

COA Opinion: An indemnity agreement which does not require notice of a defense may allow the indemnitee to recover defense costs incurred prior to providing notice of the underlying action to the indemnitor

2. September 2010 By Jason Byrne

On August 31, 2010, the Court of Appeals published its earlier, July 1, 2010, opinion in [Ajax Paving Industries, LLC v. VanOpendbosch Construction Co.](#), No. 288452. The primary issue in this case concerned the fees and costs incurred by a contractor in defending a tort action, arguably covered under an indemnity clause in a contract between the contractor and its subcontractor. After finding that the indemnity clause was sufficiently broad to cover the underlying action, the Court of Appeals turned to the question of liability under that clause for the fees and costs incurred by the contractor during the 18 months it defended that case without notifying the subcontractor. The Court of Appeals found that, because the indemnity clause did not require the contractor to notify the subcontractor of the underlying action or tender the defense of that action to the subcontractor, the contractor is entitled to complete indemnification of all of its fees and costs incurred in defending the underlying case, without limitation.