



HOLD HARMLESS AGREEMENTS

What is a hold harmless agreement?

Very simply, a hold harmless clause is an agreement between two or more parties outlining the obligation of one party (i.e., the contractor) to financially protect another party (i.e., the community association) in the event of a claim. The clause is usually incorporated into a general contract between two parties.

Why are hold harmless clauses important?

Community associations commonly hire independent contractors to provide various services, such as swimming pool operations/maintenance, landscaping, trash removal, snow removal, elevator maintenance, and more. This is generally cost effective and convenient, but this does not hold the association “harmless” in the event a claim arises resulting from the performance of the contractor.

What is the responsibility of the community association?

When hiring a contractor, make sure the general contract entered into has specific “hold harmless” language that protects the association’s interest against claims caused by or resulting from the contractor’s services. This clause should be reviewed carefully by the association board members, management, attorney, and insurance agent.

Hold harmless agreements are an essential element of contracts with independent contractors.



A lawyer will make sure the association’s legal rights are properly protected, and an insurance agent will make sure appropriate insurance would apply—it may not, which potentially could breach the association’s insurance contract. You must be careful with this clause and seek advice.

What could happen?

If a legitimate claim is presented to a community association by someone alleging bodily injury or property damage as the result of work performed by a contractor, the association could ultimately be responsible for compensating the claimant for damages.

(continued on page 2)

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If the community association did not require a hold harmless clause be included in the contract, the burden of payment would rest with the association.

However, if the contract did include a properly worded hold harmless agreement in the association's favor, the contractor would likely be contractually obligated to provide financial protection for the association including both indemnity and legal costs. The contractor's insurance would respond IF the claim is covered under the terms of its insurance policy. However, the absence of insurance coverage would not relieve the contractor of a financial obligation to protect the association.

What must the community association do?

Verify a contract contains a hold harmless clause.

Again, it's important that the language is worded to protect the community association's interest against claims caused by or resulting from the contractor's services. Have appropriate legal and insurance experts review the wording.

The agreement should include provisions to both indemnify and pay defense costs on behalf of the association for claims caused by or arising out of the contractor's work. If a lawsuit is filed alleging the contractor was negligent and the

suit names both the contractor and the community association as defendants, a properly executed hold harmless agreement can provide for a primary financing source (the contractor's insurance) to pay legal costs to defend the association's interests, and if a judgment is rendered, indemnify (pay on behalf of) the association.

The contract must be written and signed by a person with authority.

Require a current certificate of insurance from the contractor.

The certificate should indicate the term (time frame), types of coverages, and the limits they carry. There should be sufficient notification to YOU if an insurance policy is cancelled. The recommended types and limits of insurance coverage are contingent upon the nature of the services to be provided; as such, the association's insurance representative should be consulted for advice.

The stated coverage limits should be for the full benefit of the association. Accordingly, it is important to confirm that any annual aggregate limits apply *per job or location*. If this is not the case, confirm (request a claim report detailing losses incurred during the current policy period) that the aggregate limits are not in jeopardy of being exhausted.

For example, if a contractor has insurance with an annual aggregate limit of \$1,000,000, that may seem sufficient. But, if the contractor has already incurred losses against this limit for the year totaling \$600,000, the available limit is really \$400,000—not \$1,000,000.

What is an example?

XYZ Community Association had some paint peeling from a wall in a building lobby. While an engineer from Eager Engineering Corporation was performing other duties for the association, the association manager asked the engineer to take a look at the wall to determine if anything structurally could be causing the paint problem. For a fee of \$2,000, Eager Engineer agreed to evaluate the situation; however, no contract was signed.

Eager Engineer reported back to the manager that the wall was sound. Therefore, XYZ's manager had the peeling wall re-painted. Shortly thereafter, the wall collapsed and injured a resident. An investigation determined the wall did in fact have a structural problem and it caused the collapse. The peeling paint was a "symptom" of the wall's instability.

(continued on page 4)



Greg Youngblood, vice president of the Risk Consulting Group for USI Mid Atlantic and a Certified Risk Manager (CRM), relays his advice and experience over the last 15 years as it pertains to independent contractors and hold harmless agreements.

Q: What are suggested risk management practices regarding the use of independent contractors?

A: A community association's risk management program should include various initiatives designed to effectively manage the exposures inherent in service contracts with independent contractors.

Pre-Contract Initiatives

Check References—Call at least two current clients and inquire about the independent contractor's quality of service and safety record. Reputable contractors should receive solid references, and their clients should be able to comment on their prior safety program and safety record.

Review Safety Program—Obtain a copy of the written safety program that outlines the specific safety/risk control practices of the independent contractor. Most reputable contractors have developed formal programs, as they make good business sense and are often required by their property/casualty insurance carrier(s).

Review Loss Runs—Obtain 2–3 years' worth of loss runs including the following lines of coverage: general liability, workers compensation, and auto liability. Evaluate both the frequency (total number) and severity (total cost) of prior claims filed by the independent contractor. The prior claims reflect the effectiveness of a contractor's "safety controls" and are an indication of the type of claims that could occur in the future.

Review OSHA 300 Log—Obtain a copy of this log, which must be completed by most contractors. It summarizes OSHA recordable injuries (more than first aid), lost time days, and restricted days. This log is an excellent way to evaluate the types of accidents the contractor's employees are having and the quality of its safety program.

The Service Contract

Draft a Standard Contract—Community associations should have a service contract that is used for independent contractors. An attorney who specializes in constructing service contracts should draft this document.

Include Indemnity and Hold Harmless Agreements—Your attorney should include contract language that indemnifies and holds the association harmless for the independent contractor's negligence.

Include Insurance Specifications—Your attorney should include specific insurance coverages and policy limits into the service contract. Each contractor must be required to provide a Certificate of Insurance and a certification that the limits are in force at the time the certificate was issued. The community association should be identified as a certificate holder so that it will be notified in the event the policy is modified, renewed, or cancelled.

Post-Contract Initiatives

Finalize Safety Methods—It is critical to review specific controls that will be required by the community association (i.e., the association may require practices or controls that exceed those outlined in the contractor's safety program).

Hold Periodic Safety Inspections—Occasionally monitor and evaluate the work practices by contractors. It is critical to oversee the work being performed by contractors to assure that their work practices are in accordance with agreed upon methods and standards.

Indemnity and hold harmless agreements in service contracts are only one piece of the puzzle. Sound risk management requires the rest of the pieces to be in place in order to effectively manage independent contractors.



Who's responsible? Since XYZ did not have Eager Engineer sign a contract with a hold harmless agreement in favor of the association, the burden of financial responsibility falls on the association. Eager Engineer made a mistake in the evaluation of the wall, and XYZ made a mistake by entering into a verbal agreement without a written hold harmless provision.

What's the bottom line?

Hold harmless agreements are an essential element of contracts, particularly those involving community associations hiring independent contractors. But, they are NOT harmless! It is critical to understand the complex structure of contractual agreements to maintain control over liability. Such control can only come through knowledge of the facts. We urge you to carefully review and update hold harmless agreements with your legal counsel and insurance representative.

If you have any questions or need further information, please contact Steve Dickerson (703-205-8788, Steve.Dickerson@usi.biz) or Theresa Swan (703-205-8783, Theresa.Swan@usi.biz).

DEFINITIONS

Hold Harmless Agreement

Very simply, a hold harmless clause is an agreement between two or more parties outlining the obligation of one party (i.e., the contractor) to financially protect another party (i.e., the community association) in the event of a claim. The clause is usually incorporated into a general contract between two parties.

Independent Contractor

An independent contractor agrees to do a particular job according to his own judgment and methods. The person employing the independent contractor has no control over the means or methods used by the contractor. The independent contractor is not an employee or agent of the community association.