

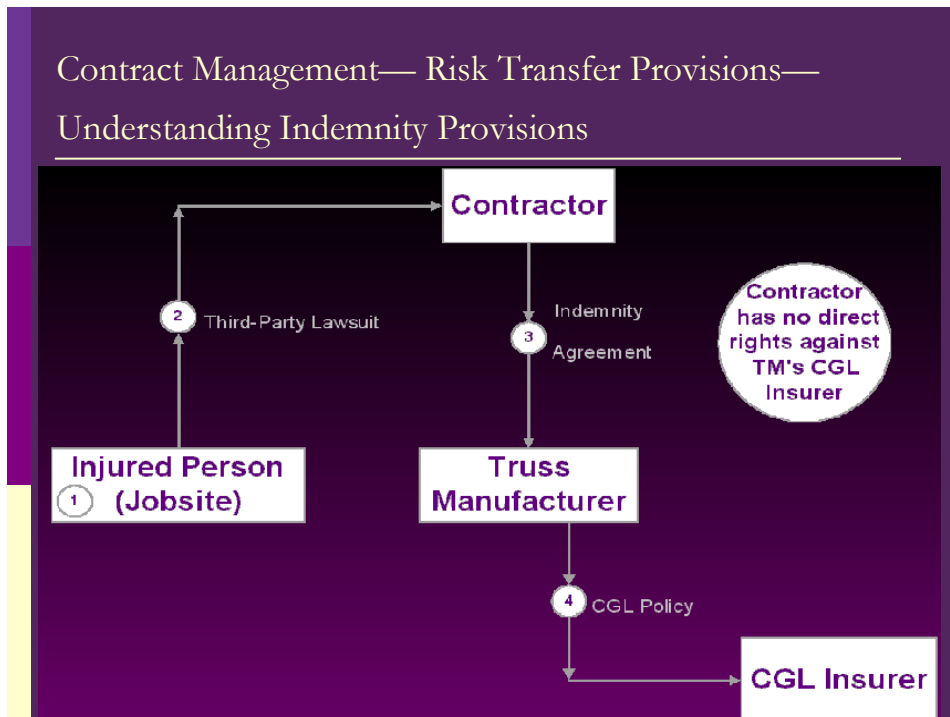
INDEMNITY PROVISIONS

An indemnification or indemnity provision is a common risk transfer technique. They are routinely used by builders and general contractors in those form customer contracts they request their subcontractors and suppliers sign.

From the perspective of the subcontractor and supplier, the builder is trying to transfer risk to them through the indemnity provision. The best way to begin, to understand indemnity provisions, is to read through a sample provision from a builder's form supplier agreement. Below we will read through an example of a broadly-worded indemnity provision. Before we start however, note that if agreed to, a broadly worded indemnity provision, transfers a great deal of risk to the person or company agreeing to such provision.

The Seller shall indemnify and hold harmless the Builder and all its agents and employees from and against all claims, damages, losses, and expenses, including attorneys fees, arising out of or resulting from the Seller's work whether it is caused in part by the negligence of Builder. It is specifically understood that this indemnify shall be interpreted as indemnifying Builder and its agents and representatives from their own sole and/or partial negligence.

The language in this indemnity provision that is most problematic is as follows: (1) "...whether it is caused in part by the negligence of Builder..." and (2) "...from their own sole and/or partial negligence." For now, let us try to at least understand fundamentally how this provision can be troublesome to the subcontractor and supplier. The following graphic outlines the way a broad indemnity provision may function assuming a wall, truss and component manufacturer agreed to a builder's indemnity provision in the customer contract that was signed.



CASE BREAK

In our example the truss manufacturer is selling roof trusses only to a contractor. The contractor hires its own trade contractor to install the trusses. The truss manufacturer however agrees to broadly indemnify the contractor in the contract that is signed for the sale of the trusses.

A person is injured on the jobsite. The person injured was climbing through the roof trusses using the webs as a ladder and a web pulled away laterally from the truss, causing the person to fall to the ground. His injuries resulted from the fall. The injured person sues only the builder for his injuries and asserts negligence claiming the contractor allowed and in fact encouraged that the trusses be used by jobsite laborers in this fashion.

In the event a broadly worded indemnity provision was signed by the truss manufacturer, the contractor may demand that the truss manufacturer defend the contractor from the lawsuit and pay whatever sums are required to resolve the lawsuit. If the truss manufacturer refuses, the contractor could in turn file his own lawsuit against the truss manufacturer. This is the case even though the truss manufacturer is without fault as the trusses were being used for other than their intended purpose. Truss webs are clearly not designed for this kind of lateral force. By agreeing to the indemnification provision the truss manufacturer now becomes directly involved in defending and resolving the injured person's lawsuit filed against the builder. In fact the builder may be the only party at fault and may be 100% responsible for allowing and encouraging the trusses to be used in the manner that leads to the fall and injury. Nevertheless because of agreeing to the broadly worded indemnification provision, the truss manufacturer now essentially becomes the responsible party instead of the contractor.

The language or scope of the indemnity provision is very important. As we have seen with our example, a broad form indemnity clause as we cited above may require the subcontractor or supplier to defend and pay all claims related to or arising out of any way their particular scope of work, whether or not the claims were caused by them. A limited indemnity clause on the other hand will only require the subcontractor or supplier to defend and cover a claim to the extent of their direct fault. To leave us with some understanding of limited indemnity clauses, let's modify our above case example somewhat.

CASE BREAK

If the indemnity provision was conditioned in some way on the direct fault of the truss manufacturer, at such time that the contractor demanded that the truss manufacturer defend the lawsuit, the truss manufacturer would respond that since it has no responsibility for the accident (other than supplying the trusses which were in turn misused) that it would refuse to defend the lawsuit. In this case, the truss manufacturer would be correct.