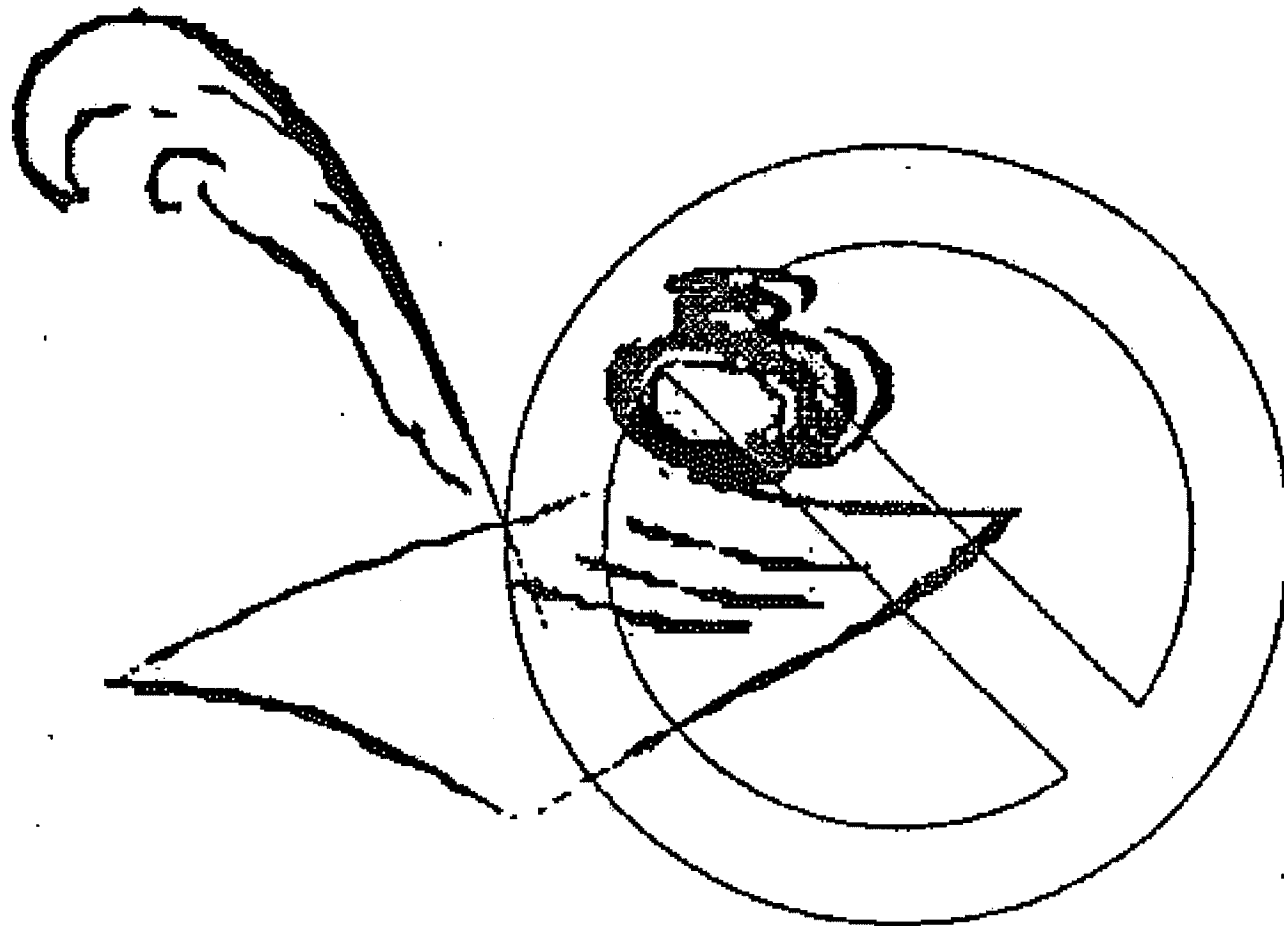
- 
-
- The Court in *Centex* distinguished *Heppler*, 73 Cal. App. 4th 1265 (1999), arguing that the contractor in *Centex*, unlike that the contractor in *Heppler*, was not the builder of a large residential tract, and, therefore, did not have a unique ability to pass on the cost of defects to its customers.
 - The Court in *Centex*, suggested that when the general contractor is not a mass producer of homes, it is reasonable to require that subcontractors (like the general contractor itself) would contribute without regard to fault to the defense or settlement of claims made with respect to the subcontractor's work.



INDEMNITY

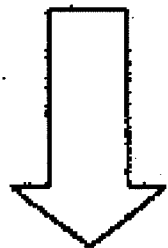
- Indemnitor must pay Indemnitor's defense costs whether or not Indemnatee tenders its defense to Indemnitor in *City of Watsonville v. Corrigan*, 149 Cal.App.4th 1542 (2007).
- An individual's contractor's license does not protect a corporation who subcontracts under Cal. Bus. & Prof. Code § 7031 in *OPP v. St. Paul Fire & Marine Insurance Co.*, 154 Cal.App.4th 71 (2007).

Limitations on Contractual Indemnity Agreements



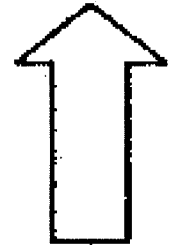
TRADITIONAL COMMERCIAL PROJECT

Money
Flows
down



Project Owner/Developer

Indemnities
Flow up



Architect

General
Contractor

Design
Consultants

Engineers

Subcontractor

Subcontractor

Professional Liability (E&O)
Claims Made Coverage

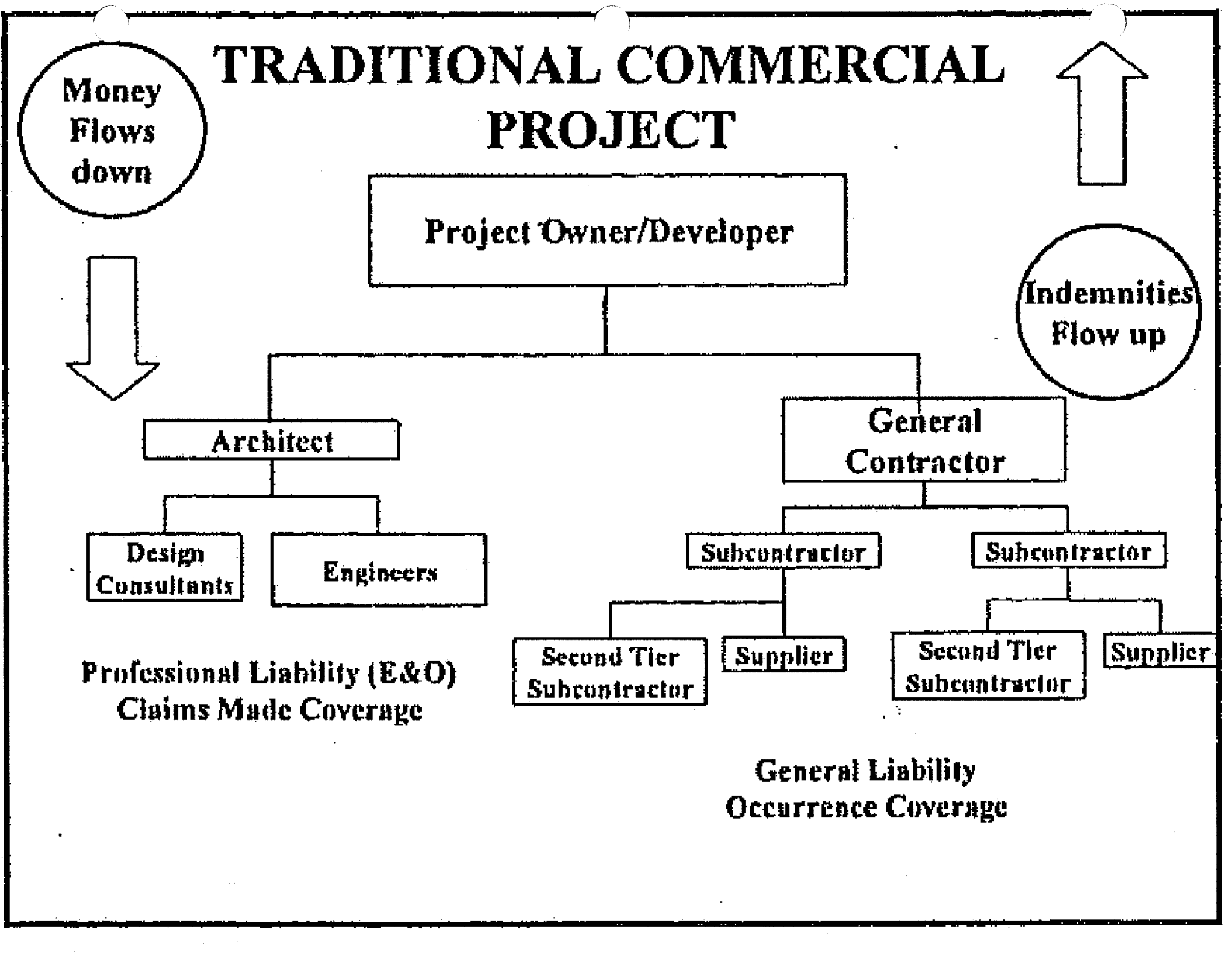
Second Tier
Subcontractor

Supplier

Second Tier
Subcontractor

Supplier

General Liability
Occurrence Coverage



Types of Contractual Indemnity Agreements

- A “Type I” indemnity will protect the person to be indemnified (“indemnatee”) from liability, regardless of the active negligence of the indemnatee.
- A “Type II” indemnity will protect the indemnatee from liability arising from the indemnatee’s passive negligence or vicarious liability, but not from the indemnatee’s active or concurrent negligence.

Indemnification Forms

"Type I" Indemnity

SECTION 10. TERMINATION. (1) Should Subcontractor fail to rectify any contractual deficiencies, including failure to pay its liabilities, within five (5) working days from receipt of Contractor's written notice, Contractor shall have the right to take whatever steps it deems necessary to correct said deficiencies and charge the cost thereof to Subcontractor, who shall be liable for the full cost of Contractor's corrective action, including overhead, profit and actual attorneys' fees. (2) Contractor may at any time and for any reason terminate Subcontractor's services hereunder at Contractor's convenience; in the event of termination for a convenience, Subcontractor shall receive only the actual cost of work completed to the date of termination, in approved units of work in percentage of completion, plus fifteen percent (15%) of the actual cost of the work for overhead and profit. Subcontractor shall not be entitled to any claim or fee against Contractor or Owner for any additional compensation or damages in the event of such termination.

Section 11. Indemnification...The Indemnity shall apply regardless of any active and/or passive negligent act or omission of Owner or Contractor...

IT IS THE POLICY OF SUBCONTRACTOR THAT THE CONTRACTED WORK IS SECURED BY CONTRACTOR.

SECTION 12. INSURANCE. Subcontractor shall, at its expense, procure and maintain insurance on all of its operations, with coverages acceptable to Contractor, and in amounts acceptable to Contractor and as required by the prime contract, including the following coverages:

- a. Workers' Compensation and Employer's Liability Insurance
- b. Comprehensive General Liability or Commercial General Liability Insurance covering all operations and
- c. Automobile Liability Insurance, including coverage for all owned, hired and non-owned automobiles.

Indemnification Forms

Section 3.18.1 Indemnification...Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants...

Reference is promptly furnished to the Architect.

...but only to the extent caused by the negligent acts or omissions of the Contractor, a subcontractor, anyone directly employed by them or anyone for whose acts acts as they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

ARTICLE 4 ADMINISTRATION OF THE CONTRACT

4.1 ARCHITECT

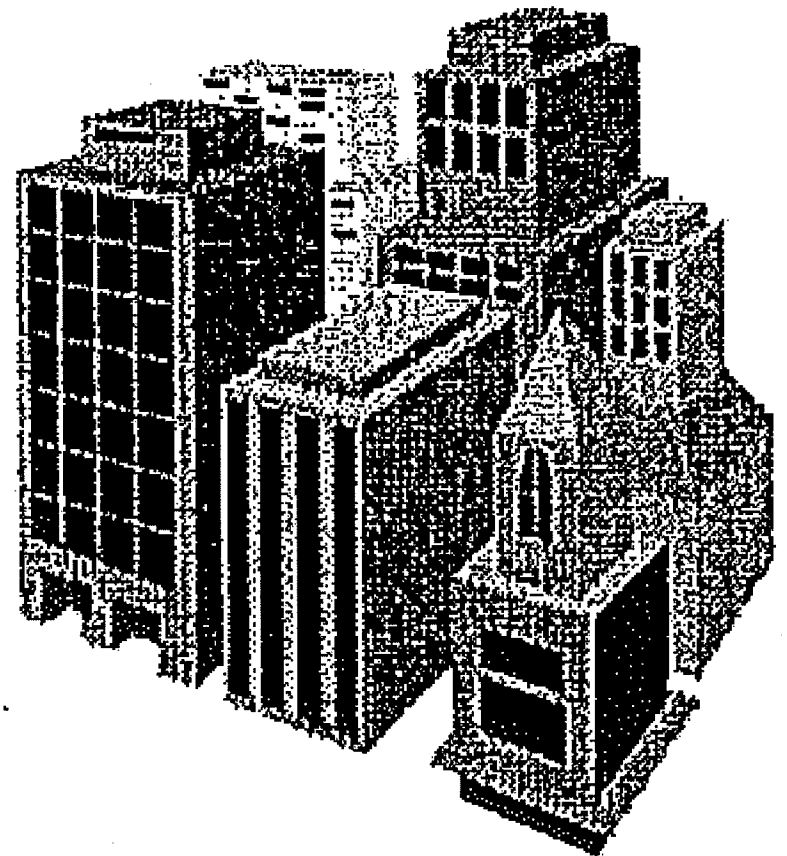
4.1.1 The Architect is the person lawfully licensed to practice architecture or an entity lawfully practicing architecture identified as such in the Agreement and is referred to throughout the Contract Documents as "Architect" or "Architect's" or "Architect's authorized representative."

AIA A201 Form

Centex Golden v. Dale Tile Co.

(2000) 78 Cal.App.4th 992

Issue: Was an indemnity clause sufficient to trigger subcontractor indemnity obligations—even if the subcontractor was not negligent?



The Holding in Centex Golden

Based on the specific language of the indemnity to Centex, Dale-Tile was required to defend and indemnify Centex, even in the absence of any negligence by Dale-Tile.

