



indemnify.

A. And *hold harmless; save harmless.*

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According to the late Charles Alan Wright, “The first edition of [Bryan Garner’s Dictionary of Legal Usage was] praised around the world as both the most reliable guide to legal usage and the most fascinating to read.” The new (2011) third edition is more of the same. We asked Garner to identify his favorite new-or-improved entry. His reply: “Indemnify and hold harmless!” Here it is, in its entirety as it appears in Garner’s 3d (except for a few typographical changes called for under the Green Bag’s own idiosyncratic formatting practices).

— The Editors

ARE THESE PHRASES — *indemnify* and either *hold harmless* or *save harmless* — synonymous? This is a crucial question that has frequently arisen in American litigation, with varying results. The correct answer is most instructive, not just about the phrases at issue but about what happens when lawyers and judges are insufficiently aware of legal terminology and its history. It will be necessary to go into quite some detail in this entry. All the “s.v.” references in what follows mean that the dictionaries mentioned are unpaginated, and one must simply look under the term mentioned in its alphabetical place.

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First, consider the etymology of *indemnify*. Some authorities suggest that the word derives from *in-* “to take away” + *damnum* “loss.” But the better etymology is *indemnis* “harmless” + *-fy* “to make.” A steady line of authorities, from the 18th century on, has recorded the meaning of *indemnis* as being translatable as “harmless.” Here’s how the dictionaries have defined *indemnis*:

1735: “without hurt, harm or damage, harmless.” Adam Littleton, *Latin Dictionary in Four Parts* (6th ed. 1735) (s.v. *indemnis*).

1786: “unhurt, harmless.” *Entick’s New Latin-English Dictionary* (pt. 2) 221 (William Crackelt ed., rev. ed. 1786).

1845: “without hurt, harm, or damage; harmless.” Thomas Morrell, *An Abridgment of Ainsworth’s Dictionary, English and Latin* (pt. 2) 253 (William Duncan ed., 1845).

1891: “without hurt, harm, or damage; harmless.” Henry Campbell Black, *A Dictionary of Law* 614 (1891).

1893: “without loss, damage or harm; unharmed; one who experiences no loss, or is affected by no loss.” J. Kendrick Kinney, *A Law Dictionary and Glossary* 383 (1893).

1916: “undamaged.” James A. Ballentine, *A Law Dictionary* 234 (1916).

The word *indemnis* is Latin, and the modern verb *indemnify* answers perfectly to the modern French *indemniser*, as the phrase *indemniser d’une perte* is to indemnify someone for a loss. See R. Lusum, *French Commercial Terms and Phrases* 90 (1922); see also 1 N. Salmon, *Boyer’s Royal Dictionary Abridged* (22d ed. 1814) (defining *indemniser* as “to save harmless”); cf. *The Law-French Dictionary* (1701) (defining the LAW FRENCH *indemne* as “saved harmless”).

Now let’s consider the modern English verb in its own right. The first English-language lexicographer to record a separate entry for *indemnify* was Elisha Coles, who in 1676 defined it as “to save harmless.” *An English Dictionary* (1676) (s.v. *indemnify*). Other lexicographers soon followed suit:

1707: “to save harmless.” *Glossographia Anglicana Nova* (1707) (s.v. *indemnify*).

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1745: “to save, or bear harmless.” Nathan Bailey, *An Universal Etymological English Dictionary* (11th ed. 1745) (s.v. *indemnify*).

1755: (1) “to secure against loss or penalty”; (2) “to maintain unhurt.” Samuel Johnson, *A Dictionary of the English Language* (1755) (s.v. *indemnify*).

1777: “to save, keep, or bear harmless; to secure from charge or danger, etc.” Thomas Dyche, *A New General English Dictionary* (16th ed. 1777) (s.v. *indemnify*).

1789: “to secure against loss or penalty; to maintain unhurt.” Thomas Sheridan, *A Complete Dictionary of the English Language* (2d ed. 1789) (s.v. *indemnify*).

1806: “to maintain unhurt, to secure.” Noah Webster, *A Compendious Dictionary of the English Language* 156 (1806).

1810: “to secure against loss, to maintain unhurt.” Thomas Browne, *The Union Dictionary* (1810) (s.v. *indemnify*).

1813: “to secure against loss or penalty; to maintain unhurt.” *A New Critical Pronouncing Dictionary of the English Language* (1813) (s.v. *indemnify*).

1821: “to secure against loss or penalty.” Stephen Jones, *A General Pronouncing and Explanatory Dictionary of the English Language* 202 (1821).

1828: (1) “to save harmless; to secure against loss, damage, or penalty”; (2) “to make good; to reimburse to one what he has lost.” Noah Webster, *An American Dictionary of the English Language* (1828) (s.v. *indemnify*).

1845: “to save or free from hurt, injury, or harm; loss, or penalty, or punishment; to save harmless or uninjured.” Charles Richardson, *A New Dictionary of the English Language* 417 (2d ed. 1845).

1845: “to secure against loss or penalty; to maintain unhurt.” John Walker, *Walker’s Critical Pronouncing Dictionary and Expositor of the English Language* 287 (John Davis ed., 1845).

1850: “to save harmless; to secure against loss, damage or penalty. To make good; to reimburse to one what he has lost.” 1 John Boag, *A Popular and Complete English Dictionary* 704 (1850).

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1861: “to save harmless; to secure against loss, damage, or penalty; to reimburse, to make good.” Arnold J. Cooley, *A Dictionary of the English Language* 311 (1861).

1867: “to make or save harmless; to secure against loss or damage; to secure against future loss . . . to put one in the situation he was in, before sustaining a loss. In some of the old books, this word is written *indempnify*.” 2 Alexander M. Burrill, *A Law Dictionary and Glossary* 67 (2d ed. 1867) (internal citations omitted).

1879: “to make free of loss. The word is used with two shades of meaning: 1. To make compensation for a loss already sustained; 2. To give assurance or security that one shall have compensation for a loss anticipated. Thus one may speak of indemnifying an owner of land taken for public use, meaning to pay him the value; or of indemnifying the sherrif, meaning to give a bond to reimburse any damages which may be collected from him.” Benjamin Vaughan Abbott, *Dictionary of Terms and Phrases Used in American or English Jurisprudence* 596 (1879) (internal citations omitted).

1882: “to indemnify is to make good a loss which one person has suffered in consequence of the act or default of another, and the operation of making good the loss is called indemnification. Thus, if A. fails to pay a debt which he owes to B., and a surety, C., pays it, he is said to indemnify B., and B. is said to obtain indemnification. So, if A. wrongfully causes a loss to B., A. is liable to indemnify B. for the loss which he has sustained.” Charles Sweet, *A Dictionary of English Law* 424 (1882).

1890: “to compensate for loss, sustained or anticipated.” William C. Anderson, *A Dictionary of Law* 534 (1890).

1891: “to save harmless; to secure against loss or damage; to give security for the reimbursement of a person in case of an anticipated loss falling upon him. Also to make good; to compensate; to make reimbursement to one of a loss already incurred by him.” Henry Campbell Black, *A Dictionary of Law* 614 (1891).

1893: “to make or save harmless; to secure against loss or damage; to make good; to reimburse to one what he has lost.” J. Kendrick Kinney, *A Law Dictionary and Glossary* 383 (1893).

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1914: “to secure or save harmless against loss or damage, of a specified character, which may happen in the future. To compensate or reimburse one for a loss previously incurred. To indemnify is said to be synonymous with ‘to save harmless.’” John Bouvier, *Bouvier’s Law Dictionary and Concise Encyclopedia* 1532 (Francis Rawle ed., 8th ed. 1914).

1916: “to secure against loss; to compensate for loss.” James A. Ballentine, *A Law Dictionary* 234 (1916).

1925: (1) “to protect fully and save harmless”; (2) “to make good”; or (3) “to reimburse another for some loss.” James John Lewis, *The Collegiate Law Dictionary* 173 (1925).

1934: (1) “to secure or save harmless against loss or damage, of a specified character, which may happen in the future”; or (2) “to compensate or reimburse for a loss previously incurred. To indemnify is said to be synonymous with ‘to save harmless.’” William Edward Baldwin, *Bouvier’s Law Dictionary* 535 (Baldwin’s Century ed. 1934).

1970: “to save harmless against loss or damage incurred by another; to reimburse another for such loss or damage.” Max Radin, *Law Dictionary* 161 (Lawrence G. Greene ed., 2d ed. 1970).

Now an aside. The noun *indemnity* had made its way into English dictionaries long before its verb sibling, from the early 17th century: John Bullokar defined it as “escaping without damage or hurt.” *An English Expositor* (1616) (s.v. *indemnity*). And then Thomas Blount (pronounced /blənt/) recorded it in 1661 and defined it as follows: “eschewing of damage, escaping without hurt, damagelessness.” Thomas Blount, *Glossographia* (2d ed. 1661) (s.v. *indemnity*). Interestingly, Blount omitted all reference to *indemnity* and its cognates in his law dictionary nine years later: see *Nomo-Lexicon: A Law Dictionary* (1670). Then, of course, came Elisha Coles in 1676: “freedom from damage or danger, pardon.” Elisha Coles, *An English Dictionary* (4th ed. 1676) (s.v. *indemnity*).

The evidence is overwhelming that *indemnify* and *hold harmless* are perfectly synonymous. The first is Latinate, the second Anglo-Saxon. And it would be possible to multiply 20th- and 21st-century authorities to this effect.

As with many doublets, triplets, and synonym-strings, arguments began to emerge among litigators about whether in fact some distinction did exist between the terms. After all, it had become a commonplace in legal drafting to use the phrase *indemnify and hold harmless* or *indemnify and save harmless*. See, e.g., Hugh M. Spalding, *An Encyclopaedia of Law and Forms* 190 (1879) (“indemnify and save harmless”); Leonard A. Jones, *Legal Forms: Contractual, Business and Conveyancing Forms* 391 (Samuel G. Gifford ed., 7th ed. 1919) (“save, defend, keep harmless, and indemnify”); Clarence F. Birdseye, *Encyclopaedia of General Business and Legal Forms* 1581 (3d ed. 1924) (“protect, indemnify, and keep harmless”); Saul Gordon, *Gordon’s Standard Annotated Forms of Agreement* 425 (1932) (“indemnify and hold harmless”). By the mid-20th century, transactional lawyers were accustomed to seeing the phrases constantly, and they seemed rarely to inquire into the precise meanings. By 2010, it was possible for a book on effective contract drafting to include a 23-page discussion of drafting indemnities, with several examples of *indemnify and hold harmless*, without even once raising the issue of the semantic contents of these words. See Robert A. Feldman & Raymond T. Nimmer, *Drafting Effective Contracts: A Practitioner’s Guide* 5-113 to -136 (2010).

But the courts had already begun invoking the rule about reading nothing in a contract as “mere surplusage.” They were charged, as is commonly said, with “giving effect to every word.” That’s not a bad rule when legal drafters abstain from larding their contracts with surplusage, but it’s a horrible rule when they do.

And so, beginning in the late 19th century, there were many ahistorical holdings that *indemnify* isn’t at all synonymous with *hold harmless* or *save harmless*. Without so much as a wink at the history of this terminology, courts said such things as this: “There is a distinction between ‘indemnify’ and ‘save harmless,’ the latter phrase possessing the more extensive meaning.” *Weller v. Eames*, 15 Minn. 461, 467 (1870). And now in many states, courts and commentators have begun to call the *indemnify* language the “indemnity clause” and the *hold harmless* language the “exculpatory clause.” See Richard J. Lind, *Express Contracts of Indemnity*, 65 J. Kan. B. Ass’n 36, 36 (1996)

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(distinguishing between exculpatory clauses [*hold harmless*] and indemnity clauses [*indemnify*]); see also John Slavich, *Environmental Issues Affecting Emerging Growth Companies*, 31 Bull. Bus. Law Section of the State Bar of Texas 41, 65 (June 1994) (stating that it is “mistaken” to treat *indemnity* and *hold harmless* synonymously).

Take one state as an example: Florida. There the practice just described has emerged in full flower. The *indemnify* language is the “indemnity clause” (covering liabilities to third parties) and the *hold harmless* language is the “exculpatory clause” (releasing first-party liability – that is, so that the *hold harmless* phrase releases a wrongdoing indemnitee where *indemnify* would not have this effect). See *O’Connell v. Walt Disney World Co.*, 413 So.2d 444, 446 (Fla. Dist. Ct. App. 1982); *Van Tuyn v. Zurich Am. Ins. Co.*, 447 So.2d 318, 320 (Fla. Dist. Ct. App. 1984); *Kitchens of the Oceans, Inc. v. McGladney & Pullen, LLP*, 832 So.2d 270, 272 (Fla. Dist. Ct. App. 2002).

And then there’s just explicit judicial nonsense, this bit being from California: “Are the words ‘indemnify’ and ‘hold harmless’ synonymous? No. One is offensive and the other is defensive – even though *both* contemplate third-liability situations. ‘Indemnify’ is an offensive right – a sword – allowing an indemnitee to seek indemnification. ‘Hold harmless’ is defensive: The right not to be bothered by the other party itself seeking indemnification.” *Queen Villas Homeowners Ass’n v. TCB Prop. Mgmt.*, 56 Cal. Rptr. 3d 528, 534 (Ct. App. 2007).

True, the majority rule is that *indemnify* and *hold harmless* is a unitary phrase that means nothing more than *indemnify* alone. See, e.g., *Brentnal v. Holmes*, 1 Root (Conn.) 291, 1 Am. Dec. 44 (1791); *Long v. McAllister-Long*, 221 S.W.3d 1, 10 (Tenn. Ct. App. 2006) (stating that the term *hold harmless* is synonymous with the word *indemnify*, so that a hold-harmless provision in a divorce agreement is nothing more nor less than an indemnity); *Loscher v. Hudson*, 182 P.3d 25, 33 (Kan. Ct. App. 2008) (“‘Hold harmless’ is synonymous with ‘indemnify.’”). Perhaps the best statement on point is that of Vice Chancellor Strine of Delaware, who was presented with an argument to distinguish the terms: “The terms ‘indemnify’ and ‘hold harmless’ have a long history of joint use throughout the lexicon of

Anglo-American legal practice. The phrase ‘indemnify and hold harmless’ appears in countless types of contracts in varying contexts. The plain fact is that lawyers have become so accustomed to using the phrase ‘indemnify and hold harmless’ that it is often almost second nature for the drafter of a contract to include both phrases in referring to a single indemnification right.” *Majkowski v. American Imaging Mgmt. Servs., LLC*, 913 A.2d 572, 588 (Del. Ch. 2006). He added that transactional lawyers everywhere would be surprised to learn that they had unwittingly created additional rights by tacking *and hold harmless* onto *indemnify*. *Id.*

There has been a welter of needless litigation over the doublet, as litigants have wasted countless dollars fighting over imaginary differences between the words – differences that have no historical justification. And now there is bad law in many states – bad law that is well ensconced. There’s an object lesson for all of us: know legal language, its history, and its development; research it when necessary (the literature is startlingly easy to find); and make considered drafting decisions that avoid extra words that don’t convey extra meaning – because some court, somewhere, some day, will find extra meaning where there isn’t any.

