

Indemnification: Get It In Writing.

Indemnification, simply put, means one person pays for damage to another caused by a specified event or loss. Every construction project contains situations ripe for indemnity: defective work, stolen equipment, personal injuries, broken pipes. Shifting final responsibility to the person who actually caused the damage, however, isn't always a straightforward process.

There are two types of indemnity: express and implied. A claim based on express indemnity arises from a written agreement. Implied indemnification only arises if there are specific relationships between the parties.

Every effort should be made to address indemnification in the contract documents. These provisions provide certainty that any losses incurred will be shifted to the party who is primarily liable for the loss.

If there is no express indemnification clause, a claim for implied indemnity might be possible so that a person who had to pay damage to another (the "Indemnitee") can recover from the party who actually caused the loss (the "Indemnitor"). The Indemnitee, however, can only be liable where the duty to pay is created by statute or common law.

Making a claim for implied indemnity is no easy task. Virginia courts require that the would-be Indemnitee prove that: (1) an indemnitor-indemnitee relationship existed between it and the proposed Indemnitor; (2) the Indemnitee was compelled to satisfy the claim of the third-party; (3) the Indemnitee's settlement with the third-party was reasonable; and (4) the unlawful action of the Indemnitor proximately caused the third-party's injury. Frequently, "only unique factors or a special relationship between the parties" are sufficient to satisfy a Court's inquiry. In some instances, Courts require that the Indemnitee actually paid a judgment (rather than just repair costs or a settlement amount, for example) before allowing recovery.

Given the challenges of making a claim for implied indemnity -- and Virginia court's reluctance to impose it -- express indemnity provisions are an essential element of any construction contract. In the absence of such a provision, a party without fault may nonetheless be liable for another's loss with no avenue for recovering from the responsible party.

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