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Does your contract have an indemnification provision? Does having one give you all of the protection you need? Are you also listed as an additional insured on the contractor's general commercial liability policy? Let's take a look at some factors that will help you better understand how you can benefit from planning ahead.

What is indemnification?

The concept of indemnification is straightforward. It rests on the idea that each person should be responsible for his own conduct and that the wrongdoer should be liable to the people who had to pay for what the wrongdoer did. It is related to the principles of restitution and unjust enrichment.

An obligation to indemnify an opposing party can occur in the absence of a written provision. For example, it may arise out of equity, the nature of the relationship between the contracting parties, and justice or fairness. Nonetheless, there is no substitute for having an express indemnification clause written into your contract. When your contract does not have a written indemnification provision, the party from whom you seek indemnity must have either clearly breached a contract or otherwise engaged in some kind of related tortious conduct in order for you to be indemnified.

Make sure you know what the indemnification clause covers.

Do not be like the party to a contract who thought its indemnification clause protected it. The party argued that, because the negligent event took place at a location other than the exact place covered by a lease, it did not have to indemnify the party whose property was damaged at the specific leased premises. The controlling factor was the unambiguous language of the contract, which stated that the indemnifying party "agrees to hold harmless" the damaged party for "any liability or loss ... arising out of ... use of the premises." Even though the negligent event took place elsewhere, the damage to the property arose out of "use of the premises," which triggered the indemnification clause.

Be aware that there are some important limitations to indemnification clauses.

Contractors in the construction industry do not have an unlimited right to indemnification. Tennessee does not allow an indemnification provision in a construction contract that "purports to hold harmless the promisee from liability for damages caused by the sole negligence of the promisee." These clauses are void against public policy, and they are not permitted.

There are other factors that may limit an indemnification clause. An indemnification clause is subject to the same principles of contract interpretation as any other clause of your contract. For example, there must be a "meeting of the minds," the provision must be clear and unambiguous, and it must be sufficiently definite to determine the rights and obligations of the parties.

Is a written indemnification clause the only way to protect yourself?

No. One of the best ways to add a layer of protection is to have the contractor list you as an additional insured on his commercial general liability (CGL) policy. As with any other contract, however, it pays to know what events and circumstances the CGL policy covers.

In one case, the dispute concerned whether water penetration around some windows installed in a hotel gave rise to insurance coverage. There were allegations that the windows had not been installed correctly and statements made that the insured party should have foreseen that water damage might have occurred from improperly installed windows. The case focused on the fact that it made more sense to assume that the windows would be installed properly, which meant that the water damage was not foreseeable.

With a CGL policy, there are some questions you should ask concerning what gives rise to insurance coverage under the policy, including at least:

- Whose conduct triggers coverage?
- What kind of conduct triggers coverage?
- What damages are excluded?
- What are the policy limits?

Accordingly, when you are considering how best to protect yourself, review your own contract to make sure it has an indemnification provision in it that satisfies you, and review your contractor's CGL policy to make sure you are listed as an additional insured and coverage is adequate.

Travelers Indem. Co. of America v. Moore & Associates, Inc., 216 S.W.3d 302 (Tenn. 2007); Union Realty Co., Ltd. v. Family Dollar Stores of Tennessee, Inc., 255 S.W.3d 586 (Tenn. Ct. App. 2007); Planters Gin Co. v. Federal Compress & Warehouse Co., Inc., 78 S.W.2d 885 (Tenn. 2002); Pitt v. Tyree Organization Limited, 90 S.W.3d 244 (Tenn. Ct. App. 2002); Winter v. Smith, 914 S.W.2d 527 (Tenn. Ct. App. 1995); TENN. CODE ANN. § 62-6-123.