INDEMNIFICATION AGAINST TORT LIABILITY—THE "HOLD HARMLESS" CLAUSE—ITS INTERPRETATION AND EFFECT UPON INSURANCE

By LAWRENCE POTAMKIN † AND NORMAN L. PLOTKA ‡

Introduction

Mathematicians will tell you, categorically and without the slightest equivocation, that you cannot combine or permute one object, that until you are ready to concern yourself with the plural you cannot deal with combination or permutation. But mathematicians have reached this conclusion without the benefit of training in the law. They think that having designated an object, a number, a clause, as A it thereafter remains A. We lawyers know otherwise. We know often the clause designated A by Judge Smith may be better called B if the judge is Jones rather than Smith. And, though thereafter the judge remains Jones, a change in his diet may make BC. Thus, in the law, we find that the plural is often contained in the singular, that one may be many. This we lawyers know. But few know which type of clause is entitled to first honors in the variety of interpretations enjoyed. The writers believe that the "hold harmless" clause wherein one party to a contract agrees to indemnify the other party against tort claims is that one. The writers also believe that the hold harmless clause may prove a veritable Frankenstein monster to its creators, threatening the security which their insurance would otherwise provide. We offer the following in substantiation of these beliefs.

†A.B., 1927, LL.B., 1930, University of Pennsylvania; Chief of the Operations Section of the Rural Electrification Division, Office of the Solicitor, United States Department of Agriculture.
‡A.B., 1934, LL.B., 1937, University of Pennsylvania; Assistant Chief of the Operations Section of the Rural Electrification Division, Office of the Solicitor, United States Department of Agriculture.
There are many types of hold harmless clauses which purport to indemnify against tort liability, and the possible variations within each type are infinite in number. For the purposes of this study, however, it will be sufficient to categorize them as unilateral and bilateral clauses; i.e., those in which one of the parties to the contract agrees to hold the other party harmless, and those in which each of the parties agrees to hold the other harmless. Similarly, in considering the problems of insurance created by the use of hold harmless clauses, an adequate categorization is had by classifying the problems under three types: (1) both parties maintain insurance; (2) only one of the parties maintains insurance, the other being a self-insurer; and (3) both of the parties are self-insurers. In this discussion, we shall concern ourselves first with the problems of interpretation of hold harmless clauses—both bilateral and unilateral—and then with the effect of such clauses upon the insurance coverage of the indemnitor. In discussing the insurance aspects, we shall deal primarily with the bilateral hold harmless clause where both parties maintain insurance, for it is in this type of situation that the case against the hold harmless clause is strongest. It is believed that a discussion of the problem along these lines will, to a large extent, clarify the difficulties which would be encountered in all types of such cases.

Bilateral hold harmless clauses are generally employed because they seem so eminently fair—and so harmless. They result, in most cases, from the understandable desire of the parties to define their respective obligations and to delineate accurately their respective fields of liability. Unilateral hold harmless clauses, on the other hand, are included in agreements at the insistence of the party to be indemnified, who holds the "whip-hand" and can compel compliance of the other party with even his unreasonable requests. Unfortunately, in either situation, sufficient attention has not been paid to the many cases in which an attempt has been made to interpret such clauses. Were the parties to a contract to make such a study, it is highly probable that bilateral hold harmless clauses would largely disappear from use—and the number of unilateral clauses would greatly decrease, or at least the draftsmanship would be much improved. The decisions on the subject could hardly create a more confused picture. It is safe to say that respectable authority can be found to support any apparently reasonable interpretation of a hold harmless clause—and, in many cases, even a patently unreasonable interpretation. It is, therefore, also safe to say that there are innumerable situations to which the hold harmless clause might apply in which there can be no certainty as to how a court will interpret the clause.
INDEMNIFICATION AGAINST TORT LIABILITY

Problems of Interpretation

The general rule of interpretation of hold harmless clauses is the same as in the case of other types of contracts: "The general rules which govern the construction and interpretation of other contracts apply in construing a contract of indemnity and in determining the rights and liabilities of the parties thereunder. In accordance with such rules the important question for determination is the intention of the parties." 1

And as is also true in other cases where written language is to be construed, the courts have formulated rules of construction for "ambiguous" hold harmless clauses, where the intent of the parties is not "clearly" expressed. It is in the omnipresence of ambiguities, and the infinite variety of the rules formulated for resolving these ambiguities, that the hold harmless clause achieves its distinctiveness. Thus, if you represent an indemnitee you can cite cases as authority for the proposition that such clauses are to be construed in favor of the indemnitee. 2 You can quote such statements as the following to sustain you: "All fair doubts of construction of such instruments as those exhibited, when their language is ambiguous and susceptible to more than one meaning, must be resolved in favor of and to the end of the protection accorded by the instrument to the party intended to be indemnified." 3 Should you represent an indemnitor, there is still plentiful authority to support your claim that such clauses are to be construed in favor of the indemnitor. 4 The cases abound with statements which you can quote to sustain you, such as "Such contracts of indemnity are to be strictly construed in favor of the indemnitor, and it cannot be extended by construction or implication beyond its plain terms." 5 In fact, even where the indemnitor is an insurance

1. First Trust Co. v. Airedale Ranch & Cattle Co., 136 Neb. 521, 531, 286 N. W. 766, 772 (1939). To the same effect, see United States F. & G. Co. v. Schwalbe, 64 Ga. App. 413, 13 S. E. (2d) 512 (1941). See also Moriarty v. Tomlinson, 58 S. D. 431, 434, 235 N. W. 363, 364 (1931), where the court said: . . . manifestly there can be no precise rule for the interpretation of such contracts, but each must rest upon the construction of the particular contract under consideration, and the contract must be given that construction which will most nearly carry out the intention of the parties.


company, and has been paid a premium for its obligation, there is authority for giving it the benefit of any doubtful construction, although this is, of course, not the usual rule.

Thus we find that it is the intent of the parties that controls. But in the event of ambiguity—and when was there ever hold harmless language without such an event?—the court magnanimously offer you a plethora of rules from which to choose your very own for your argument, always, however, reserving unto themselves a like store of wisdom from which to make their selections.

Leaving this realm of clarity of thought and certainty of decision for the specific questions which may arise in the application of the general rules, we find that one of the most common problems is whether the indemnitee is to be protected against his own negligence. It is well established that there is no public policy opposed to indemnifying a party against the results of his own negligence. Moreover, where such a provision is an integral part of a larger arrangement, it is not considered to be insurance within the meaning of the statutes regulating the conduct of the insurance business, although it accomplishes the same result as insurance by shifting the risk of loss from the party legally responsible to his indemnitior. Difficulties are, how-

6. Tulare County Power Co. v. Pacific Surety Co., 43 Cal. App. 315, 327, 185 Pac. 399, 404 (1919), where it was said, “A contract of indemnity is to be strictly construed, and the contract of indemnity measures the rights of the parties thereto, and consequently, the liability of the indemnitior.”

7. See Barratt et al. v. Greenfield, 137 Pa. Super. 310, 313, 9 A. (2d) 188, 189 (1939), where it was said, “While we have held that in cases of corporate sureties, the bond is to be strictly construed in favor of the obligee, we have also held that when obligations of suretyship or indemnity are assumed by individuals without pecuniary compensation, their obligations are not to be extended by implication or construction. Their liability is strictissimi juris.” See also Alabama Fid. & Cas. Co. v. Alabama Penny Sav. Bk., 200 Ala. 337, 76 So. 103 (1917); Barnard v. Megorden et al., 94 Ind. App. 391, 178 N. E. 888 (1931).

In Cacey v. Virginian Ry. Co., 85 F. (2d) 976, 979 (C. C. A. 4th, 1936), a slightly different test was adopted. The court, in holding an indemnity clause to extend to a case where the indemnitee was negligent, disposed of the cases which prescribe strict construction in favor of the indemnitior thus: “The decisions relied upon on behalf of the defendants [indemnitors] deal with indemnity clauses contained in contracts from which the indemnitee derived some benefit, either direct or indirect, and they are not controlling here.” That is, if the contract confers no benefit on the indemnitee, it is not to be strictly construed in favor of the indemnitior. There are obvious difficulties inherent in such a rule, not the least of which is the question of what constitutes a “benefit” and what is to be done where both parties benefit.


ever, immediately encountered when the parties fail to refer expressly to negligence in their contract.

Courts agree that if the parties intend to cover negligent acts, effect will be given to their intent. Many courts then say: "A contract of indemnity will not be construed to indemnify a person against his own negligence where such intention is not expressed in unequivocal terms," 10 and "No inference from words of general import can establish it." 11 Where the injury is caused by the sole negligence of the indemnitee, without the fault of the indemnitor, it is understandable that courts will make an effort to relieve the indemnitor of liability to the negligent indemnitee. In many such cases, all-inclusive language is read as if there were an additional provision intended by the parties and inserted in the contract by the court on their behalf, whereby injuries caused by the sole negligence of the indemnitee are excepted from the scope of the hold harmless clause. Courts find justification for such re-writing of contracts in various ways. They stress sometimes the fact that the hold harmless clause is merely an incident in the main purpose of the contract, 12 or that to give literal effect to the language would be to impose an "unusual and extraordinary" contract upon the indemnitor, 13 and sometimes the question of whether the indemnitor or the indemnitee had control of the premises where the injury occurred is introduced to determine whether the language should be given its literal meaning. 14

Nor do courts hesitate to improve the parties' handiwork by reading in the limitation as to the sole negligence of the indemnitee even where the indemnitor has included a statement that he assumes all of the risks in connection with operations under the contract; he


13. Geo. H. Dingley Lumber Co. et al. v. Erie R. R. Co., 102 Ohio St. 236, 242, 131 N. E. 723, 725 (1921). "The liability of such indemnitee is regarded to be so hazardous, and the character of the indemnity so unusual and extraordinary, that there can be no presumption that the indemnitor intended to assume the liability unless the contract puts it beyond doubt by express stipulation. It cannot be established by inference from words of general import." To the same effect, Perry v. Payne et al., 217 Pa. 252, 66 Atl. 553 (1907).

may still be deemed not to have assumed the risk of liability for things caused by the fault of the indemnitee alone.\textsuperscript{15}

While one might expect the courts to be less sympathetic to the indemnitee where the injury was caused by the concurrent negligence of the indemnitee and the indemnitee than in the sole negligence cases just considered, yet there are many situations where they read into contracts of indemnity exceptions for injuries caused only in part by the indemnitee.\textsuperscript{16} Even the fact that the contract requires the indemnitee to hold the indemnitee harmless from damage caused by the indemnitee's "negligent acts and omissions" may be insufficient to make the indemnity clause applicable where the indemnitee's negligence concurred with that of the indemnitee to cause the injury.\textsuperscript{17} Sometimes the theory of proximate cause is called upon to sustain the violence done the plain language of the contract, as, for example, in a case where the clause referred to "'claims of any kind for damages done or caused in the course of construction'," but damage done by the concurrent negligence of the indemnitee and the indemnitee was held not to have been proximately caused by the indemnitee because of the negligence of the indemnitee,\textsuperscript{18} and this despite the obvious fact that such an interpretation well-nigh destroys the effect of the language used. Degrees of negligence have also been introduced in the course of the courts' straining for justification for denying a literal interpretation of these contracts. Thus, a hold harmless clause was not applied in one case because the "primary negligence" was that of the indemnitee.\textsuperscript{19} Akin to the proximate cause theory is a case in which the indemnitee agreed to hold the indemnitee harmless from loss or injury "done by" him, but in which the clause was not applied because the indemnitee, having been the result of the concurrent negligence of both the indemnitee and the indemnitee, had not been "done by" the indem-


\textsuperscript{17} Shamrock Towing Co. \textit{v.} City of New York, 16 F. (2d) 199, 201 (C. C. A. 2d, 1926).

\textsuperscript{18} North Am. Ry. Const. Co. \textit{v.} Cincinnati Traction Co., 172 Fed. 214, 215 (C. C. A. 7th, 1909), where the indemnitee, a contractor repairing tracks, had failed to protect a ditch into which the indemnitee, a railway company, had allowed a passenger to alight. The indemnitee was denied recovery from the indemnitee of the amount which the indemnitee had been compelled to pay the passenger.

\textsuperscript{19} Pa. Steel Co. \textit{v.} Washington & B. Bridge Co., 194 Fed. 1011 (N. D. W. Va. 1912), where the injuries for which indemnity was sought arose out of the collapse of a bridge, the piers for which were defective because of the contractor-indemnitor's negligence. It was held that if the "primary" negligence was that of the bridge company's engineer, who determined the time for placing the superstructure on the piers, the contractor would not be obligated to indemnify the bridge company.
nitor. In these concurrent negligence cases, as in the sole negligence cases previously considered, the question of whether the indemnitor or the indemnitee had control of the premises where the injury occurred also has been held material.

In many of these cases the language of the hold harmless clause is extensive and fully indicative of an intent to embrace every situation, but to no avail. Thus, a provision whereby an indemnitor agreed to hold harmless an indemnitee “from and against any and all loss, damage, injury, liability, and claims therefor, including claims for injury or death to Company’s employees, howsoever caused, resulting directly or indirectly from the performance of this agreement” was held not to cover a claim for injury caused by the concurrent negligence of the indemnitor and indemnitee. Similarly, a provision in a lease requiring the lessee to hold the lessor harmless “against all claims for damages of whatsoever kind or nature arising in any manner or under any circumstances through the exercise of any right granted or conferred hereby” was held not to cover damage from fire caused by the negligence of the lessor’s employees.

In one situation the courts receive help from the parties even though the contract does not expressly except the indemnitee’s negligence from the application of the hold harmless clause. In cases involving bilateral hold harmless clauses, the fact that the injury was caused by the concurrent negligence of the indemnitor and the indemnitee may produce a sort of reciprocal cancellation of the liability of the parties. Thus, in such cases, the court is compelled to read into the contract the exception that the hold harmless clause shall not apply to

---

20. Walters v. Rao Elec. Eq. Co. et al., 289 N.Y. 57, 43 N.E. (2d) 810 (1942), modifying, 26 N.Y. S. (2d) 403. Similarly, in Flynn v. City of Philadelphia, 197 Pa. 476, 49 Atl. 249 (1901), it was held that only an injury which was negligently caused by the contractor-indemnitor would be within a contract of indemnity against injury received by any party “from the contractor.”


22. Missouri Dist. Tel. Co. v. Southwestern Bell Tel. Co., 338 Mo. 692, 93 S.W. (2d) 19 (1935), where a telegraph company using telephone company poles was held not liable to indemnify former against results of its own negligence because telephone company-indemnitee had chief control over the poles.

23. Pacific Indemnity Co. v. California Electric Works, 29 Cal. A. (2d) 260, 84 P. (2d) 313, 314 (1938). Similarly, a subcontractor who agreed to indemnify contractor “against all suits for claims or damage of any kind, nature and description in connection with the performance of this contract” was held not to have agreed to indemnify the contractor against liability to a representative of one of the contractor’s employees based upon a workmen’s compensation statute. Pennsylvania Tpk. Comm. v. United States Fidelity & Guaranty Co., 343 Pa. 543, 545, n. 1, 23 A. (2d) 416, 417, n. 1 (1942).

the negligence of the indemnitee in order to escape circular, hence endless, reasoning. 25

Where the court has reached the conclusion that the exception for the negligence of the indemnitee should be read into the hold harmless clause, it follows that the indemnitor is not liable for the indemnitee's costs in defending a suit based upon the indemnitee's negligence, even though the indemnitee was not negligent and succeeded in establishing the fact in the proceeding for which he now seeks to recover his expenses. 26

While we have seen that many courts are eager to limit the application of hold harmless clauses so as to exclude coverage where the indemnitee is negligent, there are just as many decisions upholding the application of hold harmless clauses in such situations. Despite all of the authorities of the preceding paragraphs, the indemnitor has no assurance that a hold harmless clause which does not expressly exclude coverage where the indemnitee is negligent will not be held to apply in such a case.

There is one group of cases involving licenses or easements granted by railroad companies which require the person using the premises or equipment of the railroad company to hold the company harmless from all claims for damages or injury arising "in any manner" or "directly or indirectly" from the exercise of the permission or rights granted by the company. In these cases, many courts have held that the fact that the railroad company's negligence has caused the injury will not defeat its right to be indemnified under the hold harmless clause. 27

INDEMNIFICATION AGAINST TORT LIABILITY

In the cases previously considered, it was frequently said that "no inference from words of general import can establish" the intent that the hold harmless clause apply where the indemnitee is negligent. In the cases now to be examined this principle is met with the statement that while the intent to indemnify against the results of the indemnitee's negligence must be clear, it need not be express. The principle also stated in the cases previously considered that contracts of indemnity are to be strictly construed so as to favor the indemnitor is disposed of with the statement that there is no ambiguity in the hold harmless clause, despite the fact that the language is identical with that of the cases where other courts found it necessary to resort to that rule of construction because of the "ambiguity" of the hold harmless clause.

Another large group of cases in which hold harmless clauses are held applicable despite the negligence of the indemnitee involves construction contracts wherein the contractor agrees to hold the owner harmless from claims in connection with the work, or the subcontractor agrees to a similar provision to protect the contractor. In these cases, the language of the hold harmless clause is no more specific or expressive of an intent to apply to the indemnitee's negligence than that in the cases cited earlier which said that such an intent must be "clear and unequivocal" before effect would be given to the clause in such a situation.

Some courts in applying the hold harmless clause in these cases rely upon the degrees of negligence theory mentioned earlier, holding,

City of Polytechnic et al., 236 S. W. 73 (1922), modifying, 217 S. W. 730 (1919), where a city granted a railway company the right to maintain tracks in its streets, the company agreeing to hold the city harmless from claims arising by reason of the construction, maintenance and operation of the railway. A member of the public was injured by the failure of the city and the company to guard a ditch in the street in connection with the repair of the tracks and the company was required to indemnify the city under the agreement, notwithstanding the city's negligence.


30. Southern Pac. R. R. Co. v. Fellows et al., 22 Cal. A. (2d) 877, 71 P. (2d) 755, 776 (1937), where contractor, agreeing to hold indemnitee harmless from all claims "resulting directly or indirectly from the work," was held liable to reimburse indemnitee for judgment obtained by contractor's employee injured through indemnitee's negligence; John Griffiths & Son Co. v. National Fireproofing Co., 310 Ill. 331, 141 N. E. 739 (1923); Heman Const. Co. v. City of St. Louis, 256 Mo. 332, 165 S. W. 1032 (1914); St. Louis & S. Ry. Co. v. Stewart, 187 S. W. 536 (Mo. 1916); Mercante v. Hygrade Food Products Corp., 17 N. Y. S. (2d) 625, 258 App. Div. 641, reversing, 18 N. Y. S. (2d) 271 (1940); Allen v. J. G. McDonald Chocolate Co., 62 Utah 273, 218 Pac. 971 (1923); Hartford Acc. & Ind. Co. v. Worden-Allen Co., 238 Wis. 124, 297 N. W. 436 (1941).

31. Note 19 supra.
however, that because the indemnitee's negligence was merely "passive" it would not interfere with the application of the hold harmless clause,\(^{32}\) just as other courts held that because the indemnitee's negligence was "primary" the clause should not be applied.\(^{38}\) In these cases, too, stress has been laid upon the "hazardous" nature of the work the indemnitee was engaged in doing and the serious danger of liability on the indemnitee as justification for his entering into a contract containing a hold harmless clause which would protect him against all such liability whether he was negligent or not,\(^{34}\) just as the likelihood of liability attaching as a result of the work was relied on in the cases considered earlier to establish the intent of the parties that it was not to apply where the indemnitee was negligent.\(^{35}\) Moreover, just as we have seen that an indemnity clause is frequently held not to apply where the indemnitee is negligent even though the indemnitor is also negligent,\(^{36}\) so an indemnity contract has been held applicable where the indemnitee is negligent even though the indemnitor is not negligent.\(^{37}\)

Although, as has been noted before herein, there is no public policy opposed to the indemnification of a party against the results of his negligent acts,\(^{38}\) there are many cases in which other considerations of public policy are raised and occasionally relied upon for the construction placed upon the hold harmless clause—thus imposing another obstacle for the intent of the parties to hurdle. Of course, the general principle that "a contract of indemnity based upon the performance of illegal acts is void and will not be enforced by the courts" is accepted on all sides.\(^{39}\) But the mere fact that the indemnitee violated a statute and so contributed to the loss from which he was to be indemnified is insufficient to deny the application of the hold harmless clause on grounds of public policy.\(^{40}\) The test of the validity of the indemnity


\(^{33}\) Note 19 \textit{supra}.

\(^{34}\) Walton v. Cherokee Colliery Co., 70 W. Va. 48, 73 S. E. 63 (1911).

\(^{35}\) Note 13 \textit{supra}.

\(^{36}\) Note 16 \textit{supra}.


\(^{38}\) Note 8 \textit{supra}.

39. Lebanon Carriage Co. v. Faulkner, 25 Ky. 1903, 76 S. W. 1083 (1903) (where covenant in lease was held unenforceable in which lessor agreed to indemnify lessee against liability for maintaining a public nuisance); Boylston Bottling Co. v. O'Neill, 231 Mass. 498, 121 N. E. 411 (1919) (where bond was held unenforceable which indemnified against employee converting packages entrusted to him, indemnitee being engaged in bootlegging); Mattera v. Mele \textit{et al.}, 263 App. Div. 550, 551, 33 N. Y. S. (2d) 545, 546 (1942). It has been said that if the indemnitor had no knowledge of the illegality, the indemnity will be enforced. Whinnery v. Wiley, 38 Colo. 203, 88 Pac. 171 (1906). See Owens v. Henderson Brewing Co., 185 Ky. 477, 215 S. W. 90 (1919).

agreement in these cases seems to be whether the consideration for the agreement is the doing of the illegal or tortious act and whether the enforcement of the agreement will have the effect of inducing the commission of the illegal or tortious act. The inducement reasoning is apparently not applied where only the negligence of the indemnitee is involved and even in those cases where the courts read into the hold harmless clause an exception as to the negligence of the indemnitee, it is usually admitted that the basis for the court's action is not the belief that to rule in favor of the indemnitee would offend public policy by inducing negligent conduct on the part of the indemnitee, but rather that the parties have not expressed their intent clearly enough to have the clause apply to such cases.

In contrast to the situation where considerations of public policy persuade the courts to hold the clause inapplicable, there is the case where an exception is created to an otherwise well-established rule of public policy to permit the hold harmless clause full effect. Thus, despite the general rule that common carriers may not by contract avoid liability for their own negligence, it is not contrary to public policy for a common carrier to contract that it shall be held harmless from liability for a claim arising out of its own negligence, provided the contract relates to its so-called "private" business and not the business in which it is engaged in serving the public generally.

Uncertainties may arise in the interpretation of hold harmless clauses with respect to the question of whether the indemnitee may recover upon proof of his liability for the claim against which he is to be indemnified or whether he must establish in addition the fact that he has sustained loss thereby. It has been said that "the distinction

41. John Griffiths & Son Co. v. National Fireproofing Co., 310 Ill. 331, 141 N. E. 739 (1923); Northern Pac. Ry. Co. v. Thornton Bros. Co., 206 Minn. 193, 197, 288 N. W. 226, 228 (1939) (where the court said: "Quite fanciful is the suggestion that to hold as we do is 'to put a premium on negligence rather than to discourage it'. . . . Particularly in the field of railroads and construction contractors, the results of negligence are so onerous and, the humanities and money loss aside, so altogether annoying, that only the extreme of inexperience would harbor the thought that a contract of the instant sort would operate in the slightest degree as a premium on and so an inducement to negligence."); Hartford Accident & Ind. Co. v. Worden-Allen Co., 238 Wis. 124, 297 N. W. 435 (1941).


between contracts of mere indemnity against loss or damage and indemnity against liability is well established. No liability arises in the first-mentioned class, until the indemnitee has been damnified by being compelled to pay, or his property has been subjected. . . . In the latter class, as a general rule, the indemnitee's case arises on the contract when the liability is fixed and ascertained. 44 Where the hold harmless clause expressly states that the indemnitee is to be indemnified against "any pecuniary loss" from certain acts, it is clear that such loss must be shown by the indemnitee. 45 Where, however, indemnity provisions are ambiguous, there is some conflict as to the rule of construction to be followed to settle the question. On the one hand, it has been said, "A covenant to indemnify and save harmless against any and all claims and demands for damages has been consistently construed as an indemnity against actual loss in contradistinction to an indemnity against liability." 46 On the other hand, the rule has been stated that in the absence of an express provision requiring proof of loss to be made before the indemnity action will lie, the contract of indemnity should be construed to be one against liability. 47 Another test employed for solving this problem of indemnity against liability or against loss has been to determine whether the indemnitee is obligated to perform an act or do a particular thing, which if done will prevent liability on the part of the indemnitee, or whether the indemnitee is obligated merely for the payment of money. If it is the former, and the indemnitee fails to perform that act, the indemnity is one against liability and the indemnitee may recover without proof of loss. 48 Where this test is used, the mere fact that the contract does not say expressly that the indemnitee shall be held harmless against liability will not prevent the contract from being an indemnity against liability rather than against loss. 49

Once it has been determined that the hold harmless clause is applicable, there are still several questions which might arise as to the extent of the protection afforded by the indemnity. Where the con-

44. King v. Capitol Amusement Co., 222 Ala. 115, 116, 130 So. 799, 800 (1930).
45. National Slovak Soc. v. Matlocha, 307 Ill. App. 41, 42, 29 N. E. (2d) 946, 946 (1940). Cf. King v. Capitol Amusement Co., 222 Ala. 115, 116, 130 So. 799, 800 (1930), where the indemnity was against any "loss or damage in the event of any suit," but was construed as an indemnity against liability rather than loss, the words "in the event of any suit" being relied upon to counteract the references to loss and damage.
46. First Nat. Bank v. Bankers' Trust Co., 271 N. Y. S. 191, 197, 151 Misc. 233, 239 (1934). The court gave as the reason for its decision the principle that a "court of law will only compensate for loss actually suffered—unless the parties have expressly contracted otherwise."
tract is silent as to interest, should interest be included in the amount awarded to the indemnitee? Here again there is no uniformity in the decisions. Even within the same jurisdiction there are cases which reach opposite conclusions on this question.50 Similarly, with respect to the question of including attorney's fees and court costs in the damages for which the indemnitee should be reimbursed, there is no settled principle. On the one hand, it is said "In actions brought to recover indemnity, where the right to indemnity is either implied by law or under a contract, costs, including reasonable counsel fees, which have been incurred in resisting the claim indemnified against, may be recovered." 51 This statement of the rule is frequently qualified, however, by requiring that the defense of the suit shall have been tendered to the indemnitee and refused by him.52 Contrariwise, it has been held that the rule of construction which requires contracts of indemnity to be strictly construed in favor of the indemnitor bars a claim for attorney's fees unless an express obligation to pay such claim is contained in the contract.53 As to the payment of attorney's fees in connection with suits to enforce the indemnity agreement, "The general rule is that signers of indemnity or guaranty contracts are not liable for attorney's fees incurred in suits to enforce the same, in the absence of an express stipulation." 54 Disputes may arise under hold harmless clauses over the indemnitee's right to settle a claim for which he is to be indemnified by the indemnitor, without having his liability therefor fixed by a court. Such settlements usually are made at the risk of the indemnitee and he must

50. In Great Northern Ry. Co. v. Washington Electric Co., 197 Wash. 627, 632, 86 P. (2d) 208, 211 (1939), the indemnitee agreed to pay the indemnitee for all "loss, cost, damage or expense of every kind and nature at any time or in any manner caused by" the indemnitor's dam. Because of the dam, the indemnitee had to relocate its railroad tracks. The indemnitee paid the cost of relocation, but would not pay interest on this amount from the time of the relocation to the time of payment of the cost, which had been delayed somewhat by litigation. The court held that the indemnity agreement did not require the payment of interest, despite the fact that the loss of the use of this money during this period would appear to be a "damage" suffered by the indemnitee as a result of the dam. On the other hand, in National Bank of Tacoma v. Aetna Casualty & Sur. Co., 161 Wash. 239, 241, 250, 256 Pac. 831, 832, 835 (1931), a bank loaned money to a material supplier, relying upon an agreement by the indemnitee to indemnify the bank against "any direct or indirect damages that may be suffered or claimed for lack of delivery of material within the time called for". The material supplier failed to make delivery of the materials and the bank was held entitled to recover from the indemnitor the amount of its loan plus interest, the court saying "as a necessary part of his damages, an indemnitee may also recover against his indemnitor interest, after due notice to the indemnitor of the loss and damage." 51. Employers' Liability Assurance Corp. v. Citizens Nat. Bank, 85 Ind. App. 169, 151 N. E. 366 (1926); Hartford Acc. & Ind. Co. v. Casassa et al., 301 Mass. 246, 255, 16 N. E. (2d) 866, 866 (1938). 52. Byron Jackson Co. v. Woods et al., 41 Cal. App. (2d) 777, 107 P. (2d) 639 (1940); Fidelity & Cas. Co. of N. Y. v. Mauney, 273 Ky. 400, 116 S. W. (2d) 966 (1938). 53. Rublee v. Stevenson, 161 S. W. (2d) 528 (Tex. Civ. App. 1942). 54. Miller et al. v. Bush et al., 42 S. W. (2d) 156, 159 (Tex. Civ. App. 1931).
prove in the suit against the indemnitor that he was legally liable for
the claim which he settled. The fact that the settlement was a fair
one and made in good faith will not entitle the indemnitee to his indem-
nity if in fact there was no legal liability for the claim. If, however,
the indemnitee before entering into the settlement tenders the defense of
the claim to the indemnitor, who refuses to undertake the defense, the
 indemnitee may make the settlement and recover from the indemnitor.
Similarly, where the indemnitee tenders the defense of the claim to the
 indemnitee who refuses it and the suit proceeds to judgment, the indem-
nitor is precluded by the judgment whether he was a party to the pro-
ceedings or not.

We have been discussing hold harmless and indemnity clauses in
which the language of hold harmless and indemnity is used. There are,
however, many cases where the parties included in their agreements
liability clauses which do not contain such language, such as where
territories are allocated and it is provided that neither party shall be
liable to the other for damage or injuries occurring in the territory of
the other. The result is merely to preface all of the uncertainties and
difficulties which we have noted above as attendant upon the use of
hold harmless clauses with the problem of determining whether the
liability clause is to be construed as one of indemnity or merely as a
statement of the division of responsibility between the parties, without
any intent to shift the burden of loss from the one upon whom it falls.
There does not appear to be any general rule in these cases to assist
in determining what constitutes a promise to indemnify. The usual
rules for ascertaining the intention of the parties to contracts generally
apply. It is also clear that the words "hold harmless" or "indemnify"
are not necessary in order to establish the intention for an indemnity
contract. A promise "to assume all risks" of certain accidents is suffi-
cient to constitute an agreement to indemnify against claims arising out

55. State v. City of Bremerton, 2 Wash. (2d) 243, 97 P. (2d) 1066 (1940);
Oregon-Washington R. R. & N. Co. v. Washington Tire & Rubber Co., 126 Wash. 565, 219 Pac. 9 (1923). Some hold harmless clauses attempt to give the indemnitee the
right to settle the claims indemnified against in any way that seems advantageous to
the indemnitee. It is likely that courts would prevent arbitrary and unreasonable
actions on the part of the indemnitee, but there is no doubt that they would allow con-
siderable freedom of action on the part of the indemnitee before a settlement would be
declared to be beyond the protection of the hold harmless clause.

56. Ibid.

1055 (1938). This result was reached even though the indemnity contract contained
a provision that the indemnitor would pay the indemnitee only after a judgment had
been obtained against the indemnitee and that no settlement of the claim indemnified
against should be made by the indemnitee without the indemnitor's consent.

58. Municipal Service Real Estate Co., Inc. v. D. B. & M. Holding Corp. et al.,
of such accidents. Similarly, a statement that "this is a release from" certain claims arising out of a sale has been held a contract of indemnity against such claims. But the mere statement in a contract that a contractor shall carry workmen's compensation and public liability insurance for certain activities in connection with construction cannot be interpreted as a contract to indemnify the other party against liability arising out of these activities.

The foregoing discussion has been directed toward a clearer recognition of the dangers and difficulties inherent in the use of hold harmless and liability clauses, dangers and difficulties which spring at least in part from the tendency to use familiar terminology without giving careful thought to its meaning in the particular case, merely because such terminology has been used for many years in the law. Such dangers and difficulties can be partially, but not entirely, overcome by the exercise of discrimination in the choice of language and in the selection of the words that fit precisely the parties' intent, whether they have behind them the custom of long usage or not.

It is, however, impossible to foresee all of the situations which may arise and, regardless of the degree to which the provision is detailed, there is a strong probability that situations not provided for will be encountered. In such a case it is highly probable that the rule of expressio unius will be applied to prevent the clause from applying to the particular situation. Furthermore, if the spelling out, as is so often the case, amounts merely to a statement of the law, it is either surplusage or it may be given an interpretation not contemplated, since a court might well conclude that the parties intended to create a relationship other than the one which the law would have created for them had there been no hold harmless clause. In addition, to the extent that the detailed provisions actually do or are interpreted to depart from the type of liability that the law would create without the clause, there is the danger of the provision being held inapplicable on the ground that it contravenes public policy, or of being interpreted in a manner not contemplated by the parties.

This is, of course, a problem in the preparation of many written documents. The problem is, however, much more difficult in this type of case because of the antipathy which so many courts have expressed towards hold harmless clauses. And in other types of cases where it is found difficult to spell out the obligations of the parties, the solution

may be found in the use of general and all inclusive language. In the case of hold harmless clauses, however, the use of general language may, if anything, create even greater difficulties. Careful detailing is, therefore, the shorter horn of the dilemma.

Having surveyed the cases construing and applying hold harmless clauses, it would be well for us now to review a few of the more common types of such clauses and to consider some of the varied problems which may arise thereunder. It is quite customary for a power company selling energy in large amounts to another company to insist upon a hold harmless provision such as “the electrical energy sold hereunder shall become the property of the purchaser when it passes the point of delivery and each party shall hold the other party harmless from all claims based upon damages or injuries resulting from the presence of the energy in such party’s system.” This provision certainly has all the aspects of fairness and it is not because it is unfair that it is objectionable, but rather because there are too many unanswered and unanswerable problems which may arise thereunder. For example, suppose that the negligence of one of the parties causes an electrical disturbance on the other party’s system and such electrical disturbance in turn causes damages or injury to a third party. Would the hold harmless clause require such other party to protect the first party from any costs or loss resulting from the latter’s negligence? As we have seen above, the answer is obviously “yes”—but, on the other hand, it is clearly “no.”

In addition to the problem of whether or not the clause applies in this type of case, the extent to which it applies would also present a difficult problem. Is the indemnitee required to tender the defense of the claim against him to the indemnitor or may he defend the claim and look to the indemnitor for reimbursement? If the indemnitee so requests or permits, must the indemnitor immediately assume the defense of the claim against the indemnitee, or may he await the outcome? If he awaits the outcome, shall he be required to pay to the indemnitee all of the latter’s costs, including the attorney’s fees?

Another type of difficulty which may be created by hold harmless clauses is the one which specifically requires one party to defend an action against the other party. For example, it is not uncommon to have parties provide that “each shall defend and hold the other harmless from claims based upon the presence of electrical energy in its own system unless the injury or damage complained of results from the sole negligence of such other party.” Now let us follow this hold harmless clause in its application to a hypothetical, but very probable, situation. Suppose A and B are the parties. B is sued for injuries which are suffered from contact with A’s lines. If B then calls upon
INDEMNIFICATION AGAINST TORT LIABILITY

A to defend the action against B, B will be creating a very dangerous situation for himself, because there will be every incentive for A to prove that B was solely negligent. After all, if B was solely negligent, the hold harmless clause does not function and A will suffer no loss. If B, recognizing this danger, proceeds to defend the case against him without first obtaining A's permission to do so, it is conceivable that A would be relieved of his obligations under the hold harmless clause for the reason that B had denied him the right to defend the action, which was a corollary to his obligation to do so. In such a case, where B defends the action against him, even if A is not thereby absolved from liability, a difficult situation still faces B if he loses the case. The judgment against him has proved him negligent. It has not settled the issue of sole negligence. A may very well take the position that B was solely negligent, thereby requiring B to sue him and the issue in that suit would be whether or not B was solely negligent.

There is yet another type of situation which is apt to prove troublesome, i.e., the hold harmless clause which specifically provides that one party hold the other harmless from the results of such other party's deliberate acts. As we have already seen, one of the few well settled points in suretyship and, therefore, hold harmless law, is that an agreement to protect a person from the results of his illegal acts is not enforceable. Ergo, an agreement to protect a person from the results of his own deliberately wrongful acts would not be enforceable. However, where the parties to the agreement are corporations and the agreement provides that each shall hold the other harmless from the results of certain deliberately wrongful acts of the other's employees, the above stated rule of public policy may not be held applicable. Railroad companies, for example, frequently require that in connection with a license to cross their rights-of-way the licensee agree to hold them harmless from any claims connected with the existence of the licensee's property, including claims based upon the deliberate acts of the railroad company's employees. There are jurisdictions in which employers are held liable for the deliberate torts of their employees, and therefore an action against the railroad company alleging the deliberate tort of its employees is quite within the realm of possibility. In such a case it would hardly seem to contravene public policy to permit the railroad company to seek protection or reimbursement from its

62. Note 58 supra.
63. Note 39 supra.
licensee. Of course, unless the desired protection against tortfeasor employees is specifically provided for, most courts would not grant it, but where it is clearly stated in the agreement it would probably be given full effect.

Let us now consider a typical liability clause where no language of indemnity is used. It is quite common to provide in contracts for the sale of electric energy in large quantities that “the electric energy sold hereunder shall become the property of the purchaser as soon as it passes the delivery point and the seller shall not be liable for any claim for damages or injury resulting from such electric energy on the system of the purchaser or elsewhere after it has passed the point of delivery.” It must be kept in mind that the words “hold harmless” or “indemnify” need not be used to create the relationship of indemnitor-indemnitee, and that all decisions agree that it is the intent of the parties which is controlling. With a clause such as the foregoing, the intent will obviously be what the court wants it to be. For example, to give the provision full effect would be to interpret it as saying that the purchaser will hold the seller harmless from any claim based upon the electric energy sold after it has passed the point of delivery. On the other hand, it is not illogical to interpret the clause merely as a release of liability from the purchaser to the seller for any claims against the purchaser attributable to the electric energy sold after it has passed the point of delivery. That is, a court could very well hold that what the parties intended was that the purchaser could never seek reimbursement from the seller for losses sustained by the purchaser as the result of claims based upon the electric energy sold after it has passed the point of delivery. Thus, as stated before herein, we find that the use of liability rather than hold harmless language does not avoid the difficulties of hold harmless clauses but merely adds the additional difficulty of determining whether the liability provision is in fact a hold harmless clause.

In passing, and by way of further caveat, it is interesting to note that the federal government cannot enter into contracts containing hold harmless and indemnity clauses of the types we have been discussing.  

65. Note 59 supra.

66. Dec. No. A-82008, March 3, 1937, 16 Comp. Gen. 803, at 804, wherein it was said: “The quoted portions of the agreement involved [a hold harmless clause in an agreement by a railroad company allowing a crossing of its right of way by a telephone line of the United States] purport to impose on the United States obligations so indefinite and uncertain as to bring them within the class of prohibited contracts under Section 3732, Revised Statutes.” The statute referred to provides: “No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment.”
It would be possible to continue our discussion of suppositious cases indefinitely—their number is infinite. We believe, however, that sufficient yardsticks have been furnished for the measurement of most such cases and further detailing of them would be mere belaborment.

**Problems of Insurance**

Much more important, however, than the vagueness which may attach to the interpretation and application of a hold harmless clause is its possible effect upon the insurance coverage of the parties. The usual public liability and property damage liability insurance policy which is maintained for the protection of any business will contain among its exclusions from coverage a provision stating in substance that the policy does not furnish coverage for liability assumed in a contract. Were this fact generally known, it is probable that hold harmless clauses would be shunned in almost every instance where the parties maintain insurance. After all, the public liability and property damage liability insurance policy will protect the operator of a business against most claims based upon the alleged negligence of such person in the operation of his business. If the parties to a contract refrain from attempting to define their respective tort liabilities, suits against them claiming damages for tortious behavior would, in almost every instance, have to be founded upon allegations of negligence. Thus, if they do not attempt to define or delineate their respective fields of tort liability in the contract, they are adequately protected, but the moment they introduce liability or hold harmless language they create the possibility that either of them may be able to recover against the other in an action based upon the contract and which could not otherwise have been sustained. Such a suit would be beyond the scope of the ordinary insurance coverage. Coverage can, of course, usually be obtained to protect against such suits, but it is added coverage and additional premium will be charged. Thus, we have the ridiculous situation of the parties adding to their insurance costs merely to get the same protection they would have had from their usual insurance had there been no liability or hold harmless clause in the contract.

To illustrate, it is quite common to have a provision stating that "each party shall hold the other harmless from claims resulting from injuries to each party's employees." Although this, like many other hold harmless clauses, appears to be perfectly acceptable and seems merely to require each employer to take care of his own injured em-

---

66a. "Liability assumed in a contract" has been generally interpreted as meaning liability which would not exist at all, but for the contract provision, and not the mere restatement of an existing liability.
ployees, the results of such a provision can be quite unexpected. Let us first assume that both parties, $A$ and $B$, carry only the usual public liability and property damage liability and workmen's compensation and employers' liability policies. Let us then assume that an employee of $A$, acting within the scope of his employment, is injured through the negligence of $B$. Such employee will, of course, collect the amount specified in the workmen's compensation statutes from $A$'s workmen's compensation insurance carrier. Such insurance carrier will then be subrogated to $A$'s right against any third party, and $A$ is subrogated to his employee's rights against third parties to the extent of the payment made. If the injuries of $A$'s employee were serious and he believes that in a common law action against $B$ he can recover substantially more than he received from $A$'s workmen's compensation insurance carrier, he will unquestionably join with the latter in an action against $B$. $B$'s public liability and property damage insurance carrier will, of course, defend the action and pay the judgment, if any. But it will then be subrogated to any rights which $B$ has against third parties. Under the contract $B$ was to have been held harmless by $A$ from claims based upon injuries to $A$'s employees. Hence $B$'s insurance carrier can recover from $A$ for its costs in connection with the suit against $B$ and $A$ will not have any insurance coverage against this claim by $B$'s insurance carrier, because it will be a claim based solely upon a contract. The result will be that $A$ has paid out a large sum of money and will have received no benefit from the insurance which he maintained. Furthermore, $B$ himself would have received no direct benefit from the hold harmless clause which has been so costly to $A$, for it is $B$'s public liability and property damage liability insurance carrier which would have benefited. It is true that $B$'s loss experience under its public liability and property damage liability insurance policy would have been improved but this will, in the usual case, result in little if any benefit to the parties. Had there been no hold harmless clause, however, there would have been no action by $B$'s insurance carried against $A$; the only claims would have been by $A$'s employee against $A$ and then by $A$'s employee and $A$'s compensation insurance carrier against $B$. Both of these suits would have been covered by the ordinary insurance carried by $A$ and $B$.

A further difficulty encountered in any case where one party agrees to protect the other from claims for injuries by the one party's employees is the possible effect upon the latter party's workmen's compensation insurance. After all, an employer who pays compensation benefits to an employee is subrogated, to the extent of such payments, to the employee's rights against third parties. The employer's com-
INDEMNIFICATION AGAINST TORT LIABILITY

pensation carrier, standing in the stead of the employer, obtains that right for payments it has made to the employee. And it is often a substantial right. What effect does the employer's waiver of that right, without the insurance company's consent, have upon the workmen's compensation insurance? Might it not even vitiate it? Or, if it doesn't invalidate it, must not the court rule either that the insurer's rights against the third party cannot be waived by the insured or that the insured must reimburse the insurer in the amount which the insurer would otherwise have been able to recover from the third party? There are apparently no cases on this exact point, but it is one that merits serious thought.67

Another common, and apparently "fair," type of hold harmless clause is the one providing that each party shall be solely responsible for the results of his own negligence, but where there is concurrent negligence the loss or costs shall be shared equally between them. In jurisdictions where equal contributions between joint tort-feasors is required by law, such a clause adds nothing to the respective rights and liabilities of the parties. But to the extent that the concurrent negligence provision is a departure from the law—as in those jurisdictions where no contributions between joint tort-feasors are required—a liability beyond the scope of ordinary insurance coverage is created. Without the provision, the parties would have been adequately protected by their ordinary insurance. And should the parties purchase contractual liability coverage, they will then have, at additional expense, only the same protection they would have had under their existing insurance had they omitted the hold harmless clause from the contract.

Another interesting question under the hold harmless clause is the following: Suppose a suit in contract is brought by one of the parties against the other under a hold harmless clause, but the facts which led to the damages or injuries for which redress is sought are such that the indemnitor would have been liable in tort, had the indemnitee sued in tort, or, where a third party is involved, had such third party sued the indemnitor instead of the indemnitee. Will the mere fact that the indemnitee has chosen to bring his suit on the contract, or the third party has elected to sue the indemnitee instead of the indemnitor thereby making it necessary for the indemnitee to sue the indemnitor in contract, deprive the indemnitor of the coverage of his public liability and

67. There are numerous cases holding that the release by an insured of a third party against whom the insured had a claim for which the insured has been indemnified by the insurance company will entitle the insurance company to recover from the insured all sums paid. See, for example, Illinois Automobile Ins. Exchange v. Braun et al., 280 Pa. 550, 124 Atl. 691 (1924) and cases collected in Note (1925) 36 A. L. R. 1262.
property damage liability insurance? There is considerable authority to the effect that the mere fact that the action against the indemnitor is in contract will not release the indemnitor's insurance carrier. In these cases, the insurance carrier of the defendant had denied coverage, and the defendant had been compelled to itself defend and pay the judgment. The defendant then instituted proceedings against its insurance carrier for reimbursement of its costs and the amount paid the plaintiff. The courts permitted the insured to prove in its suit against its insurer that the injuries or damages for which it had been sued in contract were in fact caused by its negligence and therefore it was entitled to the benefit of the insurance which it maintained for suits in tort against it. Responsible representatives and associations of insurance companies have agreed to this conclusion. The situation does of course appear strained, almost anomalous, for you have in the suit against the insurance company the unique situation of a plaintiff attempting to prove that he was negligent and his negligence was the proximate cause of the injuries or damages in question. However, in view of the authorities supporting this position and the acquiescence in it by insurance companies, as well as the patent fairness of such a ruling, we are justified in assuming that only to the extent that the hold harmless clause actually creates a new liability is an insurer relieved of responsibility through the contractual liability exclusion.

68. Board of Trade Livery Co. v. Georgia Casualty Co., 160 Minn. 490, 200 N. W. 633 (1924) (where indemnitee-navigation company recovered judgment from indemnitee-livery company under an agreement to hold the indemnitee harmless from claims for personal injuries by passengers carried by indemnitee for indemnitee, the indemnitee's insurance company was held liable to reimburse the indemnitee, notwithstanding the usual exclusion of contractually assumed liability. The policy insured against loss from "claims upon the assured for damages on account of bodily injuries"); St. Paul & K. C. S. L. R. R. Co. v. U. S. Fidelity & Guaranty Co., 231 Mo. App. 613, 105 S. W. (2d) 14 (1937) (where an indemnitor-contractor held liable to a railroad company because of an injury to a member of the public, for which injury a judgment has been obtained against the railroad company, was permitted to secure reimbursement from its insurance company, notwithstanding the contractual liability exclusion); A. T. Morris & Co. v. Lumber Mutual Cas. Ins. Co. of N. Y., 298 N. Y. S. 227, 230 (1937) (where a subcontractor had agreed to hold the contractor harmless from loss caused by the subcontractor, and the subcontractor's employees negligently damaged the work, for which damage the owner held the contractor responsible, and where the subcontractor paid the contractor the amount of the owner's claims, the subcontractor was held entitled to recover that amount from its insurance company, the court saying: "First, I am of the opinion that this is a liability imposed upon the plaintiff by law. To my mind, it is immaterial that plaintiff, in his contract . . . agreed to assume entire responsibility for any and all damage or injury of any kind or nature to all persons. . . . It becomes immaterial, therefore, whether the counterclaim in the action between plaintiff and Buensod-Stacey Airconditioning, Inc. [the contractor] was based upon contract or negligence." Kibler v. Maryland Casualty Co., 74 Wash. 159, 132 Pac. 878 (1913). See also Note (1926) 40 A. L. R. 683.

69. That proof by the plaintiff of his own negligence is essential in this situation may be seen from the following cases in which recovery was denied because the plaintiff failed to establish his own negligence: Royal Indemnity Co. v. May & Bell, 222 Ky. 157, 300 S. W. 347 (1927); Tolmie v. Fidelity & Casualty Co., 88 N. Y. S. 717, aff'd, 76 N. E. 1110 (1906).
We have demonstrated the necessity for additional insurance coverage if the hold harmless clause is used. But this discussion would not be complete without the caveat that some such clauses are not even insurable. After all, unless an insurer can with some degree of certainty compute the risks incurred under a particular clause and can control the defense of claims arising thereunder, it will not insure the indemnitor's hold harmless liability.

Where both of the parties are self-insurers, however, there is no insurance problem. For them there is merely the difficulty of determining the meaning of their undertakings—the interpretations to be given the hold harmless clause when it is applied to a situation not specifically provided for. Also, when one of the parties is a self-insurer, then, as to that party, there is no problem of creating a liability beyond the coverage of his existing insurance, or of paying higher premiums for protection which he would have had under his ordinary insurance but for the hold harmless clause. For him too, however, remains the uncertainty of the meaning of the clause when applied to particular situations. And if he does not require the other, the insured, party to insure the contractual liability assumed in the contract, he had better make certain that that other party has the financial means himself to make good his undertaking.

Also, where the clause is unilateral in obligation, the problem for the indemnitee is merely that involved in the interpretation of the clause. The question remains, what does the clause mean as applied to a given set of facts?

Granted that for the self-insured indemnitee there appears to be little, if any, incentive to forego whatever benefits the hold harmless clause gives him, yet if his indemnitor is not a self-insurer it would be well for the parties to investigate a solution via insurance rather than the contractual language. If there is an insurance remedy—and there will almost always be one—the indemnitee benefits by obtaining certain protection instead of a clause whose precise meaning in all situations cannot be guaranteed. And he need no longer worry over the financial ability of the indemnitor to meet his obligation. For the indemnitor, there is no longer the fear of having assumed liabilities not covered by his existing insurance, or the necessity of purchasing contractual liability coverage at a usually substantial premium. For example, if a supplier of electricity is a self-insurer and desires protection from claims based upon the negligent operation or maintenance of a purchaser's system, it can often obtain that protection by having itself added as an additional party insured in the purchaser's insurance policies. The increased premium for this additional coverage will usually be less than
the increased premium for covering a hold harmless clause and, of course, there will be none of the uncertainty attendant upon the interpretation of such a clause.

Conclusion

It is not intended that all hold harmless clauses be condemned. There are certain cases in which the use of a proper hold harmless clause may be the only sane and fair solution. For example, where one party has a statutory liability which he cannot escape and that party employs an independent contractor to perform certain work for him, it is no more than fair that the independent contractor be the one held responsible if any damage or injury results from his work. Ordinary insurance policies except coverage for operations conducted through an independent contractor. Thus, the best way to handle this type of situation may be to have the independent contractor agree to hold the other party harmless and then to insure his contractual liability under the hold harmless clause, although if both parties are insured by the same insurer, an indorsement on the employer's policy stating that the independent contractor's exclusion shall not apply to operations conducted through this independent contractor will provide the simplest solution. Similarly, in those states where the owner of a building is liable to any person injured as the result of the defective condition of the sidewalk in front of his property regardless of who may have caused that defective condition, the property owner who employs a plumber to fix the piping under the sidewalk would be perfectly justified in requiring a hold harmless clause from the plumber, which can be insured reasonably, for it would add little if anything to the existing risk of the plumber's insurer. However, the important thing to keep in mind is that one should carefully examine the relationship between the parties to determine whether the hold harmless clause is necessary, and, before any decision is reached, the problem of protection should be submitted to an insurance expert, to determine how it can be solved by insurance and the cost of such a solution. Should it be determined that it is necessary to use a hold harmless clause, great care should be exercised to keep the provisions within reasonable bounds and to make them clear.

This, then, is our caveat: never use language of hold harmless, indemnity or liability in a contract without first carefully examining all possibilities of obtaining the desired result without resort to such language. Where insured parties are involved, there will usually be available some insuring arrangement which will provide the solution. If it is finally determined to use such language, the greatest of care
should be exercised in its drafting, so that it may clearly state the intent of the parties at least as to the main purposes of its inclusion. And if the indemnitor is not a self-insurer, contractual insurance must be purchased, or the indemnitor must himself be ready and able to discharge the additional obligations which he has assumed in the contract. If the indemnitor is to purchase contractual insurance, the advice of the insurance carrier as to the exact language to be used should be sought before the contract is executed, not only to be certain that the liability to be assumed can be covered by insurance but to keep the additional premium as low as possible.