STATEMENT FROM STUART S. ZISHOLTZ, ESQ.

Recently we have come across a new and insidious indemnification clause that we want to alert you to.

Indemnification is a fancy way of saying that you have to pay somebody back. Essentially, I will pay you back if you lay out money for me.

Hold harmless, which is usually used in connection with indemnification, means that you make sure that the other fellow does not pay it in the first place. If we agree that if we incur a debt, I will pay it and make sure that you will not have to pay it, that is hold harmless.

The normal clause in construction contracts is for the subcontractor to indemnify and hold harmless in the event of personal injuries, property damage or wrongful death due to negligence that may exist on the job site.

Thus, if you are an electrician and a carpenter trips over your wiring, etc., that does not belong there, the general contractor or the owner want to know that they are not going to get involved in either paying the claim for negligence, or if they have to pay it, that they will be reimbursed. That brings in the indemnification and hold harmless clause.

Under normal circumstances, you look at that clause, trot over to your insurance broker, make sure that you have that type of insurance coverage, and you are on your way.

Recently, we came across an indemnification and hold harmless clause in a contract that reads as follows:

> "Contractor will indemnify and hold harmless Owner and Construction Manager, their officers, directors and employees from and against any and all claims, suits, liens, judgments, damages, losses and expenses including reasonable attorneys'

> fees and costs, arising in whole or in part and in any manner for the acts, omissions, breach or default of contractor in connection with the performance of any work by Contractor pursuant to this contract. Contractor will defend and bear all costs of defending any actions or proceedings brought against Owner and/or Construction Manager arising in whole or in part out of any such acts, omissions, breach or default."

This is a dangerous and insidious clause. It puts contract work into the insurance clause which normally pertain to personal injuries. It gives the contractor a blank check to hold back your money, and, worse than that, it does so with your consent.

Everyone is familiar with the way retainage money is held back, backcharges are concocted, excuses are fabricated to hold back payment, etc. The difference between those situations and this clause is that this clause gives the contractor your consent and your blessings. All the contractor has to do is go to a lawyer and "consult" and, bingo, you have a backcharge. If the backcharge is legitimate, the costs can skyrocket. If it is not legitimate, at least a part of it will go towards "consultation" which can stick.

You are, therefore, placed on an alert at this point not to gloss over the indemnification clause because it might contain a lot more than you bargained for and a lot more than is part of your agreement.

Never let your lien time run out!

For a free copy of a pamphlet pertaining to Mechanic's Liens and payment bonds, please contact me.

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