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**Subject:** Homeowners Association Tip of the Week - Contracts and Indemnification

**E K M A R K & E K M A R K, L.L.C.**  
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Contracts with vendors and contractors are a recurring issue in many associations. We will be providing a series of tips on the issues involved in these contracts and the pitfalls to avoid in entering into a contractual relationship.

One of the most important issues with respect to any contract between an association and a vendor or contractor is indemnification. To “indemnify” means to secure or protect against potential loss, and a contract should have a provision requiring the vendor or contractor to indemnify, defend, and hold harmless the association against any claim or damage that arises out of the work being conducted by that vendor or contractor while on the association’s property. Without such a provision, an association could find itself facing legal claims for damage or injury caused by the vendor’s or contractor’s actions on the common area.

An association should be extremely cautious of any contract that has the association indemnifying the vendor or contractor. There are limited instances where this may be warranted, but we have seen contracts that have an association indemnifying a vendor for that vendor’s own negligent, or even criminal, actions. Such language could be very harmful to an association’s interests.

Some contracts limit indemnification to the “gross negligence” or “negligent acts or omissions” of a vendor or contractor. Such language means that an association must show that the vendor or contractor’s action that resulted in the claim for damage constitutes gross negligence or negligence before the indemnification provision takes effect. If the association cannot do so, then the association could be left responsible for the damages. In this situation, the association could be left in a precarious position where it has to prove the contractor was negligent (thus admitting negligence) to obtain indemnification from the contractor, but, in the process, open itself up to liability by the person bringing the claim. On the other hand, if it proves that no negligence occurred, then the contractor will not pay for the attorney’s fees and costs incurred by the association in proving the contractor was not negligent. Thus, associations should avoid such language and having indemnification apply broadly to all actions or omissions of the vendor, contractor, or any other person for whose acts they may be liable (e.g., employees, subcontractors, etc.) arising out of their work under the contract.

Finally, an indemnification obligation is only as good as the ability of that vendor or contractor to actually pay for any claim or damage. As a result, a contract also should require that the vendor or contractor carry a general liability insurance policy and name the association as an additional insured on that policy before the work is commenced.

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