

# RED FLAG WORDS YOU CANNOT IGNORE INDEMNIFICATION HOLD HARMLESS DEFENSE

By Glenn H. Youngling, Esq.

If you sign a contract containing a provision such as the one below, you may be putting your association into the role of insurance company to the vendor or service provider. You may be opening yourself up to liability you never dreamed of, even if you or the Association does nothing wrong.

**Indemnification:** *The Client agrees to the fullest extent permitted by law to hold*

*harmless and to indemnify Provider, Provider's partners; servants, agents, and employees (collectively the "indemnitees"), and to defend the indemnitees using the counsel satisfactory to the Provider, from and against all claims, liabilities, losses, damages, judgments, awards, and costs arising from or connected with the Work and/or the performance of the Work described herein, but only if such claim, damage, loss, or expense is caused in whole or in part by pas-*

*sive or active negligence, by Client, or Client's employees, agents, contractors, sub-contractors, disgruntled homeowners, aunts, uncles, or any party directly or indirectly employed or retained by them, regardless of whether or not it is caused in part by the passive or active negligence of a party indemnified hereunder. However, this provision shall not apply to the liability of any indemnitee arising out of said indemnitee's sole negligence or willful misconduct.*

Often provisions similar to this are included in the standard contracts of reputable vendors and service providers. The sections are often put there by the other party's attorney. It may well be that the party whose contract includes the provision does not know what this section means. It is possible to balance some of these concepts with appropriate companion provisions such as insurance, limitations of liability and alternative dispute resolution. Legal counsel should be consulted about such sections so that risk management can be appropriately addressed.

### **GOTCHA!**

In each of the following examples the association could have averted a significant problem by addressing simple contract basics before it signed on the line. Do you know what the association should have done as part of the contracting process? Will you check next time before you sign on the line?

#### **The Suspended Corporation.**

When the State forms are sent to the former manager or the invalid address of a former director who has moved, they go unresponded to. The State then suspends the corporation. The association has just contracted to perform expensive deck repairs and an irate owner learns the corporation has been suspended. The owner threatens to litigate. A suspended corporation lacks the legal capacity to enter into contracts and has no standing to appear in court as a plaintiff or defendant!

**Worker's Comp Surprise.** The Association enters into an agreement with a contractor without confirming the validity of the contractor's license. Months after the job is complete, the Association's insurer performs an audit of contractors hired by the association and discovers the discrepancy. The insurer retroactively levies an expensive workers compensation premium against the Association.

#### **Unlicensed Contractor Equals**

**Uninsured Liability Claim.** A landscaper who is not licensed to work on tall trees nevertheless has an employee climb to the top of a tree to perform pruning. The employee falls and is seriously hurt. The worker (employed by an unli-

censed contractor) is deemed an employee of the owner of the property. The worker sues the association. The association's liability insurer refuses to defend saying it is a workers compensation claim. The association has no workers compensation on the landscaper's employees.

**No Scope of Work Means Claim Debatable.** The Association procures bids to "paint" the buildings. The low bidder proposal (which, when signed, became the contract) describes the work as a complete two coat paint job. The low bidder's proposal is signed but two years later the paint job is failing. The painter says the association got the two coat job it paid for with one coat being a sweep of the spray gun one direction and the second coat being a sweep back. In looking back at one of the higher bids it is noted that the scope of work includes a description of the preparation, the brand and type of paint to be used and a minimum thickness of the paint coating that would end up on the building. Does the association have a breach of contract claim against the first painter?

**No Additional Insured Status Means No Insurance Coverage At All.** A pest control company performs routine chemical treatment around several units. There is no request that the contractor add the association as an additional insured on its policy, although this could be done at no additional cost. The contract with the association is simply the signed proposal. A resident dies unexpectedly and the family sues the association with a claim that is somewhat unclear but based on the use of the chemical. The Association's insurer refuses to defend pointing out the exclusion for claims arising out of exposure to toxic chemicals. The pest control company's insurer refuses to defend the association as well because it is not an insured.

### **RESOURCES FOR VERIFYING WITH WHOM YOU ARE CONTRACTING**

**CALIFORNIA CONTRACTORS STATE LICENSE BOARD:**  
<http://www.cslb.ca.gov/consumers/>

At this site you can confirm that a contractor is properly licensed, review

the basics of what must be in a construction contract and review dispute resolution options offered by the board.

### **CALIFORNIA SECRETARY OF STATE:**

At this site you can confirm that corporations (the other party and your Association) are in good standing and able to enter into contacts:

<http://kepler.ss.ca.gov/list.html>

If you are dealing with a partnership, you may also find it registered at the same website.

### **COUNTY FICTITIOUS NAME FILINGS:**

You may find that the entity you are dealing with uses a name different from its legal name or the individual who is conducting the business. This is called a fictitious name. Businesses using fictitious names are required to register at the county level. Many counties have interactive web sites where information is available to verify who is the responsible party behind a fictitious name. Generally you can write to the county and for a small fee the clerk will send you a copy of the fictitious name statement that identifies the business and the individual who is using the fictitious name.

A few web sites, such as San Francisco, permit you to check the name on its interactive web site:  
<http://services.sfgov.org/bns/start.asp>

### **CALIFORNIA DEPARTMENT OF CONSUMER AFFAIRS**

This umbrella organization maintains a web site where you can verify a wide range of licenses including architects, engineers, pest control operators, alarm companies, locksmiths and security companies.

<http://www.dca.ca.gov/r-r/r rdca.htm>

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*Glenn Youngling is an attorney with offices in San Rafael whose practice includes a sizeable number of common interest developments. He is a member of the ECHO Legal Resource Panel.*