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California Contractual Indemnity

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A thorough knowledge of how to interpret express indemnity clauses in contracts and how to use them in litigation are useful tools for the litigation attorney, as well as for those practitioners involved in the drafting of construction contracts, leases, and similar agreements. Parties can agree by contract that the risk of loss will be entirely upon one party to the contract, regardless of how the loss is caused or whether the party to be indemnified was responsible for the loss. Most attorneys, however, must confess to some trepidation upon entering what they may perceive as the arcane world of contractual indemnity clause interpretation. This article, through historical analysis, will attempt to illuminate the law of indemnity contracts in California.¹ The historical overview will include a discussion of the Type I, Type II, and Type III classifications established in *MacDonald & Kruse* and applied by various California appellate courts.² These classifications are helpful in assessing the effect of a particular indemnity clause.

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1. See *infra* notes 8-60 and accompanying text.
2. See *infra* notes 21-60 and accompanying text.

The authors will show, however, that the continued validity of these classifications appears doubtful. Moreover, the current trend of cases suggests the appropriate approach to the interpretation of indemnity clauses is to determine whether the clause is general or specific, focusing on the intent of the parties and not on the *MacDonald & Kruse* classifications.³ The authors then will analyze the active-passive distinction used by the courts to determine an indemnitee's rights under a Type II or general indemnity provision.⁴ The article will demonstrate that the indemnitee, if actively negligent, may not benefit from the agreement and will conclude that the question of active or passive negligence is primarily one of fact.⁵ Finally, tactical and procedural considerations in making effective use of express indemnity clauses will be discussed.⁶ These factual and procedural considerations may differ depending upon whether the indemnity provision is deemed specific or general.⁷ To understand the current state of the law in California, a historical overview of indemnity clause interpretation first will be made.

HISTORICAL OVERVIEW

In the landmark case of *Vinnell Company v. Pacific Electric Railroad*,⁸ the California Supreme Court dealt with an indemnity clause under which an excavation contractor "release[d] and agree[d] to indemnify and save Railroad harmless from and against any and all injuries to and deaths of persons, claims, demands, costs, loss, damage and liability, howsoever same may be caused, resulting directly or indirectly from the performance of any or all work" The agreement was drafted by the railway. The main issue was whether the indemnity clause operated to exculpate the railway from the consequences of its own negligence, which involved the switching of railway cars into the area of excavation.¹⁰ The California Supreme Court very strictly construed the indemnity clause against the drafter/indemnitee railway and held that the language of the contract was not specific enough to compel a finding that the parties intended the negligent indemnitee to be compensated by the nonnegligent indemnitor.¹¹ The

3. See *infra* notes 43-60 and accompanying text.

4. See *infra* notes 61-123 and accompanying text.

5. See *infra* notes 63-123 and accompanying text.

6. See *infra* notes 124-126 and accompanying text.

7. See *infra* notes 124-126 and accompanying text.

8. 52 Cal. 2d 411, 340 P.2d 604 (1959). For a discussion of this case, see also Corley & Sayre, *Indemnity Revisited: Insurance of the Shifting Risk*, 22 HASTINGS L.J. 1201, 1202-03 (1971).

9. *Vinnell Company v. Pacific Electric Railway*, 52 Cal. 2d at 414, 340 P.2d at 606.

10. *Id.* at 413-14, 340 P.2d at 606.

11. *Id.* at 415, 340 P.2d at 607.

court established the 'simple rule' that if the parties fail to refer expressly to the negligence of the indemnitee in their contract, the failure evidences the parties' intention not to provide for indemnity for the indemnitee's negligent acts.¹² The *Vinnell* court reasoned that if an indemnitor is to be made responsible for the negligent acts of an indemnitee over whose conduct it has no control, the language imposing such liability must do so expressly and unequivocally.¹³

The first movement away from the simplistic approach of *Vinnell* came the following year in *Harvey Machine Company Inc. v. Hatzel and Buehler, Inc.*¹⁴ In this case, the California Supreme Court upheld the indemnity clause although the indemnity agreement did not refer expressly to the negligence of the indemnitee.¹⁵ The court stated:

The question is one of interpretation of contracts. If it can be determined that the parties intended by their agreement to protect the indemnitee against claims of damage caused by any or even all types of negligent conduct on its part, such an agreement would effectively accomplish that purpose.¹⁶

Vinnell was distinguished because of factual differences. In *Harvey*, the claimed breach of duty on the indemnitee's part was not active, affirmative misconduct, but merely passive negligence. Moreover, the misconduct did not relate to some matter over which the indemnitee exercised exclusive control.¹⁷ In distinguishing *Vinnell*, the court appeared to focus on the parties' intent rather than mechanically applying the *Vinnell* rule, which requires the negligence of the indemnitee to be addressed expressly in the agreement. Significantly, the court was influenced by the indemnitee's passive negligence.¹⁸

Subsequent cases appeared to merge the strict construction approach with the active/passive distinction. In *Markley v. Beagle*,¹⁹ the California Supreme Court expressed the rule as follows: "An indemnity clause phrased in general terms will not be interpreted . . . to provide indemnity for consequences resulting from the indemnitee's own actively negligent acts . . . [while] mere non-feasance [or passive

12. *Id.*

13. *Id.* at 416, 340 P.2d at 608.

14. 54 Cal. 2d 445, 353 P.2d 924, 6 Cal. Rptr. 284 (1960).

15. The indemnity clause involved stated that "[Indemnitors] agree to indemnify and hold harmless [indemnitee] . . . against liability, . . . for bodily or personal injuries . . . sustained by any person or persons . . . arising from the use of the premises, facilities or services of [indemnitee]" *Id.* at 447, 353 P.2d at 926, 6 Cal. Rptr. at 286.

16. *Id.*; see also *City of Oakland v. Oakland Unified School District*, 141 Cal. App. 2d 733, 738, 297 P.2d 752, 755 (1956).

17. *Harvey Machine Company v. Hatzel & Buehler, Inc.*, 54 Cal. 2d at 448, 353 P.2d at 926-27, 6 Cal. Rptr. at 286-87.

18. *Id.*

19. 66 Cal. 2d 951, 429 P.2d 129, 59 Cal. Rptr. 809 (1967).

negligence] will not preclude indemnity under a general clause.”²⁰

In 1972, the court of appeal in *MacDonald & Kruse, Inc. v. San Jose Steel Company*²¹ sought to categorize indemnity clauses into three distinct types.²² According to the court, the first type of clause (Type I) is one that provides “expressly and unequivocally” that the indemnitor is to indemnify the indemnitee for, among other things, the negligence of the indemnitee.²³ Under this type of provision, the indemnitee is indemnified whether his liability has arisen as a result of his negligence alone²⁴ or as the result of conegligence with the indemnitor.²⁵

The second type of clause (Type II), also known as a “general indemnity clause,”²⁶ does not address itself specifically to the issue of an indemnitee’s negligence. The indemnitor instead promises to be responsible for the indemnitee’s liability “howsoever same may be caused,”²⁷ “regardless of responsibility for negligence,”²⁸ “arising from the use of the premises, facilities, or services of [the indemnitee],”²⁹ “which might arise in connection with the agreed work,”³⁰ “caused by or happening in connection with the equipment or the condition, maintenance, possession, operation or use thereof,”³¹ or “from any and all claims for damages to any person or property by reason of the use of said leased property.”³² The *MacDonald* court determined that a passively negligent indemnitee will be indemnified under this type of provision because the provisions “manifest that it is the intent of the parties” that the indemnitee’s passive negligence “was [one of the risks], if not the most obvious risk, against which [the indemnitee] sought to be covered.”³³ An indemnitee is not indemnified for his own acts of active negligence that solely or contributorily cause his liability under this type of clause.

20. *Id.* at 962, 59 Cal. Rptr. at 816.

21. 29 Cal. App. 3d 413, 105 Cal. Rptr. 725 (1972).

22. *Id.* at 419, 105 Cal. Rptr. at 728.

23. *Id.*

24. *Id.*; see also *Vinnell Co. v. Pacific Elec. Ry. Co.*, 52 Cal. 2d 411, 340 P.2d 604 (1959).

25. 29 Cal. App. 3d at 419, 105 Cal. Rptr. at 728; see also *Markley v. Beagle*, 66 Cal. 2d 951, 429 P.2d 129, 59 Cal. Rptr. 809 (1967).

26. See *infra* notes 61-123 and accompanying text.

27. See *Vinnell*, 52 Cal. 2d 411, 414, 340 P.2d 604, 606.

28. See *Goldman v. Ecco-Phoenix Elec. Corp.*, 62 Cal. 2d 40, 42-43 n.2, 396 P.2d 377, 378 n.2, 41 Cal. Rptr. 73, 74 n.2 (1964).

29. See *Harvey Machine Co. v. Hazel & Buehler, Inc.*, 54 Cal. 2d 445, 447, 353 P.2d 924, 926, 6 Cal. Rptr. 284, 286 (1960).

30. See *Markley*, 66 Cal. 2d 951, 962, 429 P.2d 129, 136, 59 Cal. Rptr. 809, 816 (1967).

31. See *Price v. Shell Oil Co.*, 2 Cal. 3d 245, 256, 466 P.2d 722, 729, 85 Cal. Rptr. 178, 185 (1970).

32. *MacDonald & Kruse*, 29 Cal. App. 3d at 419, 105 Cal. Rptr. at 728-29; see *Morgan v. Stubblefield*, 6 Cal. 3d 606, 623 n.12, 493 P.2d 465, 477 n.12, 100 Cal. Rptr. 1, 13 (1972).

33. *McDonald & Kruse*, 29 Cal. App. 3d at 420, 105 Cal. Rptr. at 729 (opinion quoting *Harvey*, 54 Cal. 2d at 449, 353 P.2d at 927, 6 Cal. Rptr. at 287).

The third type of contractual provision (Type III) is one “which provides that the indemnitor is to indemnify the indemnitee for the indemnitee’s liabilities caused by the indemnitor, but which does not provide that the indemnitor is to indemnify the indemnitee for the indemnitee’s liabilities that were caused by other than the indemnitor.”³⁴ The court stated that under this type of provision, any negligence on the part of the indemnitee, whether active or passive, will bar indemnification against the indemnitor, regardless of whether the indemnitor also may have been a cause of the indemnitee’s liability.³⁵ In other words, because the indemnitor does not promise to be responsible for the indemnitee’s liabilities caused other than by the indemnitor, he will not be responsible when the indemnitee’s negligence contributes to the liability.

While the Type I, Type II, and Type III classifications advanced in *MacDonald & Kruse* may help in assessing the effect of a particular indemnity clause, the California Supreme Court never expressly adopted or approved these classifications. The court continues to look to the intent of the parties rather than to a rule classifying the indemnity clause.³⁶ Various appellate courts, however, have continued to apply the *MacDonald & Kruse* classifications. Some notable exceptions, however, are discussed below.

In *Rossmoor Sanitation, Inc. v. Pylon, Inc.*,³⁷ Pylon appealed to the supreme court from a judgment that they indemnify a general contractor, Rossmoor Sanitation. Rossmoor employed Pylon to construct a sewage pump station. In the course of trenching without adequate shoring of the trench, a cave-in occurred which killed a Pylon employee. The court found that the conduct of Rossmoor as a general contractor was merely passive in nature, and that a “general indemnity” provision would be given effect.³⁸ On appeal, Pylon contended that the supreme court should overrule earlier decisions allowing passively negligent indemnitees to recover under general indemnity clauses. The court was urged to adopt a rule by which the right to express indemnity under a general indemnity clause would exist only when the indemnitee’s negligence was derivative in nature, such as under the doctrine of *respondet superior*. The court, however, rejected this approach.³⁹

34. *MacDonald & Kruse*, 29 Cal. App. 3d at 420, 105 Cal. Rptr. at 729.

35. *Id.*

36. See *infra* notes 37-59 and accompanying text.

37. 13 Cal. 3d 622, 532 P.2d 97, 119 Cal. Rptr. 449 (1975).

38. *Id.* at 630-31, 532 P.2d at 102, 119 Cal. Rptr. at 454.

39. *Id.* at 631, 532 P.2d at 102, 119 Cal. Rptr. at 454.

After an extensive discussion of what constitutes active as opposed to passive negligence, the court stated in oft-quoted language:

In actuality, however, we do not employ the active-passive dichotomy as wholly dispositive of this or any other case While adhering to the underlying distinction between active and passive negligence which has long been accepted by the bench, the bar, and the insurance industry, we hold that, as declared in *Harvey*, the question of whether an indemnity agreement covers a given case turns primarily on contractual interpretation, and it is the intent of the parties as expressed in the agreement that should control. When the parties knowingly bargain for the protection at issue, the protection should be afforded. This requires an inquiry into the circumstances of the damage or injury and the language of the contract; of necessity, each case will turn on its own facts.⁴⁰ [Emphasis added.]

Significantly, the court cited from *MacDonald & Kruse*, which was not criticized or overruled.⁴¹ The *Rossmoor* court merely indicated that the provision in the indemnity contract holding the indemnitee harmless for any claims arising "from any cause whatsoever," when the clause did not expressly mention the indemnitee's negligence was a general clause.⁴²

In the wake of *Rossmoor*, one appellate court has held that the *MacDonald & Kruse* classification system is no longer tenable. In *Rodriguez v. McDonnell Douglas Corp.*,⁴³ the trial court construed an indemnity agreement as a general indemnity provision and found the general contractor only passively negligent, and entitled to indemnity.⁴⁴ The appellate court conceded that if *MacDonald & Kruse* classifications were applied, the clause appeared to be a Type III.⁴⁵ Since the general contractor was concurrently negligent the indemnitee would be negligent, and thus could not recover from the subcontractor.⁴⁶ Nevertheless, relying on the traditional *Rossmoor* definition that a general clause is one that does not refer to the issue of an indemnitee's negligence, and on the rule that an indemnitee may recover if he is only passively negligent, the court upheld the finding of the trial court that indemnity was owed.⁴⁷ The court held

40. *Id.* at 632-33, 532 P.2d 103-04, 119 Cal. Rptr. at 455-56.

41. *Id.* at 629, 532 P.2d at 100, 119 Cal. Rptr. at 452.

42. *Id.*

43. 87 Cal. App. 3d 626, 151 Cal. Rptr. 399 (1978).

44. *Id.* at 671, 151 Cal. Rptr. at 424.

45. *Id.* at 673, 151 Cal. Rptr. at 426.

46. *Id.*

47. *Id.* at 673-76, 151 Cal. Rptr. at 426-28. *Cf.* *Gonzales v. R.J. Novick Constr. Co.*, 20 Cal. 3d 798, 810, 575 P.2d 1190, 1198, 144 Cal. Rptr. 408, 415 (1978). The court stated that "[w]hether conduct constitutes active or passive negligence depends upon the circumstances of a given case and is ordinarily a question . . . of fact. . . ." *Id.*

that the concurrent negligence must be active negligence to preclude an indemnitee from recovering under a general indemnity clause.⁴⁸

The trend of the cases suggests that reliance upon *MacDonald & Kruse* classifications is unwise.⁴⁹ This is illustrated by a recent case that has caused commotion in the insurance and construction fields. In *C.I. Engineers and Constructors, Inc. v. Johnson and Turner Painting Company, Inc.*,⁵⁰ the clause in issue provided as follows:

Subcontractor agrees to save, indemnify and hold and keep harmless Contractor against any and all liability, claims, judgments, or demands. . . arising directly or indirectly out of the obligations herein undertaken or out of the operations conducted by Subcontractor, save and except claims or litigation arising through the sole negligence or sole willful misconduct of Contractor⁵¹

The subcontractor contended on appeal that because California Civil Code section 2782 renders void as against public policy⁵² any provision in a construction contract that seeks to provide indemnity against the "sole negligence or willful misconduct of the promisee," the inclusion of that phrase in the indemnity clause was simply an effort to comply with the statute.⁵³ The subcontractor further argued that the clause was sufficiently general, protecting against any and all liability, that "arises directly or indirectly out of the obligations herein undertaken or out of the operations conducted," so that the clause should be treated as Type II and the active negligence of the indemnitee should foreclose indemnity.⁵⁴ The appellate court stated that the indemnity clause did address the issue of the indemnitee's negligence and, therefore, was not a general indemnity clause.⁵⁵ The court noted

48. *Rodriguez*, 87 Cal. App. 3d at 675, 151 Cal. Rptr. at 427; *see also*, *Herman Christensen & Sons, Inc. v. Terrace Plastering Company*, 61 Cal. App. 3d 237, 249 132 Cal. Rptr. 86, 93 (1976).

49. *See, e.g., Rodriguez*, 87 Cal. App. 3d at 674, 151 Cal. Rptr. at 427 (holding that the *MacDonald & Kruse* classification is no longer tenable in light of *Rossmoor*); *Herman Christensen & Sons, Inc. v. Paris Plastering*, 61 Cal. App. 3d 237, 248, 132 Cal. Rptr. 86, 92 (referring to the *MacDonald & Kruse* classifications, the court stated that because "this interpretation renders the indemnity agreement illusory . . . , the fact that the judgment was properly reversed because the indemnity was actively negligent as a matter of law, and . . . only two judges joined in the classification established, all lead us to reexamine that part of the decision").

50. 140 Cal. App. 3d 1011, 189 Cal. Rptr. 824 (1983).

51. *Id.* at 1014, 189 Cal. Rptr. at 826.

52. The courts have held that even when an indemnity clause is broad enough to provide for indemnity, and the indemnitee is solely negligent, only the operation of that part of the clause violative of California Civil Code section 2782, and not the entire clause, should be invalidated. *See Armco Steel v. Roy H. Cox Company*, 103 Cal. App. 3d 929, 933-34, 163 Cal. Rptr. 330, 332-33 (1980); *Gonzales v. R. J. Novick Construction Company, Inc.*, 20 Cal. 3d at 809 n.8, 575 P.2d 1190, 1197 n.8, 144 Cal. Rptr. 408, 415 n.8 (1978).

53. *C.I. Engineers*, 140 Cal. App. 3d at 1015, 189 Cal. Rptr. at 826-27.

54. *Id.* at 1014-15, 189 Cal. Rptr. at 826.

55. *Id.* at 1015, 189 Cal. Rptr. at 826.

that the inclusion of the phrase referring to the sole negligence of the indemnitee was sufficient to preclude general categorization and to allow indemnity even though the indemnitee was actively negligent. The court phrased the question as follows:

[I]s there a legally significant semantic distinction between saying "I expect to be indemnified against any and all claims arising out of job related injuries, including those arising from my negligence" and I "expect to be indemnified against any and all claims arising out of job related injuries except those attributable to my sole negligence?" We think not.⁵⁶

The court distinguished the rule of *Vinnell* that required the agreement to expressly and unequivocally refer to the indemnitee's negligence. The court stated that to require that an express indemnity clause be cast in rote form, as suggested by *Vinnell*, is to cause the parties to "lie upon a procrustean bed of linguistic formalism that inhibits the clear meaning of plain English."⁵⁷

Apparently, the real intent of the parties in including the phrase referring to the sole negligence of the contractor was to comply with California Civil Code section 2782. Another disturbing facet of this case was the rejection by the appellate court of the California Supreme Court precedent established in *Vinnell* that the exculpatory clause must be unequivocal. Interpreting the indemnity agreement in this case as specific was contrary to the overwhelming weight of authority in California and fundamentally unsound. *Vinnell* does not require that the agreement be cast in rote form that inhibits the clear meaning of plain English. To the contrary, the court merely indicates that if a party wishes to be indemnified even for active negligence, that desire simply should be stated. The case, however, does indicate the dangers of relying solely upon the *MacDonald & Kruse* classifications in analyzing indemnity agreements. Interestingly, the *C.I. Engineers* case was decided by the same appellate court that decided the *MacDonald & Kruse* case.⁵⁸

56. 140 Cal. App. 3d at 1016, 189 Cal. Rptr. at 827.

57. *Id.* at 1018, 189 Cal. Rptr. at 828.

58. These two cases were decided by the California Second District Court of Appeal, Division 5. See *C.I. Engineers*, 140 Cal. App. 3d 1011, 189 Cal. Rptr. 824; *MacDonald & Kruse*, 29 Cal. App. 3d 413, 105 Cal. Rptr. 725; see also *Armco Steel Corp. v. Roy H. Cox Co.*, 103 Cal. App. 3d 929, 163 Cal. Rptr. 330 (1980). The indemnity clause in that case read as follows: "[Indemnitor will indemnify indemnitee from] any and all claims which may be made against [indemnitor] by reason of injury or death to person or damage to property *however caused or alleged to have been caused and even though claimed to be due to the negligence of [indemnitee].*" (Emphasis added). *Id.* at 933, 163 Cal. Rptr. at 332-33. The court held the clause to be a general indemnity clause that failed to expressly and unequivocally state that the indemnitee would be indemnified for its own active negligence. *Id.* at 936, 163 Cal. Rptr. at 334.

Current law has been summarized fairly in the recent case of *Guy F. Atkinson Company v. Schatz*,⁵⁹ quoting *Rossmoor*, as follows:

“Past cases have held that an indemnity agreement may provide for indemnification against an indemnitee’s own negligence, but such an agreement must be clear and explicit and is strictly construed against the indemnitee. (citation omitted) If an indemnity clause does not address itself to the issue of an indemnitee’s negligence, it is referred to as a ‘general’ indemnity clause. (citation omitted) While such clauses may be construed to provide indemnity for a loss resulting in part from an indemnitee’s passive negligence, they will not be interpreted to provide indemnity if an indemnitee has been actively negligent. (citations omitted) Provisions purporting to hold an owner harmless ‘in any suit at law’ ‘from all claims for damages to persons’ (citation omitted) and ‘from any cause whatsoever’ (citation omitted) without expressly mentioning an indemnitee’s negligence, have been deemed to be ‘general’ clauses.”⁶⁰

Any remaining validity to the *MacDonald & Kruse* Type III classification, which provides for the indemnitor to indemnify the indemnitee for the indemnitee’s liability caused by the indemnitor alone, is very doubtful. Upon close examination, such an interpretation does, in fact, render the clause virtually illusory because the clause would apply only when an indemnitee’s liability was derivative.

In spite of *C. I. Engineers*, the trend of the cases clearly suggests that the best way to approach interpretation of indemnity clauses is to determine whether the clause is general or specific, focusing on the intent of the parties and not the *MacDonald & Kruse* categories. If an indemnitee wants to be indemnified for his own negligence, that desire should be stated in the indemnity clause. If the indemnity provision does not provide specifically for the indemnitee’s own negligence, however, and the provision is determined to be a general or Type II provision, the right to indemnification will depend upon whether the conduct of the indemnitee is viewed as active or passive.

ACTIVE/PASSIVE DICHOTOMY

Despite the discussion in *Rossmoor Sanitation, Inc. v. Pylon, Inc.*⁶¹ in which the California Supreme Court did not employ the active/passive distinction as entirely dispositive of any case, all courts clearly will use the dichotomy to analyze a general indemnity agreement. The *Rossmoor* court specifically stated that when the indemnity

59. 102 Cal. App. 3d 351, 161 Cal. Rptr. 436 (1980).

60. *Id.* at 356-357, 161 Cal. Rptr. at 439.

61. 13 Cal. 3d 622, 532 P.2d 97, 119 Cal. Rptr. 449 (1975); *see supra* notes 37-42 and accompanying text.

provision in a given contract is determined to be a general provision, the indemnitee may not benefit from the agreement if he is deemed actively negligent.⁶² The language quoted previously, therefore, would appear to speak primarily to the issue of whether the provision is sufficiently specific to provide indemnity even though the indemnitee may be actively negligent.⁶³

While the active/passive distinction originated in non-contractual and implied indemnity settings, the distinction is equally applicable to express indemnity agreements that are general or Type II indemnity provisions. The distinction is critical because the indemnitee under a general indemnity provision will be foreclosed from obtaining full indemnity if his conduct is viewed as active.⁶⁴

One of the earliest cases to discuss the active/passive distinction in the express contractual setting was *Harvey Machine Company, Inc. v. Hatzel and Buehler, Inc.*⁶⁵ In *Harvey*, the appellant construction contractors appealed from a lower court judgment that required them to indemnify the plaintiffs pursuant to an indemnification clause in their agreement. The appellants were to perform electrical installations at plaintiff's plant. While construction was ongoing, an employee of the appellants fell into an open elevator pit. The employee brought an action against the plaintiffs who demanded that the appellants defend and indemnify under the provisions of the contract.⁶⁶ In affirming the lower court ruling that appellants were obligated to indemnify the plaintiffs, the California Supreme Court held that the claimed breach of duty on the part of the indemnitee was at most passive negligence.⁶⁷ The court noted that in this case the owner did not continue to maintain independent operations on the premises when construction was in progress and that the only breach would be a failure to act in fulfillment of a duty of care that devolved upon the indemnitee as the owner of land.⁶⁸

62. 13 Cal. 3d at 629, 532 P.2d 101, 119 Cal. Rptr. 453.

63. At least one commentator has suggested that authority exists for the proposition that the active/passive dichotomy has no application to express contractual indemnity. See Corley & Sayre, *Indemnity Revisited: Insurance of the Shifting Risk*, 22 HASTINGS L.J. 1201, 1208 (1971). The commentators in that article rely on *Del Real v. San Diego Gas & Electric Company*, 11 Cal. App. 3d 1096, 89 Cal. Rptr. 702 (1970) for that proposition. *Del Real* stated that the active/passive distinction would have no application to a case in which the indemnity agreement expressly provided for indemnity for loss occasioned by the concurrent negligence of the indemnitee and the indemnitor. The court stated that the active/passive distinction had no application to a Type I indemnity agreement. *Id.* at 1102-03, 89 Cal. Rptr. at 706.

64. See *Cahill Brothers, Inc. v. Clementina Company*, 208 Cal. App. 2d 367, 382, 25 Cal. Rptr. 301, 309 (1962).

65. 54 Cal. 2d 445, 448, 353 P.2d 924, 926, 6 Cal. Rptr. 284, 286 (1960). For a discussion of *Harvey*, see *supra* notes 14-16 and accompanying text.

66. 54 Cal. 2d at 446, 353 P.2d at 926, 6 Cal. Rptr. at 285-86.

67. *Id.* at 448, 353 P.2d at 927, 6 Cal. Rptr. at 287.

68. *Id.* at 448, 353 P.2d at 926-27, 6 Cal. Rptr. at 286-87.

The appellate court case of *Cahill Brothers, Inc. v. Clementina Company*⁶⁹ contains an excellent discussion of the active/passive distinction. The *Cahill Brothers* case, which arises in the context of an implied indemnity setting, indicated that the contractor, Cahill, engaged Clementina as an independent contractor to perform demolition work for an excavation. In the course of this work, a pedestrian was injured due to the negligence of Cahill's employee, acting in a dual capacity for both parties. The injured party recovered judgment against both Cahill and Clementina. Cahill then sought indemnity against Clementina.⁷⁰ The appellate court, in holding that Cahill was not entitled to implied indemnity, found that Cahill's own conduct was sufficient to preclude recovery.⁷¹ The court reviewed the development of noncontractual implied indemnity and noted the following:

[I]f the person seeking indemnity personally participates in an affirmative act of negligence, or is physically connected with an act of omission by knowledge or acquiescence in it on his part, or fails to perform some duty in connection with the omission which he may have undertaken by virtue of his agreement, he is deprived of the right of indemnity.⁷²

In finding that *Cahill* was not entitled to indemnity, the court stated that Cahill's participation was active.⁷³ The court noted that the Cahill employee was present on the job as general superintendent, that the employee was physically connected with the barricade by virtue of his knowledge and acquiescence, and that he was actively involved in construction of the barricade.⁷⁴ Moreover, during the construction of the barricade, the employee was conscious of his obligation to protect Cahill's interests as well as those of Clementina, and was conscious of his obligation to protect the tenants, who were Cahill's responsibility.⁷⁵ The court found that as a matter of law, Cahill participated consciously and actively in the wrong to the plaintiff.⁷⁶

In *Price v. Shell Oil Company*,⁷⁷ the California Supreme Court again addressed the issue of whether a passively negligent indemnitee would

69. 208 Cal. App. 2d 367, 25 Cal. Rptr. 301 (1962).

70. *Cahill Brothers, Inc. v. Clementina Company*, 208 Cal. App. 2d at 374, 25 Cal. Rptr. at 304.

71. *Id.* at 382, 25 Cal. Rptr. at 309-10.

72. *Id.* at 382, 25 Cal. Rptr. at 309.

73. *Id.*

74. *Id.*

75. *Id.* at 382, 25 Cal. Rptr. at 309-10.

76. *Id.* at 382, 25 Cal. Rptr. at 310.

77. 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1978).

be indemnified under a general indemnity provision.⁷⁸ In *Price*, the Shell Oil Company leased a gasoline tank truck to Flying Tiger in 1958, and in 1962 Shell removed an original movable ladder, which had been mounted upon the tank, and a replacement, which was built by an undisclosed manufacturer, was furnished and installed on the truck. Approximately two years after the replacement was installed, the plaintiff was climbing a ladder when the legs split, causing plaintiff to fall and sustain serious injuries. One of the issues in the case was whether Shell was entitled to be indemnified by Flying Tiger.⁷⁹ The court interpreted the indemnity provision between Shell and Flying Tiger as a general indemnity provision,⁸⁰ one that did not contain language expressly and unequivocally requiring the indemnitor to indemnify the indemnitee for liability or damages caused by the indemnitee's own act of negligence. In the absence of a specific agreement to protect the indemnitee against its own negligence, the court argued that the indemnitor should not be required to indemnify.⁸¹ The court stated that to impose this type of liability, the language in the provision must expressly and unequivocally require indemnification so that the indemnitor is advised of the liability to which he is exposed.⁸² In holding that Shell was not entitled to indemnity, the court noted that to interpret a general clause as transferring the liability for a defective article from the distributor, who places the article in the stream of commerce, to the user or consumer of the article, would violate the doctrine of strict liability and thwart its basic purpose.⁸³

In *MacDonald & Kruse, Inc. v. San Jose Steel Company*,⁸⁴ MacDonald, the general contractor, subcontracted with San Jose Steel for the erection and fabrication of steel to be used in widening an existing overpass on the Long Beach Freeway. San Jose subcontracted the erection of the steel to California Erectors, Inc. During construction, an employee of California Erectors was injured when he fell

78. *Price v. Shell Oil Company*, 2 Cal. 3d 245, 256, 466 P.2d 722, 729, 85 Cal. Rptr. 178, 185 (1970).

79. *Id.*

80. *Id.* at 257-58, 466 P.2d at 730, 85 Cal. Rptr. at 186.

81. *Id.*

82. *Id.* (citing *Vinnell*, 52 Cal. 2d at 416-17, 340 P.2d at 608). Moreover, the court added the following in a footnote:

In the overwhelming majority of the cases the result reached by their interpretational efforts can be condensed into the simple rule that where the parties fail to refer expressly to negligence in their contract such failure evidences the parties' intention not to provide for indemnity for the indemnitee's negligent acts.

Price, 2 Cal. 3d at 258, 466 P.2d at 730, 85 Cal. Rptr. at 186 (quoting from *Vinnell*, 52 Cal. 2d at 415, 340 P.2d at 607).

83. *Id.* at 258, 466 P.2d at 731, 85 Cal. Rptr. at 187; see also *Widson v. International Harvester Co., Inc.*, 153 Cal. App. 3d 45, 60, 200 Cal. Rptr. 136, 147 (1984).

84. 29 Cal. App. 3d 413, 105 Cal. Rptr. 725; see *supra* notes 21-33 and accompanying text.

from the overpass to the ground. The injured worker brought an action against MacDonald, San Jose, and the State of California, and recovered against MacDonald and the State.⁸⁵ Cross-complaints were brought with the State seeking contractual indemnity from MacDonald and MacDonald seeking contractual indemnity from San Jose. The lower court found that the negligence of the State was not active.⁸⁶ The appellate court held, however, that the negligence of MacDonald was active, precluding recovery against San Jose.⁸⁷ The court affirmed the judgment in favor of the State and against MacDonald.⁸⁸ Although the specific facts concerning the accident were not addressed by the court, an examination of the court discussion is instructive. The court held that assuming the agreement between MacDonald and San Jose was a general indemnity agreement, conduct of MacDonald had to be interpreted as active negligence.⁸⁹ The court first noted that MacDonald was actively negligent by *failure to perform contractual undertakings*.⁹⁰ Moreover, the court found that MacDonald had contracted to:

(1) “keep [itself] fully informed of all existing and future State and national laws and county and municipal ordinances and regulations which may in any manner affect those engaged or employed in the work . . . and of all such orders and decrees of bodies or tribunals having any jurisdiction or authority over the same”; (2) “observe and comply with . . . all such [rules]”; and (3) “provide all safeguards, safety devices and protective equipment and take any other needed actions, on [its] own responsibility, or as the State Highway Department contracting officer may determine, reasonably necessary to protect the life and health of employees on the job and the safety of the public to protect property in connection with the performance of the work covered by the contract.”⁹¹

The court found that the agents of MacDonald were aware of the construction order stating that when an elevation is twenty-five or more feet above the ground and the use of safety belts and lifelines are impracticable, safety nets should be erected; that the area in which the employee was working prior to the accident was more than twenty-five feet above the ground; and that more conventional types of safety were impractical and that safety nets should have been used and, in

85. *MacDonald & Kruse*, 29 Cal. App. 3d at 417, 105 Cal. Rptr. at 727.

86. *Id.*

87. *Id.*

88. *Id.* at 426, 105 Cal. Rptr. at 734.

89. *Id.* at 422, 105 Cal. Rptr. at 731.

90. *Id.* at 424, 105 Cal. Rptr. at 732.

91. 29 Cal. App. 3d at 424, 105 Cal. Rptr. at 732.

fact, were placed in other locations on the construction site.⁹² MacDonald apparently did not employ safety nets at that particular site because of an inadequate supply of nets.⁹³ The court found that because MacDonald expressly agreed, by contract, to provide safeguards, safety devices, and protective equipment reasonably necessary to protect the life and health of employees on the job, its failure to provide the employee with a safety net was active negligence.⁹⁴ Furthermore, because MacDonald was aware of the problem and was aware that the employee was working in the area, the court found that MacDonald was involved in a personal affirmative act of negligence.⁹⁵

Another interesting facet of *MacDonald & Kruse* is the discussion of the two different indemnity clauses contained in the contract between MacDonald and San Jose.⁹⁶ In the contract, all rights and remedies that were reserved to the State of California under the general contract that MacDonald had with the State would apply to and be possessed by MacDonald in dealings with San Jose.⁹⁷ Moreover, the indemnification agreement that existed between the State and MacDonald was a general indemnification agreement. In the contract between MacDonald and San Jose, a more specific indemnity provision provided that San Jose would indemnify MacDonald, which would be held harmless from any liability caused by San Jose, its agents, or its employees. The clause was interpreted as a Type III indemnity provision, which would preclude MacDonald from recovering if actively or passively negligent.⁹⁸ The court in *MacDonald & Kruse* held that the more specific agreement would control, citing the well recognized rule that if a general and specific provision of a contract are inconsistent, the specific controls the general.⁹⁹

An excellent discussion of the active/passive dichotomy appears in *Rossmoor Sanitation, Inc. v. Pylon, Inc.*¹⁰⁰ The court notes that whether the conduct is active or passive is ordinarily a question of fact, although, in appropriate cases, the question is to be determined as a matter of law.¹⁰¹ Examples of passive negligence cited by the

92. *Id.* at 424, 105 Cal. Rptr. at 732.

93. *Id.* at 424, 105 Cal. Rptr. at 733.

94. *Id.* at 424-25, 105 Cal. Rptr. at 733.

95. *Id.* at 425, 105 Cal. Rptr. at 733.

96. *See id.* at 421, 105 Cal. Rptr. at 730.

97. *Id.*

98. *See id.*

99. *Id.* at 421, 105 Cal. Rptr. at 730. For a contrary result on this same issue, *see* *Indenco Co. v. Evans*, 201 Cal. App. 2d 369, 374, 20 Cal. Rptr. 90, 93 (1962).

100. 13 Cal. 3d 622, 532 P.2d 97, 119 Cal. Rptr. 449 (1975).

101. *See id.* at 629, 532 P.2d at 101, 119 Cal. Rptr. at 453.

Rossmoor court included (1) failure to exercise a right of inspection over certain work and to specify changes,¹⁰² (2) failure to exercise the right to order removal of defective material,¹⁰³ and (3) a failure to discover a dangerous condition which was created by others.¹⁰⁴ Examples of active negligence by the court included (1) digging a hole which caused injury,¹⁰⁵ (2) supplying a scaffold that does not meet safety order requirements,¹⁰⁶ and (3) creating a perilous condition that resulted in an explosion.¹⁰⁷

In *Rossmoor*, the trial court found that Rossmoor was only passively negligent.¹⁰⁸ Appellants contended that Rossmoor was actively negligent because Rossmoor (1) furnished the plans and specifications according to which the trenches were excavated, (2) retained the engineering firm to prepare the plans, (3) approved the plans, (4) supervised personnel on the job site at various stages of construction to interpret plans and to direct Pylon's work, (5) knew of, permitted and approved excavation of the trench, (6) used hazardous practices not consistent with good construction practice, (7) experienced difficulty with land slippage and excavation collapse during construction, (8) never requested a compaction report on the first trench, (9) conducted dynamiting operations during which trucks and heavy equipment caused vibrations, and (10) worried about delays in construction.¹⁰⁹ In holding that active negligence could not be determined as a matter of law, the appellate court stated that the trier of fact reasonably concluded that Rossmoor had no supervisory personnel at the site of the accident, that Rossmoor had no knowledge that Pylon employees intended to enter the unshored trench, and that Pylon was directly responsible for the trench remaining unshored.¹¹⁰

In *Gonzales v. R. J. Novick Construction Company, Inc.*,¹¹¹ the plaintiff sought damages for personal injuries that he suffered after

102. *Id.* at 630, 532 P.2d at 101, 119 Cal. Rptr. at 453 (citing *Muth v. Urricelqui*, 251 Cal. App. 2d 901, 911, 60 Cal. Rptr. 166, 172 (1967)).

103. *Id.* at 630, 532 P.2d at 101, 119 Cal. Rptr. at 453 (citing *Safeway Stores, Inc. v. Massachusetts Bonding and Insurance Company*, 202 Cal. App. 2d 99, 111-13, 20 Cal. Rptr. 820, 826-27 (1962)).

104. *Id.* at 630, 532 P.2d at 101, 119 Cal. Rptr. at 453 (citing *Markley v. Beagle*, 66 Cal. 2d 955, 429 P.2d 129, 131-33, 59 Cal. Rptr. 809, 811-12 (1967)).

105. *Id.* at 630, 532 P.2d at 101, 119 Cal. Rptr. at 453 (citing *Morgan v. Stubblefield*, 6 Cal. 3d 606, 626, 493 P.2d 465, 479, 100 Cal. Rptr. 1, 15 (1972)).

106. *Id.* at 630, 532 P.2d at 101, 119 Cal. Rptr. at 453 (citing *Morgan*, 6 Cal. 3d at 625, 626, 493 P.2d at 478-79, 100 Cal. Rptr. at 14-15).

107. *Id.* at 630, 532 P.2d at 101, 119 Cal. Rptr. at 453 (citing *Burlingame Motor Company v. Peninsula Activities, Inc.*, 15 Cal. App. 3d 656, 661, 93 Cal. Rptr. 376, 379 (1971)).

108. *Rossmoor*, 13 Cal. 3d at 628, 532 P.2d at 99-100, 119 Cal. Rptr. at 451-52.

109. *Id.* at 630, 532 P.2d at 101-02, 119 Cal. Rptr. at 453-54.

110. *Id.* at 630-31, 532 P.2d at 102, 119 Cal. Rptr. at 454.

111. 20 Cal. 3d 798, 575 P.2d 1190, 144 Cal. Rptr. 408 (1978).

falling from a scaffold on a construction site. The plaintiff had stepped on a plank incorrectly overlapped in the scaffold, which did not have guardrails in place. A cause of action was brought against R. J. Novick Construction Company, the general contractor, and in a trifurcated trial, the jury found that Novick was negligent so as to have proximately caused plaintiff's accident.¹¹² The jury further found that plaintiff's employer was negligent, and the court ruled in favor of Novick against the employer on the cross-complaint for express indemnity.¹¹³ One of the issues on appeal was the contention of the employer that the conduct of Novick was active negligence, precluding recovery on the cross-complaint.¹¹⁴ The argument made by plaintiff's employer on appeal was that the job superintendent of Novick had a duty to perform a daily safety inspection of the premises and to report safety hazards, which he detected and could not immediately remedy himself, to a foreman for plaintiff's employer.¹¹⁵ Moreover, on the morning of the accident the job superintendent for Novick had noticed that the scaffold was not completed, but failed to take action himself or to report that fact to the foreman for plaintiff's employer.¹¹⁶ In holding that this evidence did not compel a finding of active negligence on the part of Novick, the court stated that the failure to discover dangerous conditions would not preclude indemnity under a general clause.¹¹⁷ Furthermore, the *Gonzales* court stated that evidence in the record indicated that while the job superintendent for Novick noticed the condition, he had no reason to consider it dangerous, even if his conclusion fell below the standard of reasonable care under the circumstances.¹¹⁸ The court also emphasized that the person seeking indemnity did not participate in the conduct causing the injury.¹¹⁹

In *Armco Steel Corporation v. Roy H. Cox Company, Inc.*,¹²⁰ the appellate court held that as a matter of law, appellant's conduct was active.¹²¹ Armco had employed Cox Company to clean and paint an area at an Armco Steel plant. While painting a vertical duct within a "bag house," which operated as a giant vacuum cleaner to filter particles during the course of steel manufacturing, the ladder fell and

112. *Id.* at 803, 575 P.2d at 1193, 144 Cal. Rptr. at 411.

113. *Id.* The express indemnity provision in *Gonzales* was a general indemnity provision. See *id.* at 809, 575 P.2d at 1197, 144 Cal. Rptr. at 415.

114. *Id.* at 810, 575 P.2d at 1198, 144 Cal. Rptr. at 416.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 810-11, 575 P.2d at 1198, 144 Cal. Rptr. at 416.

119. *Id.*

120. 103 Cal. App. 3d 929, 163 Cal. Rptr. 330 (1980).

121. *Id.* at 936, 163 Cal. Rptr. at 334.

the Cox employee fell into an open fan sustaining serious injuries. The evidence showed that the ladder fell because of vibrations caused by the activation of a nearby motor. Armco had designed the filtration system, was aware that vibrations occurred in the area in which the Cox employee was working, and had employees operating the filtration system. Moreover, Armco provided no warnings to Cox employees that the system was about to start, and minutes before the accident, Armco employees observed the Cox employee working on the ladder. Nonetheless, employees of Armco activated the system and caused the accident. The court stated that a reasonable argument could not be made that the negligence of Armco was only passive since clear evidence of affirmative activity was introduced.¹²²

The analysis of these cases establishes, therefore, that the question of active or passive negligence is almost always one of fact. In analyzing the issue, the factors outlined in *Cahill* should be considered as guidelines.¹²³ Clearly, the trier of fact in *Rossmoor* or *Gonzales* could have determined that the conduct discussed was active. The tendency to immediately label conduct as active or passive, however, should be avoided. Since fixed rules do not exist, the facts weighed must be investigated and analyzed thoroughly. Furthermore, legal factors also are influenced by practical considerations.

PRACTICAL CONSIDERATIONS

An understanding of the law governing express indemnity agreements is indispensable to litigators as well as to drafters of indemnity agreements. Attorneys drafting contractual agreements that contain indemnity provisions must be aware that the provision should be drafted in accordance with the *Vinnell* criteria. To be fully protective, the indemnity provision should expressly state that the indemnitee will be entitled to indemnification irrespective of whether the indemnitee is actively or passively negligent.

In most cases, however, the indemnity agreement that the litigator encounters will be one that is not so specific. In this case, the attorney first should analyze the entire contract, focusing upon the indemnity provisions. The crucial inquiry is whether the agreement contains a general or specific indemnity clause, which in most cases is easy to determine. A gray area will emerge, however, when the indemnity provision is similar to that of *C. I. Engineers* or when more than one indemnity provision is included in the contract.

122. *Id.* at 935, 163 Cal. Rptr. at 334.

123. *See supra* notes 68-75 and accompanying text.

If a specific or Type I agreement exists, the attorney representing the indemnitee should take certain steps to protect and to perfect the client's rights. First, a demand should be made immediately upon the indemnitor for indemnity and defense of the action. The entire agreement should be read carefully to determine whether more than one indemnity provision exists in the contract, whether the contract provides for attorneys fees, and whether the indemnitor has agreed to name the indemnitee as an additional insured under its insurance policy. If the latter is the case and the indemnitor has obtained insurance, this may provide additional impetus to the indemnitor and the carrier to provide a defense and to agree to indemnify the indemnitee. If the indemnitee is not insured and the indemnitor has secured insurance for the indemnitee by means of an additional insured endorsement, the carrier will be compelled to provide a defense and to indemnify the indemnitee. The demand for defense and indemnification should be specific and should clearly define the law and rights under the contract. The demand further should advise the indemnitor, when appropriate, that attorneys' fees will be sought. If product litigation is involved, proper notice under California Commercial Code section 2607 also should be given.¹²⁴

Assuming the indemnitor fails to agree to indemnify and to defend, defense counsel should attempt to establish through discovery that the contract represents the full agreement and intent of the parties.¹²⁵ After establishing that the contract does represent the full agreement and intent of the parties and that the contract was in full force and effect, the attorney representing the indemnitee may be able to secure an early ruling from the court through a declaratory relief action or a summary judgment motion, entitling the indemnitee to indemnity under the terms of the contract. If the contract calls for the indemnitee to be named as an additional insured under the policy of the indemnitor and if the indemnitor has failed to obtain such insurance, a cause of action for breach of contract should be included in the cross-complaint. Requests for admissions should be structured to establish such a breach. If the agreement is clearly Type I, the action of counsel for the indemnitee should be aggressive and recovery of attorneys' fees should be sought.

124. California Commercial Code section 2607 provides that when the buyer sues for breach of warranty or other obligation for which the seller is answerable, the buyer may give the seller written notice of litigation. If the notice states that the seller is allowed to defend and, if the seller does not do so, that he will be bound in any later action against him by this buyer, as to any facts common to the two litigations, then the seller is so bound, unless after reasonable receipt of the notice he appears and defends. CAL. COM. CODE §2607.

125. The court may consider parole evidence on that issue. *See, e.g.*, *Pacific Gas & Electric*

Similarly, in the event a determination is made that the indemnity agreement is a general one, a demand for defense and indemnification should be made. Again, the contract should be read carefully and analyzed in light of the factors discussed above.¹²⁶ The indemnitor also should be reminded of California Code of Civil Procedure section 1021.6,¹²⁷ in the event that the contract specifically does not provide for attorneys fees. If the demand is rejected, discovery should be undertaken to establish the same elements discussed in connection with a Type I indemnity agreement. In addition, discovery should be employed to determine whether and on what basis the indemnitee claims the indemnitor was actively negligent.

In representing the indemnitor, the same basic analysis must be undertaken. If the determination has been made that the agreement, on its face, contains a specific Type I indemnity provision, counsel must determine if any evidence supportive of an intent exists other than what is expressed in the contract. If not, and the accident arose out of the work covered by the agreement, defense and indemnity should be assumed unless a valid question remains as to whether the loss was caused by the *sole* negligence of the indemnitee. If some doubt exists as to whether defense and indemnification should be undertaken, counsel must weigh the possibilities of an adverse determination and decide accordingly.

If the agreement is general, counsel must carefully gather all facts bearing on the active/passive distinction. While the question is, as discussed previously, usually one of fact, all available evidence should be weighed and a decision to defend and to indemnify necessarily must be based upon the strengths and weaknesses of those facts and a consideration of attorneys' fees.

CONCLUSION

An understanding of how to interpret and use express indemnity clause provisions in contracts is helpful for practitioners involved in drafting construction contracts as well as for litigation attorneys. By asserting an express indemnity provision, the parties to the contract may agree that the risk of loss is borne entirely by one party to the contract, regardless of how the loss is caused or who is responsible

Company v. G. W. Thomas Drayage & Rigging Company, 69 Cal. 2d 33, 36, 442 P.2d 641, 643, 69 Cal. Rptr. 561, 563 (1969); *supra*, note 29.

126. See *supra* notes 61-123 and accompanying text.

127. California Code of Civil Procedure section 1021.6 provides that a court may award attorneys' fees to a person who prevails in a claim for implied indemnity, under certain conditions, despite the lack of a contractual obligation to do so. CAL. CIV. PROC. CODE §1021.6.

for causing the loss. Consequently, the indemnitee may be indemnified even for losses caused by its own negligence.

To facilitate the interpretation of express indemnity clauses, many California courts have applied the Type I, Type II, and Type III classifications advanced in *MacDonald & Kruse*. These classifications are helpful in assessing the effect of a particular indemnity clause. The current trend of cases, however, creates doubt as to the continued validity of these classifications and suggests that the appropriate approach to indemnity clause interpretation is to determine whether the clause is general or specific, focusing on the intent of the parties rather than on the *MacDonald & Kruse* classifications. Specific indemnity clauses will be interpreted in accordance with the express language contained in the contract. For example, an indemnitee may be indemnified for its own negligence by expressly providing for such indemnification in the contract. If the indemnity clause is deemed to be general rather than specific, recovery by the indemnitee for its own negligence will depend upon whether the indemnitee's conduct is passive or active. If the conduct is active, the indemnitee will be precluded from benefitting under the general indemnity provision.

An analysis of the cases suggests that the question of whether the particular conduct is passive or active is almost always a question of fact. The tendency to immediately place an active or passive label on the conduct should be avoided. All of the facts and circumstances must be thoroughly investigated and analyzed. Inexorable rules relating to the nature of the conduct do not exist.