

*Suire v. Lafayette City-Parish Consolidated Government, et al*  
**Indemnity Agreements**

By Bradley C. Myers

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The plaintiff sued the City of Lafayette and its contractor alleging that construction of a drainage ditch (i.e. driving metal sheets that were used to create a box culvert into the ground near the plaintiff's home) caused damage to the home's foundation. The plaintiff asserted claims for negligence, strict liability<sup>1</sup> and absolute liability. Under Louisiana law (Civil Code 667), a person can be found liable for certain conduct (pile driving and blasting with explosives) regardless of knowledge or whether reasonable care was exercised.

The City in turn filed a third party demand against the contractor seeking defense and indemnity under the terms of the contract and against the contractor's insurer as an additional insured. The contract provided:

[T]he [contractor] does and will agree to defend, indemnify, and hold forever harmless the [City]... from and against any and all claims, demands, causes of action and/or rights of action arising out of or resulting from the performance of any of the work and/or obligations contemplated under the contract, ...which result from any breach by the contractor of any of the terms, provisions, conditions and/or limitations of the contract, as well as any and all claims resulting from the sole negligence, liability, strict liability, and/or fault of the Contractor and/or the joint and concurrent negligence, liability, strict liability, and/or fault of the Contractor with any other persons or parties whomsoever.

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<sup>1</sup>The plaintiff claimed that the City was independently liable for a number of acts and omissions unrelated to performance of the contract.

The trial court dismissed plaintiff's claims under absolute liability because driving metal sheets into the ground was not the same as "pile driving" contemplated by Article 667. The Court also granted the City's motion for summary judgment on its claim for defense and indemnity, but limited the contractor's obligation to defend and indemnify to the absolute liability claim, and determined that since that claim had been dismissed, the obligation to defend and indemnify was extinguished.<sup>2</sup>

All parties appealed. The Third Circuit reversed the dismissal of the plaintiff's absolute liability claim and determined that there was, in fact, absolute liability. The Third Circuit also found that the contract between the City and the contractor did not require indemnity for any conduct that did not arise out of the performance of the contract and thus, limited the indemnity obligation to the absolute liability claim because any broader interpretation would violate R.S. 38:2216(G). The revival of the absolute liability claim also revived the contractor's duty to defend and indemnify. The Court remanded for a determination of the actual defense costs related to the absolute liability claim.

The Supreme Court reversed the Third Circuit on the issue of absolute liability, finding that the installation of sheet metal is not pile driving under Art. 667.

On the defense and indemnity claim, the Court determined that the claim was premature because the City had not sustained any compensable loss. The Court stated:

We find that the City's ... claim for defense under the indemnity agreement is premature under settled law, as these parties have not yet sustained any compensable loss... An indemnitor is not liable under an indemnity agreement until the indemnitee 'actually makes payment or sustains loss.' *Id.* Thus, this court has held that 'a cause of action for indemnification for cost of defense does not arise until the lawsuit is concluded and defense costs are paid.' (Citations omitted). As this lawsuit is still pending, and no determination of liability has been made, the court of appeal erred in finding that [the contractor] owed a duty to defend, or pay for defense costs, under the terms of the contractual indemnity provision.

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<sup>2</sup> Louisiana has a law (La.R.S.38:2216(G)) that limits the ability of governmental entities from seeking indemnity from contractors. The trial court found that despite what the contract said, the only obligation the contractor had to defend and indemnify related to the absolute liability claim.

*Suire, supra*, at p. 10.

In other words, the Court found that the duty to defend, as well as the duty to indemnify, depends on the outcome of the case.

The Court, however, found that the insurer's duty to defend was much broader than that of an indemnitor and that an insurer's duty to defend does not depend on the outcome of the suit. The court found that unless the allegations of the suit and the language of the contract unequivocally exclude coverage, defense must be provided. Since the plaintiff claimed that the City and the contractor were jointly liable under both negligence and strict liability theories and these claims were within the coverage of the indemnity contract, the insurer owed a duty to defend.

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***About the Author:***

*Brad Myers is a partner in the Baton Rouge office of Kean Miller. He joined the firm in 1982 and practices in the litigation group. Mr. Myers represents clients in toxic tort defense, medical malpractice defense, commercial and business litigation, civil rights and municipal law. He has particular experience in litigation involving medical issues relating to chemical exposure and white collar criminal defense. Upon graduating from law school, Mr. Myers served as a law clerk to the Honorable Michael E. Ponder of the 19<sup>th</sup> Judicial District Court. He has also served as Assistant U.S. Attorney of the Middle District of Louisiana and Special Assistant U.S. Attorney of the Eastern and Western Districts of Louisiana.*

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