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Contractual Indemnification Clauses - Part I

Probably no other type of contract clause common to construction and design or, for that matter, any contractual undertaking between parties, generates as much concern and effort as clauses for express indemnification. A brief working definition of the concept of indemnity may be:

> "In general, indemnity may be defined as the obligation resting on one party to make good a loss or damage another party has incurred. This obligation may be expressly provided for by contract, or it may arise from the equities of particular circumstances."

Several types of indemnity are generally recognized under the laws of most states. Indemnity may arise from a written indemnity agreement. It may also be implied from contractual language, from the relationship of the parties, or because the parties are jointly at fault in causing damages to another party.

Indemnity which is not contractual in nature, does not arise from a stated or expressed contractual provision in an agreement between the parties, is a means of shifting the obligation to pay damages from one person to another when facts of a particular case make it unfair to hold one party completely or partially responsible for the loss to a third party. Or, as it has otherwise been stated, comparative indemnity allows a party at fault to spread the obligation for payment of loss among others who also bear some measure of culpability. As one court has expressed it, "comparative equitable indemnity includes the entire range of possible apportionments, from no right to any indemnity to a right of complete indemnity."

Most concerns about indemnity as they relate to contractors and design professionals arise in the form of express contract clauses in their dealings with others and so we shall focus upon this relationship.

Generally speaking, there are three types of express indemnity clauses:

Type One is the "broad form" indemnity clause which states that the indemnitor, the party with the duty to indemnify, will hold the indemnitee, the protected party, harmless from the risk in question, even if the entire loss is caused by the indemnitee. An example of this type of clause may be when a contractor or designer agrees to hold its owner/client harmless from any and all claims arising from the project, even if such claims are caused solely by the

The **Type Two** clause or the "intermediate form" requires the indemnitor to assume all of the risks associated with the subject, but not if the sole cause of risk is attributable to the

indemnitee. This type of clause is more typical of the construction industry. Typical intermediate form language could include the contractor or designer agreeing to hold the owner harmless from any and all claims arising from the project, provided such claim is caused in whole or in part by the negligent act or omission of the contractor or designer and regardless of whether the claim is caused in part by the negligent act or omission of the owner.

A **Type Three** agreement, which may also be called a "comparative fault" agreement, would hold the indemnitor responsible only for the loss caused by the indemnitor, or to the extent caused by the indemnitor. Typically the contractor or designer could agree to hold an owner harmless from any and all claims arising from the project, but only to the extent caused in whole or in part by the negligent acts or omissions of the contractor or designer. This Type Three agreement is more or less reiterative of what was discussed above in the context of non-contractual indemnity, which is sometimes referred to as 'implied or equitable indemnity,' and is based upon common law principals commonly recognized in the United States.

Each of these types of agreements has particular legal and insuring ramifications.

Coming Next Quarter:
Contractual Indemnification Clauses - Part II
"The Ramifications"

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RA&MCO Insurance Services
2300 Clayton Rd, Suite 600
Concord, CA 94520-2142
www.ramco-ins.com

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