

Indemnification or “Hold Harmless”

by
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Preventing or reducing liability is an important aspect for the survey practitioner to consider in preparing contracts. One clause employed to prevent or reduce responsibility for liability damages is an indemnification or “hold harmless” clause.

An indemnification clause or “hold harmless” clause imposes a contractual responsibility for reimbursing the surveyor for liability damages claimed against the surveyor by third parties. Most people have relied upon indemnification in the form of automobile insurance. Automobile insurance shifts the responsibility for liability damages to the insurance company per the insurance contract. An indemnification clause is often and properly used by the surveyor to shift the responsibility to the client for paying damages for a negligent act that should not in fairness be the responsibility of the surveyor.

The employment of an indemnification clause by a surveyor is ideally suited in one of three situations. The first situation is where the client has demanded some reduction of services to save money, time, or both that increase the risk that the surveyor will be liable to a third party as a result of the reduced services demanded by the client. The second situation is where the surveyor must rely on information provided by the client or their agent, contractor, etc. to properly perform surveying services and that information could be faulty. The third situation is where the surveyor’s services are intertwined with services provided by others to such an extent that liability by any one will reflect poorly on the surveyor’s services and may be difficult for a layperson to understand and identify the true source of the fault.

For example, assume a surveyor’s client intends to erect a structure and employs the surveyor to stake out the location of the structure. The client gives the surveyor a faulty engineering plan that the surveyor must rely upon to stake out the structure. The contractor completes half the structure before the mistake in the plan is discovered. The contractor sues the surveyor and engineer for misrepresentation. The surveyor along with the engineer is found liable to the contractor. An indemnification clause in the client’s contract would allow the surveyor to seek reimbursement from the client for the liability damages caused by the engineer’s negligence.

An indemnification clause should be employed in a contract between the surveyor and the client where three factors are present: 1) There is risk of increased liability to the surveyor from third-parties, the client, or client’s agents, contractors, etc. 2) The client stands to benefit from the risk undertaken by the surveyor or the client has caused or increased the likelihood of liability to the surveyor. 3) The client has the assets to cover reasonable and foreseeable damages arising from the risk. (The most meticulous and well-written indemnification clause will not get “blood from a rock” or money from an indigent.)

Indemnity: Client and Surveyor each agree to indemnify and hold the other harmless, and their respective officers, employees, agents, and representatives, from and against liability for all claims, losses, damages, and expenses, including reasonable attorney fees, to the extent such claims, losses, damages, or expenses are caused by the party's negligent acts, errors, or omissions or those of their agents, contractors, sub-contractors, or assignees. In the event claims, losses, damages or expenses are caused by the joint or concurrent negligence of Client and Surveyor, they shall be borne by each party in proportion to their respective negligence.

There are several different forms of indemnification clauses. One form shown by the previous example treats each party the same and shifts the responsibility for liability damages to the party at fault. Another form shifts the responsibility for liability damages to one party regardless of the source of the faulty behavior. The former is generally given unhampered recognition by the courts while the later is critically scrutinized by the courts and often rejected under equitable grounds where there is unequal bargaining power.

The surveyor must avoid signing a contract prepared by the client that shifts all the responsibility for damages, regardless of the source of negligence, to the surveyor. Quite often client-prepared contracts contain one-sided indemnification clauses.

Indemnity: The surveyor shall indemnify the owner for any and all claims arising out of the work or services performed.

Some states do not allow professionals to employ indemnification clauses that shift the responsibility for damages resulting from professional negligence.

Some professional liability insurance contracts will not cover damages that are shifted to the surveyor under an indemnification clause. Accordingly, the surveyor is cautioned to carefully read an indemnification clause and reject those shifting responsibility for liability that was beyond the surveyor's control. When employing an indemnification clause in a contract, the surveyor should review the clause with their liability insurance agent.

Indemnification does not remove or diminish liability. It does not prevent the surveyor from being sued or held liable. It is not a defense to a lawsuit nor can it be used to prevent a lawsuit. It merely allows the surveyor to seek reimbursement from the client for certain sources of liability damages the court will hold the surveyor liable. Furthermore, an indemnification clause is ineffective where the client does not have the assets or money to cover the responsibility for damages that are shifted as a result of the indemnification clause.

The surveyor would be wise to consult with their attorney to determine if an indemnification clause will be effective in their state and what language is most appropriate according to their state law.

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