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## The A201 General Indemnity Clause

The American Institute of Architect's *Document A201 General Conditions of the Contractor for Construction* (A201) is the product of thousands of hours of thoughtful consideration by two generations of design professionals. Hence, many design professionals and general contractors assume that the indemnity agreement contained in A201 provides the maximum amount of protection to the owner of a project.

Many risk managers across the country also assume that the A201 indemnity clause provides exemplary protection. However, upon closer analysis, the A201 indemnity clause contains glaring weaknesses when applied to certain situations that may create losses.

### What Losses Are Protected?

A201 section 3.18.1 states:

To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless

the Owner, Architect, and Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is

attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 3.18.

If one breaks this clause into its component parts and reads them in conjunction with the definitions of the defined terms in the clause, gaps in the indemnity obligation arguably exist. This clause, like most indemnity clauses, has three main components and subparts:

1. Parties protected: "...the Contractor shall indemnify...the Owner, Architect and Architect's consultants and agents and employees of any of them...."

2. Losses protected against: "...against claims, ...arising out of the Work, provided [the] claim is attributable to....":

a. personal injuries: "...bodily injury, sickness or death...."

b. tangible property damage, other than property that is part of the project: "...or injury to...tangible property (other than the Work itself)...."

3. Extent of the risk: "but only to the extent...caused in whole or in part by negligent acts...of the [General] Contractor, a Subcontractor...whether or not such claim...is caused in part by [the Owner, Architect or Architect's consultants and agents and employees of any of them]...."

This clause is effective at protecting the owner and the design team from most conceivable types of personal injury claims (component 2(a), above). For example, if a laborer is injured at the site, the owner and design team are protected. If the project is a condominium and the homeowners claim they are suffering emotional distress due to the defective design and construction of structural components, this clause will protect the owner. If a crane falls onto passing traffic next to a construction project, again, this clause will protect the owner. There are nearly infinite variations of the types of protection this clause provides.

What the clause arguably does not protect, however, is more subtle and can be found in component 2(b) above, concerning tangible property damage. "Work" is separately defined in A201 as:

...the construction and services required by the Contract Documents, whether completed or partially completed, and include all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or part of the Project.

Usually, the Work will constitute the whole project.

If one substitutes "the project" for Work in the indemnity clause, it is apparent that damage to the project is excluded from the clause. Thus, under the A201 indemnity clause, the general contractor will be required to indemnify the owner for many

### The A201 indemnity agreement may not stand up under scrutiny.

By Peter V. Dessau

types of loss, but it will not be required to indemnify the owner for a damage claim to a project while it is actually under construction. Nor will it protect the owner if there are post-construction claims of construction defects. This is because construction defects are by definition part of the Work.

The clause was probably drafted in this manner because the insurance provisions contained in the A201 require that the parties to the construction process secure insurance that will indemnify the parties from damage to the Work.

The problem, however, with relying on the insurance clauses to provide this protection is three-fold. First, insurance coverage often does not meet the parties' expectations. For example, on smaller projects or projects that are not properly administered, parties commonly fail to obtain Builder's Risk insurance, a requirement of A201, paragraph 11.3.1.

Second, if there is a post-construction defect claim, insurance coverage will be more difficult to secure. These are precisely the types of risk insurance carriers attempt to characterize as simple workmanship flaws that are not covered by the insurance policy in question. Normally, in the best case, the insurance carrier will provide coverage only for the collateral damage caused by the defective work, e.g., the water damage to a wall caused by a defectively constructed roof. In the worst case, the insurance carrier will try to deny coverage because the only property damage that manifests itself will be intangible—for example, a drop in the value of the project—a loss, the carrier will assert, that is not insurable.

Finally, most comprehensive general liability policies contain contractual liability coverage, which affords qualified protection to an insured for obligations that the insured promised to indemnify. The extent of coverage is affected by the scope of the indemnity obligation. Inserting indemnity language that does not create a duty to indemnify a large category of claims is a questionable risk management technique.

In summary, the A201 indemnity clause

is effective at indemnifying owners and design professionals against certain types of risks, but likely fails to protect them against construction defect claims. Instead, A201 attempts to shift construction defect risks to insurance carriers. However, even if all of the insurance policies mandated by A201 are purchased, the lack of strong indemnity language may affect the ability to get an acknowledgment of insurance coverage from the insurance carrier. Moreover, it is common for insurance carriers to assert coverage positions and defenses against many types of construction defect claims.

Many risk managers  
across the country  
also assume that the  
A201 indemnity  
clause provides  
exemplary protection.

#### What is the Extent of the Protection?

Savvy contractors argue that there is an ambiguity in the A201 indemnity clause. Because most states strictly construe indemnity clauses, causing narrow interpretations, this argument may meet with success in some courts. Before revealing this potential ambiguity, some background is necessary regarding indemnity clauses.

Generally speaking, there are three types of indemnity clauses:<sup>1</sup>

1. The *broad form* indemnity clause states that the indemnitor, the party with the duty to indemnify, will hold the indemnitee, the protected party, harmless from the risk in question, even if the entire loss is caused by the indemnitee. The following illustrates the breadth of broad form language:

Contractor hereby agrees to hold Owner harmless from any and all claims arising from the Project, even if such claims are caused solely by the negligent act or omission of owner or Owner's agents.

2. The *intermediate form* clause requires the indemnitor to assume all of the risk associated with a subject, but not if the sole cause of the risk is attributable to the indemnitee. This type of clause is fairly typical in the construction industry, because it permits an owner to shift 100 percent of risk onto the contractor even if the contractor was only 1 percent responsible for the loss. Typical intermediate form language is as follows:

Contractor hereby agrees to hold Owner harmless from any and all claims arising from the Project, provided such claim is caused in whole or in part by the negligent act or omission of Contractor and regardless of whether the claim is caused in part by the negligent act or omission of Owner.

3. With a *comparative fault* clause, the indemnitor is responsible only for the loss that the indemnitor actually caused:

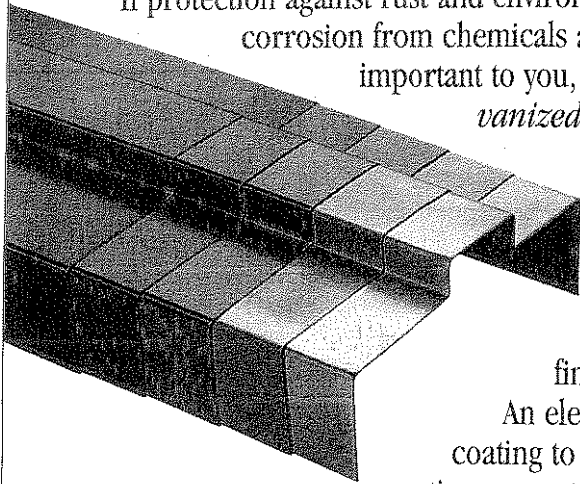
Contractor hereby agrees to hold Owner harmless from any and all claims arising from the Project, but only to the extent caused in whole or in part by the negligent acts or omissions of Contractor.

In many states, the law imposes comparative indemnity obligations between parties. This indemnity duty is called "implied indemnity" and is based on common law principles of negligence. Thus, a comparative indemnity clause does not create any more protection than the owner would otherwise have in a dispute with a general contractor.

The potential problem with the A201 clause is simple: what type of clause is it? It is unclear whether section 3.18.1 of A201 is a comparative fault clause or an intermediate form clause. The key language, "but only to the extent," is in one portion of the clause and can be construed as limiting the

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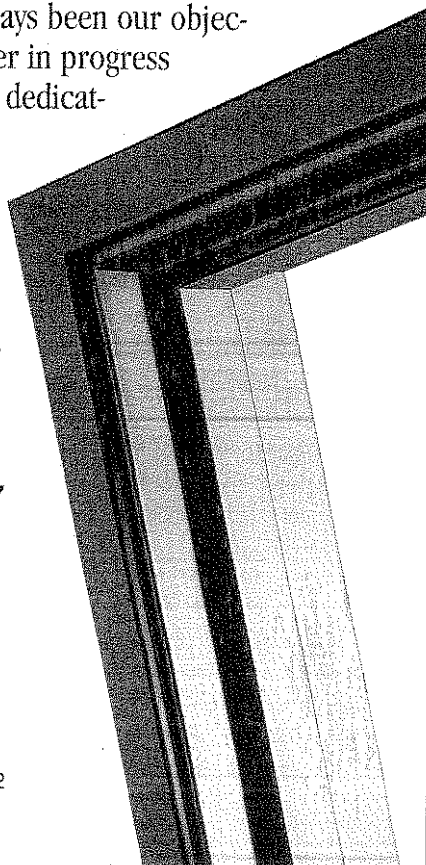
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duty to indemnify to the extent the loss is caused by the Contractor's negligent acts or omissions, i.e., a comparative fault interpretation. However, this limiting language appears contrary to language found later in the clause: "...regardless of whether or not such claim...is caused in part by a party to the agreement..."

The apparent intent of this language was to ensure the clause is an intermediate form clause. But this interpretation, though sensible, is far from clear. Whether the clause is interpreted by a court to be an intermediate form clause or a comparative fault clause is not tremendously important once a dispute erupts.

The potential ambiguity in the clause unnecessarily creates an argument permitting the general contractor to avoid indemnity duties that the owner assumed the contractor would assume. Even if a court later finds the general contractor's denial was unfounded, the owner will still have lost much of the benefit of the clause by virtue of the general contractor's refusal to defend the owner during a claim.

**Conclusion**

Indemnity clauses are a key element in the risk management arsenal of the general conditions. Recognizing the risks to which the clause applies is essential. The A201 general indemnity clause provides broad protection, but relies heavily on the proper placement of insurance policies and favorable coverage decisions of insurance carriers for protection from construction defect claims. If proper insurance is not in place, the insurance carrier asserts aggressive coverage positions, or the general contractor proves the clause is ambiguous, then the owner may not be wholly protected. ♦

**Note**

1. This portion of the article draws upon the characterizations in Patrick Wielinski's excellent two-volume work, *Contractual Risk Transfer*, published by the International Risk Management Institute, Inc. (1995).

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