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# Indemnity

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## Client Alert: Indemnity and Insurance in Arizona

### Top 10 List of Questions and Answers for Owners, Contractors and Design Professionals\*

by Jim Sienicki and Ron Messerly,  
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#### 1. Is an indemnity clause that requires the other party to indemnify you for losses caused by your own negligence enforceable?

If the project is public, the answer is no, you cannot ask another party to indemnify you for your own negligence. If the project is private, the answer is that you cannot shift the risk of your “sole” negligence (sole negligence is where it is alleged that you were solely to blame for the damages or injury in question), but you can shift the risk of your partial negligence through a “specific” indemnity clause. If drafted properly, a specific indemnity clause that requires the other party to indemnify you for losses caused in part by your own negligence is enforceable. A general indemnity clause does not provide indemnity for losses caused by your own negligence. Therefore, a properly drafted and specific indemnity clause can help protect you in cases where it is alleged that you and the other party to the agreement are both responsible for the damages or injury in question. Because it is difficult to apportion that fault, a specific indemnity clause can help save a lot of time and money on private projects that would otherwise be spent litigating the apportionment of that fault. Therefore, you should discuss with your attorney whether the indemnity clause in the contract you are preparing or reviewing is a properly drafted specific indemnity clause and whether it is enforceable. That way, you would know the protection you are receiving or the risks you are taking by agreeing to such an indemnity clause, and what changes to such clause should be made before you sign the contract.

#### 2. Does insurance cover your indemnity risks?

It depends on the breadth of your indemnity clause. If you agree to indemnify another party only for claims arising from death, personal injury, or property damage, the answer is probably yes. If you agree to indemnify the other party for additional economic claims, penalties, and losses, however, those claims will probably not be covered by your policy.

#### 3. Are you giving a broader indemnity than you are getting?

If you are a general contractor, you should be sure to compare the breadth of the indemnity you are giving the owner in the general contract with the indemnity you are getting from your subcontractors in your subcontracts. If they are not the same, you may find that you have liabilities that are now yours, but that you cannot pass on to your subcontractor. This is not a good position to be in. This same warning applies to subcontractors who subcontract out part of their subcontract work, and architects who contract with engineers or other consultants.

#### 4. Can your indemnity clause protect you against civil penalties?

In many cases the answer is yes. However, there are some cases, such as penalties imposed for violations of environmental laws, the answer is probably no. Other cases, such as penalties imposed by OSHA, remain an open question.

## 5. What do I get/give when the word “defend” is used in my indemnity clause?

The term “defend” usually appears in a phrase like “X agrees to defend, indemnify, and hold harmless Y . . . .” In such a phrase, the obligation to “indemnify” means that X promises to pay Y, if Y is found liable for the injury or damages in question. If the word “defend” is left out, X does not have to pay anything to Y until Y is found liable or pays money in settlement of the claim. If Y is found not liable, X may never have to pay anything to Y. However, if the word “defend” is used, as soon as it is alleged that Y is liable for damages or injury within the scope of the indemnity clause, X has the obligation to hire an attorney and defend Y from the claim – even if X has no liability at all. If X does not defend, then X will be liable for any attorney fees Y incurs in defending itself. Discussing this one word “defend” with your attorney may save you hundreds of thousands of dollars.

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# Insurance

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## 6. What is a Wrap Up?

A wrap up is a policy or combination of policies of insurance that cover all of the risks that are otherwise covered by policies purchased by the individual project participants. So, if a wrap up for Commercial General Liability (CGL) insurance is issued, there will be one policy for the CGL project. The individual participants then notify their own carriers and tell them not to cover the project, and deduct their normal insurance costs from their contracts. The party administering the wrap up (typically the owner or the contractor) then pays only one premium thereby reducing overall project insurance costs.

## 7. I have a Certificate of Insurance that says I am named as an additional insured on another party’s policy, am I protected?

Not necessarily. A certificate of insurance is not part of an insurance policy and is generally held not to create any rights in the certificate holder. Only by obtaining a copy of the insurance policy containing a “blanket” additional insured clause (that makes everyone an additional insured who the insured promises in a contract to make an additional insured) or by obtaining a copy of the actual policy endorsement making you an additional insured can you be sure that you are actually an additional insured. In some cases, however, it is possible that a certificate will create the protection it purports -- but you don’t only want to be left with the option of hiring an attorney to make that argument if you can protect yourself by you, your insurance professional,

or your attorney actually reviewing the relevant policy provision before a problem arises.

## 8. Are all additional insured endorsements the same?

No. It is best to request a form of additional insured endorsement that covers both on going and completed operations – meaning it provides coverage both while the project is ongoing and after it is complete. If you don’t specify, you will likely get an endorsement that protects you only during the operations of the primary insured.

## 9. What is the difference between “Occurrence” policies and “Claims Made” Policies?

“Occurrence” policies cover claims whenever they are made as long as the “occurrence” that gives rise to the claim occurs while the policy is in effect. Commercial General Liability (CGL) policies are typically Occurrence Policies. “Claims Made” policies only cover “claims” that are made to the insurance carrier while the policy is actually in effect. Architect and Engineers’ Errors and Omissions Policies are typically Claims Made Policies.

## 10. What insurance does your contract require you to have and what does your insurance policy say about your subcontracts?

You should review your contract and your insurance policies with your insurance professional and/or your attorney. You must make sure you are providing the insurance required by your contract so you don’t have any losses for which you are responsible for providing insurance that are not covered by your existing insurance policy. That is a recipe for a disaster. In addition, in order to protect themselves from more and more claims, insurance companies sometimes require that an insured general contractor put specific requirements in its subcontracts for insurance that must be provided by the subcontractors. The reason is to ensure that if the general contractor is sued as a result of the subcontractor’s wrongdoing and the insurer has to defend and/or pay the claim, that the risk or loss can be transferred to the subcontractor and the subcontractor’s insurance carrier. You must review your insurance policies as set forth above to see if there are any such requirements so that you can comply with them. Otherwise, if those provisions (required by your insurance policies) are not present in your subcontracts, you may find your insurer declining coverage because you breached the insurance contract. Then you have bought yourself an insurance coverage dispute which will require you to hire an attorney with funds out of your own pocket. You should make sure you take these “ounce of prevention” steps to avoid incurring “a pound of cure.”

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## Be Informed

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Indemnity and insurance issues are complex. Mistakes regarding these issues can be very costly. You should have your attorney review your indemnity and insurance provisions in your contracts and meet with your attorney to discuss these important issues. You should discuss your particular situation with your attorney. If you have any questions regarding this client alert or indemnity or insurance issues, please call us or your attorney.



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**Jim Sienicki** is a partner with Snell & Wilmer L.L.P. His practice is concentrated in commercial litigation, with emphasis on construction law, alternative dispute resolution, and creditors' rights. Jim has represented owners, developers, general contractors, subcontractors, suppliers, and design professional in litigation, arbitration, and mediation matters involving public and private projects, and with public bid procedures, bid protests, contract preparation and revision, preparation of construction claims, calculation and proof of damages, prompt payment issues, surety rights, lien and bond claims, licensing and registration requirements, architect and engineer liability, personal injury litigation, construction defects, administrative law issues, legislation, registration of contractors matters, insurance risks and coverage, and bankruptcy matters. He is active in many construction industry trade associations.

Jim has extensive experience in dealing with indemnity and insurance matters during his 20-year career. He is a panel member of the American Arbitration Association; a former panel member of U.S. Arbitration and Mediation of Arizona, Nevada, and New Mexico Inc.; a member of the State Bar of Arizona's Construction Law, Bankruptcy, and ADR sections; a member of the Maricopa County Bar Association, and a member of the American Bar Association's Public Contract Law, Tort and Insurance Practice, Litigation, and Forum on the Construction Industry sections. Jim is a graduate of the U.S. Air Force Academy and the University of Kansas School of Law. He is licensed to practice in Arizona.



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**Ron Messerly** concentrates his practice in construction and design law, insurance law (as it relates to the construction industry and design professions), and complex real estate development transactions. For over 12 years, he has advised participants in every phase of the construction and development process including property owners and developers, general contractors, subcontractors, suppliers, and sureties. Ron's practice includes dispute resolution, insurance coverage analysis, drafting and review of all forms of construction and professional design contracts, purchase orders, bonds, claims, and claim responses. He represents parties contracting with all levels of government in bid protests and disputes, including proceedings on federal contracts before contracting agencies and the United States General Accounting Office.

Ron is a member of the American Bar Association and its Sections on Litigation and Construction Law, the Federal Bar Association, the Oregon State Bar and its Section on Construction Law, the Multnomah Bar Association, the State Bar of Arizona, the Maricopa County Bar Association, the United States Supreme Court Historical Society, and the Selden Society. He is a graduate of Arizona State University and Willamette University College of Law (J.D., *magna cum laude*).

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Snell & Wilmer is a law firm of more than 360 attorneys with offices in Phoenix and Tucson, Arizona; Denver, Colorado; Irvine, California; Las Vegas, Nevada and Salt Lake City, Utah; and represents more than 10,000 clients ranging from large, publicly-traded corporations to small enterprises and individuals.

*\* The purpose of this newsletter is to provide our readers with information on current topics of general interest. The article should not be considered legal advice or opinion, because its content may not apply to the specific facts of a particular case. This article is not intended to be a complete analysis of indemnity and insurance issues in Arizona. Attorney consultation is especially recommended before signing the contract. For specific questions or a copy of these recent amendments, please contact James J. Sienicki or Ron Messerly of Snell & Wilmer, or your attorney.*

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