

Hold Harmless and Indemnity Provisions... What Did I Agree To Do?

By Jeffrey Cavignac, CPCU, RPLU, ARM

One of the most misunderstood provisions in a construction contract is the indemnity provision. An indemnity provision, which usually includes a requirement to hold harmless and defend another party, is included in nearly all construction contracts. Generally speaking, the upstream party (a general contractor or owner for example) is attempting to shift risk to a downstream party (the general contractor or a subcontractor). In simple terms, subject to certain parameters, the downstream party is agreeing to be responsible for the upstream party.

As an insurance broker focused on development and construction businesses, we get asked frequently: "If we sign this, are we insured?" It would be great if this could be answered "Yes" or "No," but life is rarely that straight forward. In order to understand whether or not a specific indemnification provision is insurable, we have to drill down in to an actual indemnity.

A typical indemnity provision might read as follows:

"To the fullest extent permitted by law the Contractor shall indemnify, defend and hold harmless the owner, architect, architect's consultants and agents and employees of any of them from and against any claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the work whether caused in whole or in part by the contractor, a subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable."

This type of provision requires the contractor (downstream party) to indemnify, defend and hold harmless the owner (upstream party). In layman's terms:

- *Indemnify* means that the contractor will compensate the upstream party for a loss.
- *Defend* means the contractor will provide the upstream party with a legal defense.
- *Hold Harmless* means the contractor will relieve the upstream party from liability for a loss.



The next question is to whom the contractor owes this obligation? The provision is clear, the contractor has an obligation to "the owner, architect, architect's consultants and agents and employees of any of them..." Needless to say, this is overly broad.

Having determined what the contractor's obligations are, and to whom they are owed, we now need to determine when the obligation arises. The obligation arises when there are "any claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting

from performance of the work...” The challenge with this provision is twofold. First of all, “any claims damages, losses or expenses” is overly broad. The provision could extend to “any claim” the owner or another upstream party may have against the contractor. This, for example, could make the contractor responsible for legal fees that he might not have been otherwise responsible for. Secondly, the phrase that reads “resulting from performance of the work...” does not require any link at all to the contractor’s performance. All it requires is that it results from the work.

The final phrase of the provision “*whether caused in whole or in part by the contractor, a subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable*” makes it clear that so long as the contractor is even remotely at fault, that they will be responsible for 100% of the damages. Although each state may have specific indemnity laws that prohibit an indemnity this broad, the first part of this provision makes it clear that if the indemnity in question is broader than what is allowed under current law that this indemnity will be interpreted “to the fullest extent permitted by law.”

Our construction clients are asked to sign provisions like this all the time and, as mentioned above, it is not uncommon for them to ask us if such provisions are insurable. In order to determine if a provision is insurable, you need to understand the coverage provided by a contractor’s commercial general liability policy. In classic insurance industry style, contractual liability coverage is provided by an exception to an exclusion. Here is the Contractual Liability Exclusion for the standard Commercial General Liability form published by the Insurance Services Office (Form #CG 0001).

Contractual Liability—“Bodily injury” or “property damage” for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

1. That the insured would have in the absence of the contract or agreement; or
2. Assumed in a contract or agreement that is an “insured contract”, provided the “bodily injury” or “property damage” occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an “insured contract,” reasonable attorneys’ fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of “bodily injury” or “property damage”, provided:
 - a) Liability to such party for, or for the cost of, that party’s defense has also been assumed in the same “insured contract”; and
 - b) Such attorneys’ fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

Based on a review of the exclusion, we know that contractual assumptions of liability are not covered, unless the insured would have been responsible any way (even in the absence of the contract) or if the contract is considered an “Insured Contract.” The applicable section of the definition of “**Insured Contract**” reads as follows:

9. “Insured contract” means:
 - f) That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for “bodily injury” or “property damage” to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

So back to the question that started this discussion: “If I sign this indemnity, am I insured?” Well I know what I would say (I’ll tell you in a minute) but I wanted to find out what the insurance companies who specialize in construction would say. Not surprisingly, I didn’t get a good answer. The typical response

was something like “Every situation is different and has to be evaluated on its merits.” Unfortunately, the underwriters are correct; the answer isn’t black and white. Contractual coverage is often endorsed and coverage can be restricted. You need to understand the specific coverage you have under your commercial general liability policy. In addition, there are indemnity laws in every state that affect this coverage. For example, in California (in most cases) it is illegal to require a subcontractor to indemnify an upstream party for their sole or active negligence. It is acceptable, however, to indemnify that same party for their passive negligence.

“OK, great, but we still want to know if the above indemnity is insurable?” Fair enough, if you’ve read this far, you are entitled to one man’s opinion and here it is: Subject to the qualifiers above, if you are covered by the standard ISO Commercial General Liability Policy (CG 0001) and the contractual coverage has not been modified, you would be covered for the contractual assumption of another’s tort liability or negligence that results in either bodily injury or property damage.

There are two key caveats built in to this statement. First of all, the indemnitee (the owner in this case) must have been at least partially at fault (negligent). Secondly, the damages must involve either bodily injury or property damage.

Final Comments: Just because an indemnity is legal and may be insurable, doesn’t mean it’s fair. While occasionally we come across reasonable indemnification agreements, most, like the one above, are written to strongly favor the upstream party who drafted the contract. The good news is that every contract can be negotiated (okay, most contracts can be negotiated...some clients may tell you to “take it or leave it”) and we strongly suggest when faced with an onerous indemnity that you seek to negotiate a more equitable agreement. The benefits of a good contract attorney and a knowledgeable insurance broker should not be overlooked. ■

2016 Risk Management Seminar Series



Performance Management & Effectively Ending Employment

Friday, August 12, 2016

7:30am Registration

8:00am - 10:00am Program

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Friday, September 9, 2016

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Handbooks: The Do’s and Don’ts of Creating a Handbook

Friday, September 16, 2016

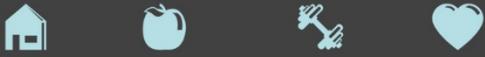
7:30am Registration

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SPF Claims Fall Short For Many Sunscreens

According to a new study from Consumer Reports, 43 percent of sunscreen products do not live up to the sun protection factor (SPF) claims on their bottles.

Consumer Reports found that 13 out of the 35 sunscreen lotions tested had an SPF of less than 30, despite claiming to have at least an SPF of 30 on their labels. The majority of products that fell short on their SPF numbers did so by 10 to 15 points. However, some products were labeled as SPF 50, and were only found to have an SPF of 8.

The study found that sunscreens with active chemical ingredients like avobenzone and ecamsule performed better during testing than those with natural ingredients like zinc oxide.

For more information about the report and to see the top performers, click [here](#). To promote further sun protection, the American Academy of Dermatology encourages people to wear protective clothing when going outdoors and to stay in the shade when possible to reduce the risk of skin cancer.

This article is intended for informational purposes only and is not intended to be exhaustive, nor should any discussion or opinions be construed as professional advice. Readers should contact a health professional for appropriate advice.

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FDA Moves to Regulate the Sale of E-cigarettes

When electronic cigarettes, or e-cigarettes, first entered the market, there were few rules regulating who they could be sold to and what warnings (if any) they must carry. In recent years, concerns about the safety of e-cigarettes has grown and many have criticized e-cigarette manufacturers for targeting teenagers with candy-like flavors like cookies and cream, chocolate and birthday cake.

On May 5, 2016, the Food and Drug Administration (FDA) announced that e-cigarettes and other tobacco products, like hookahs, will be regulated in the same way that traditional cigarettes are. Retailers will now be required to verify that all e-cigarette customers are at least 18 years old, and they will no longer be able to distribute free samples to customers.

Previously, there were no regulations about disclosing the ingredients in e-cigarettes. Under the new rule, all manufacturers will be required to list what is in their products. E-cigarettes must also now carry warnings that they contain the addictive substance, nicotine, and they must come in child-resistant packaging.

In addition, all e-cigarettes that went on sale after February 2007 must gain FDA approval. Considering the fact that the e-cigarette market was virtually non-existent before 2007, this means that every e-cigarette, as well as every flavor and nicotine level, will need to be approved. This could be a very time-intensive and expensive process for companies. E-cigarette manufacturers will have two years to gain FDA approval.

CALIFORNIA AVOCADO SUMMER WRAPS

- 1 ripe avocado, seeded, peeled and cut into chunks
- ½ cup plain nonfat Greek yogurt
- 1 tsp. lime juice
- ½ cup blueberries
- ½ cup carrots, grated
- ¼ cup red onion, chopped
- 2 cups fresh arugula, chopped
- 12 ounces cooked chicken breast, cubed
- 4 8-inch whole wheat tortillas

PREPARATION

Mash half of the avocado chunks with the yogurt and lime juice in a medium bowl. Add the remaining filling ingredients, including the rest of the avocado chunks; mix gently. Top each tortilla with ¼ of the filling mixture. Roll and tuck in the ends. Slice in half diagonally, securing with toothpicks if needed.

Makes: 4 servings

Nutritional Information (per serving)

Total Calories	389
Total Fat	13 g
Protein	35 g
Carbohydrates	32 g
Dietary Fiber	7 g
Saturated Fat	3 g
Sodium	370 mg

*Percent Daily Values are based on a 2,000 calorie diet.

Source: USDA



Food Labels to Get a Makeover

On May 23, 2016, the FDA announced that food labels will be getting an overhaul. The new food labels will now list how many added sugars are in each product and more clearly define what a serving size is. Many Americans are unaware of how much sugar is added to foods they wouldn't conventionally think of as sweet, like cereal, flavored yogurts and tomato soup. The FDA hopes that these new labels will help Americans better manage their diets.

The new labels will also use a bolder font to highlight the number of calories in each food, and labels will now include potassium and vitamin D levels—since studies have shown that many Americans are deficient in these areas.

Food labels will no longer be required to list vitamin C and A levels because deficiencies in these vitamins are now rare, according to the FDA. Calcium and iron amounts, though, will remain on the label.

Large food manufacturers will have two years to add the new labels to their products. Small manufacturers—those who generate less than \$10 million in sales a year—will have three years to adhere to new labeling requirements.

NEW FOOD LABEL

Serving:
Larger
bolder type

New:
Added sugars

Change
in nutrients
required

Serving sizes
updated

Calories:
Larger type

Updated
daily
values

Actual
amounts
declared

New
footnote

Nutrition Facts	
8 servings per container	
Serving size 2/3 cup (55g)	
Amount per serving	
Calories	230
% Daily Value*	
Total Fat 8g	10%
Saturated Fat 1g	5%
Trans Fat 0g	
Cholesterol 0mg	0%
Sodium 160mg	7%
Total Carbohydrate 37g	13%
Dietary Fiber 4g	14%
Total Sugars 12g	
Includes 10g Added Sugars	20%
Protein 3g	
Vitamin D 2mcg	10%
Calcium 260mg	20%
Iron 8mg	45%
Potassium 235mg	6%

* The % Daily Value (DV) tells you how much a nutrient in a serving of food contributes to a daily diet. 2,000 calories a day is used for general nutrition advice.

Spotlight On



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**American
Red Cross**

The San Diego/Imperial Counties chapter of the American Red Cross is part of the largest and most diverse service organization in the United States. They serve more than 3.6 million people and cover nearly 10,000 square miles in the two counties.

They provide food and shelter in emergencies, assist members of our armed forces and their families, teach lifesaving skills, and more. All

American Red Cross disaster assistance is free, made possible by voluntary donations of time and money from the American people.

The vision of the American Red Cross San Diego/Imperial Counties Chapter is to be the most trusted community service organization in education, preparation and response to natural disasters and human emergencies.

For more information about the American Red Cross, visit www.redcross.org/local/california/san-diego