



VIEWS & VISIONS

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Indemnity Trends and Insurance Implications in Construction Contracts

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Taylor Johnson is Vice President of Mountain State Insurance Agency (MSIA) – an independent agency serving business and personal clients throughout West Virginia and the surrounding area. He first became interested in the insurance industry as a fifth grader when his dad purchased a controlling interest in Mountain State Insurance. He is very proud to be a second-generation insurance professional.

Johnson began his insurance career in 2014 as an account executive at MSIA. He earned his Certified Insurance Counselor (CIC) designation in 2015. In 2016, he accepted the role of Vice President, in which he oversees the agency's operations. Johnson also works closely with clients in the construction and energy industries.

He earned an accounting degree from Marshall University in 2011 and a law degree from West Virginia University in 2014. Johnson is licensed to practice law in West Virginia.

Two of the primary mechanisms for risk transfer in construction contracts are indemnity provisions and insurance requirements. It is extremely important to note that indemnity and insurance are not the same thing. Indemnity obligations operate only as a way to transfer legal liability from one party to another. However, because indemnity obligations are only as good as an indemnifying party's financial ability to pay, insurance requirements are typically written to mirror those indemnity obligations to the greatest extent possible, and some owners may require that a contractor's indemnity obligations be insured.

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Types of Indemnity

Indemnity provisions can vary greatly from one contract to another, but many of them have traditionally been based upon fault. A limited indemnity provision could require a contractor to indemnify an owner for the extent of the contractor's fault. For example, if the contractor is 75 percent at fault and the owner is 25 percent at fault for a particular claim, the contractor would only be required to indemnify the owner for the contractor's 75 percent portion of damages.

A broader indemnity provision could require a contractor to indemnify an owner for an entire claim that is caused at least in part by the contractor. Under one of these provisions,



the contractor would be required to indemnify the owner for 100 percent of a claim even if the contractor was one percent at fault and the owner was 99 percent at fault.

In recent years, indemnity provisions have been shifting away from fault-based principles and moving toward party-based principles. Under party-based indemnity principles, each party is responsible for its own employees and property, regardless of fault. Party-based indemnity requires a contractor to indemnify and hold an owner harmless for all injuries to persons employed by a contractor or any lower-tier subcontractors, as well as for damage to property owned or leased by a contractor or any lower-tier subcontractors, regardless of fault. Additionally, an owner would be required to indemnify and hold a contractor harmless for all injuries to persons employed by the owner or any of the owner's other contractors, as well as for damage to property owned or leased by the owner or any of the owner's other contractors, regardless of fault.

It may seem very unusual for a contractor to sign a document agreeing to indemnify an owner for potential losses that are entirely the owner's fault, but the goal of party-based indemnity principles is to eliminate the difficulty of determining proportionate fault and the corresponding legal fees. When insurance programs are tailored to properly insure these indemnity obligations, party-based indemnity provisions work very well in accomplishing that goal.

Insuring Indemnity Provisions

Contractual Liability

One method of insuring contractual indemnity requirements is “contractual liability” coverage in most commercial general liability policies. “Contractual liability” coverage is actually a misnomer, as the coverage grant is an exception to an exclusion for contractually assumed liabilities. Coverage is typically provided for the named insured for parts of their contracts under which they assume the tort liability of other parties for bodily injury or property damage to a third person or organization. However, some carriers may limit this coverage or delete it entirely.

Additional Insured

A second method to insure contractual indemnity obligations is by including the indemnified party as an additional insured, through one or more policy endorsements, on the indemnifying party’s general liability insurance. Additional insured endorsements can provide broad coverage to the indemnified party, but conditions and limitations in these endorsements can vary greatly, especially from one carrier to another. It may take a combination of multiple endorsements, or multiple editions of endorsements, to provide the coverage that the contract requires.

Keep Your Agent Involved

Due to the complexities of indemnity provisions, there is no one-size-fits-all solution for all of a contractor’s construction contracts. It is critically important for your insurance agent to understand your indemnity obligations so that your contracts can be properly negotiated or your insurance policies can be properly tailored. ▽

