

# Legal Scope

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## Indemnification: What is it and why is it so important?

There are specific construction contract clauses that receive extra scrutiny. Indemnification is one of them.

Indemnification is a risk-shifting provision that identifies certain potential liability exposure, and it shifts that risk to one party. Typically, prime contracts shift risk from the owner onto a prime contractor. Subcontracts typically shift risk from the contractor onto a subcontractor.

Typical indemnification paragraphs will commence with language along the lines of “[Contractor] agrees to indemnify, defend and hold harmless the [Owner] against . . .”

Usually, contractual indemnification pertains to injuries (losses) that may arise due to a third-party suffering physical or property damage. Common examples that might trigger indemnification litigation include a pedestrian injured on a sidewalk near a construction site, or if a construction activity somehow injured property, such as a

neighboring building or automobile. In those instances, the injured party would likely pursue its claim against (at a minimum) the owner, prime contractor, and relevant subcontractors.

The reason indemnification clauses receive extra scrutiny during contract reviews is because a contractor/subcontractor should be aware of the risk that it is accepting on a project. Most contractors/subcontractors are willing to be responsible for losses caused by their own acts, omissions, and negligence. It only seems fair that if one company caused the loss, then that company (or its insurer) should be responsible for the pay-out to the injured party.

Where significant redlining tends to happen, is when the contract seeks to expand the indemnification clause to cover risks or losses that are beyond the control of the party. For example, Pennsylvania courts will enforce a contract that requires the prime contractor to cover (indemnify) the losses that arise from the owner’s portion of negligence. Accordingly, depending on the specific language in the clause and the circumstances of the injury, it may be that the prime contractor is required to cover the entire loss, even if the prime contractor was only minimally at fault. This same issue can arise for subcontractors in relation to a prime contractor.

To ensure the greatest amount of protection and clarification of rights and obligations, it is wise to seek advice from counsel to redline and negotiate the indemnification language, as well as advice from counsel when an incident occurs and litigation is pending. Often, when indemnification clauses are litigated, other issues of liability, insurance, and breach of contract become part of the complex litigation.

## The Numbers:

**6.8%**

- Case-Shiller Index year-over-year increase in the 20-City Composite.
- The Case-Shiller Index monitors housing price data on large metropolitan regions.
- Home prices are generally increasing in all the surveyed metro areas, but particularly Seattle, Las Vegas, and San Francisco

Source(s): S&P Dow Jones Indices, Press Release, April 24, 2018.



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