

# Legal Corner

## Contractual Indemnification Provisions and the Recovery of Attorneys' Fees

### Part Two: Contractual Indemnification Provisions

By Willcox Dunn, Vandeventer Black LLP

Part One of this article, in the previous issue of *CM Advisor*, focused on the “American Rule” and “prevailing party” provisions, also referred to as “attorneys’ fees” provisions. Prevailing party provisions shift the status quo under the American Rule, where each party is responsible for its own attorneys’ fees, to a loser-pays system similar to that under the British Rule. An express prevailing party provision is fairly easy to identify, allowing the parties to discuss and negotiate the terms and ultimately make an informed business decision to accept, modify or reject the provision. This is not always the case for broadly-worded indemnification provisions that appear to address only third-party liability, but that can be construed by courts as accomplishing more expansive results. Consider the following example of a typical, broadly-worded indemnification provision:

*To the fullest extent permitted by law, the Construction Manager (Indemnitor) shall indemnify and hold harmless the Owner (Indemnitee) from and against all claims, damages, losses and expenses, including, but not limited to, attorneys’ fees, arising out of or resulting from the Construction Manager’s performance of its services under this Agreement.*

The parties entering into such an indemnification agreement may have damages and costs arising from third-party claims in mind, but the above language does not expressly limit the scope of the indemnification obligation to third-party claims and damages. Some courts have interpreted broad language such as this to include not only damages and costs arising from third-party claims, but also those arising from claims made directly by the indemnitee against the indemnitor unrelated to third-party, pass-through claims and damages. For example, armed with a provision such as the above example, an owner filing a breach of contract claim against its CM might seek recovery of its attorneys’ fees and costs from the target of its lawsuit, the CM. In addition to paying for its own costs of defense, the CM may end up funding the legal action against itself.

To make matters worse, the owner might not even need to prevail to obtain recovery of its attorneys’ fees and costs since the indemnification provision says nothing about having to prevail in order to trigger the indemnification obligation. Adding insult to injury, the attorneys’ fees and costs related to the owner’s first-party claims against the CM likely do not represent damages for which the CM otherwise would be liable absent the indemnification agreement. The fees and costs, therefore, may be excluded by standard professional liability insurance policies as a contractual assumption of liability.

From the CM’s perspective, the preferred solution is to delete such an indemnification provision in its entirety from the agreement. If the owner insists on an indemnification provision, the CM could consider limiting the scope of the provision to third-party damages resulting from the CM’s negligent performance of its services under the agreement. Negligence often is the trigger for professional liability insurance coverage, and with this type of insurance coverage trigger in place, it is important to include a matching negligence trigger for the indemnification obligation. The CM should delete terms and phrases like “claims,” “losses,” “expenses,” and “attorneys’ fees,” and leave only a reference to damages. An indemnification obligation limited to damages is more likely to track the coverage provided under the CM’s professional liability policy, and less likely to run afoul of a contractual liability exclusion. Often, a simple explanation that the original language represents an uninsured risk, and that the revised language is intended to increase the likelihood of coverage will convince an owner to agree to more reasonable terms. If the owner insists on language that includes attorneys’ fees and costs, the CM could consider limiting the scope of the provision to third-party damages resulting from the CM’s negligent performance of its services under the agreement, *including reasonable attorneys’ fees and costs related to the litigation*. Whether this approach is advisable and the third-party attorneys’ fees and costs will be covered by insurance may depend on the precise wording of the CM’s professional liability insurance policy and the applicable jurisdiction’s definition of “damages.”

Indemnification provisions often seem harmless, but they can create tremendous liability exposure by shifting significant risks and responsibilities. Professional liability insurance brokers and carriers, and attorneys who practice design and construction law can be valuable resources for addressing proposed provisions and identifying their inherent risks. Once the risks have been identified, the CM will be in a better position to negotiate reasonable terms and make an informed business decision about these deceptively complicated provisions that involve the interplay of insurance coverage, applicable law and practical business concerns. [CM](#)

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# Foundation

## A Salute to URS for Foundation Leadership

CMAA’s Foundation focuses on supporting the needs of owners to successfully implement their capital programs nationwide. The funds raised by our Foundation are used to promote CM careers, student scholarships and CM research.

In each issue of *CM Advisor*, the Foundation Board wishes to recognize one of our premier Capital Campaign supporters. This issue, we recognize URS Corporation for their leadership in this regard. The Company recently expanded their support of CMAA and joined the campaign as a ‘Visionary’ member.

URS has been a member of CMAA for many years and has always led by example. This has never been so evident as under the current direction of our Chairman, Tom Bishop, PE. Tom, URS’s Vice President, Strategy and Senior Vice President, URS Division, has been instrumental in CMAA’s growth over the past year and played a critical role in attracting new corporate sponsors to the Foundation.

URS also steadfastly supports the growing CM Certification program, recognizing the need to enhance the CM profession in the marketplace for the benefit of our owners. This is especially true now, as the federal government is allocating billions of dollars for construction and infrastructure projects to help revitalize the economy.

With more than \$130 billion of stimulus funding set aside for construction projects, federal and state agencies will increasingly turn to Construction Managers to ensure project accountability and the efficient use of public funds. The stimulus package set aggressive timelines for spending the money, as well as included detailed transparency and accountability guidelines. URS believes it is important for its CMs to complement their technical training with the business skills that allow them to successfully adapt to the industry’s ever-changing operating environment. Certified CMs have the expertise to effectively manage the various phases of these complex projects, ensure they are completed within the specified timetable and meet the quality standards that our industry has set and our clients demand. URS recognizes the importance of the CMAA’s certification program and also encourages all of its CMs to get more involved in the organization and the CMAA Foundation.

We want to thank URS for being a solid professional force in our complex marketplace, and a big supporter of CMAA’s Foundation goals. We also look forward to the continued growth of the Foundation mission and encourage all of you to [visit the website](#) and get involved as a supporter. Keep in mind that our Foundation is the only one in the country completely dedicated to enhancing the CM profession, something that will pay dividends to all of us. [CM](#)

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