

# Contract Review: Indemnity & Insurance Considerations

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# Contract Provisions Connected to Indemnity and Insurance



Every contract is unique:

- Objectives relating to risk allocation differ from contract to contract.
- Relative bargaining strength also often plays a role in the negotiation of insurance and indemnity provisions.
- Parties' *perception* of risk should be understood.
- Is flexibility limited by regulatory or upstream contract requirements?
- The most important question to ask: Do you understand what risks you have shifted, and which you have retained?

# Contract Provisions Connected to Insurance

- Types of Coverage – Should be complete and be consistent with coverages offered under modern insurance forms. Should also indicate whether claims-made or occurrence is mandated, and include key coverage provisions required.
- Limits – Considerations include the legal environment, types of risks (catastrophic/routine), collectability. Consider whether aggregate limits should be required.
- Deductibles – Should consider specifying amount and, depending on the type of policy, who pays the deductible.
- Insurer Minimum Ratings – Are these appropriate for the risk?

# Contract Provisions Connected to Insurance



## Waivers of Subrogation

- What they are: a contract provision where the parties agree to waive their rights to sue each other for losses covered by their insurance.
- These clauses often require that the parties obtain their insurers' consent, and they should – many insurance policies provide that a policyholder may not waive the insurer's subrogation rights and, if the policyholder has done so, the insurer may deny the claim.

“To the fullest extent permitted by law, the Contractor hereby waives its rights and its insurer(s)' rights of recovery against County under all the Required Insurance for any loss arising from or relating to this Contract. The Contractor shall require its insurers to execute any waiver of subrogation endorsements which may be necessary to effect such waiver.”

# Additional Insured Coverage

- Contracts often require one party to name another party as an additional insured on their liability policies.
- Additional insured status allows direct coverage from the named insured's carrier in the event of a third-party claim, but typically only if the claim derives from the acts or omissions of the named insured.
- Two general approaches to naming an additional insured.
  - Scheduled: Can be specified on a policy endorsement by specific party or by category.
  - Broad Form: Or, the insurance policy can specify that any party who the named insured has agreed to name as an additional insured in a written contract will be given additional insured status.

# Additional Insured Coverage

## Evolution of ISO Endorsements (1985 to 2004)

- CG 20 10 11 85: Very broad, provided coverage for liability “arising out of” the named insured’s operations.
- CG 20 10 10 93: Attempt to limit coverage to only ongoing operations.
- CG 20 10 10 01 and 20 37 10 01: One form clarified to limit to ongoing operations; the second permitted the insured to “buy-back” the products-completed operations AI coverage.
- CG 20 10 10 04 and 20 10 37 04: Narrowed coverage – there must be *some fault* of the named insured before AI coverage is triggered.



# Additional Insured Coverage

## 2013 ISO Form (CG 20 10 04 13 and CG 20 27 04 13)

Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to their liability as co-owner of the premises shown in the Schedule. However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and
2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

(Limits are capped by the amount required by the contract or agreement).

# Additional Insured Coverage

## Primary and Non-Contributory Coverage

- Additional insured requirements are often accompanied by language that states that the additional insured coverage will be provided on a “primary and non-contributory basis.”
- This means that the named insured’s insurance should apply *first* to any loss suffered by the additional insured, prior to the additional insured’s own insurance.
- Key drafting consideration—should this requirement apply to umbrella and excess policies?



# Additional Insured Coverage

## Notice of Cancellation

- Notice requirements are hard to enforce against the insurer, a stranger to the contract.
- Options include (i) requiring that proof of coverage be part of the payment process, (ii) requiring that named insured add an endorsement which requires notice to Als of cancellation or non-renewal, or (iii) consider software that tracks existence, key terms, and modifications/cancellation/renewal of coverage.



# Evidence of Additional Insured Status



## Certificates of Insurance

- Standard Form – identifying insurer, agent or broker, and the named insured. Also gives basic information: Type of Insurance, Policy Period, Limits.
- What they are: Evidence of insurance issued to the policy's named insured.
- What they are not:
  - Evidence of coverage for additional insureds.
  - Evidence of waivers of subrogation.
  - Evidence of any other special endorsements to the named insured's insurance policies.

# Indemnity Principles



- General Concepts
- Purpose: Shift burden to party most able to control the outcome.
- Insurance: Can be an important mechanism for funding the risk, but doesn't necessarily cover all the risk accepted in the contract.
- Understanding the Terms:
  - Indemnify – the agreement by one to reimburse another for a loss.
  - Defend – the agreement by one to provide a legal defense to another.
  - Hold Harmless – the agreement by one to refrain from asserting claims against another.

# Indemnity Principles

## Types of Indemnity

- Common Law: arises as a matter of law and generally provides indemnification for losses only where the indemnitee is 100% without fault.
- Limited Form: indemnification for losses “to the extent” of the indemnitor’s negligence.
- Intermediate Form: complete indemnification for losses caused in whole or in part by the negligence of the indemnitor. And,
- Broad Form: indemnification for all losses even when the indemnitee is 100% at fault.

# Indemnity: Typical Terms

- Covered Damages
  - “Arise out of” or “relating to”
  - Bodily injury, property damage, consequential, punitive, attorneys fees
- Standard of Care
  - No standard, Negligence, Gross Negligence
  - Concurrent or sole negligence
- Special Circumstances
  - Intellectual Property, Hazardous Material
- Caps/Triggers/Limitations
- Survival Terms
- Choice of Counsel



“That was due today? Seriously? I need help.  
Where can I get some homework insurance?”

# Indemnity Principles

## Sample Indemnity Form

In a typical commercial contract, a supplier agrees to indemnify the purchaser against claims arising from the supplier's product. A typical provision might provide:

Supplier shall indemnify, defend and hold Customer harmless from and against all claims, liability, loss, damage, royalties or other expense (including reasonable attorney's fees) to the extent same results from or arises out of (i) bodily injury, death or property damage caused in whole or in part by the negligent or intentionally wrongful act of the Supplier or its employees or agents. The Supplier's indemnification obligations shall survive, and shall not be impaired by (i) the Customer's acceptance of the Products or (ii) the termination of this Agreement.

# Anti-Indemnity Statutes

**Ohio Revised Code 2305.31.** A[n] ... agreement ... relative to the design, planning, construction, alteration, repair, or maintenance of a building ... pursuant to which ... the promisee ... has hired the promisor to perform work, ***purporting to indemnify the promisee*** ... against liability for damages arising out of bodily injury to persons or damage to property initiated or ***proximately caused by or resulting from the negligence of the promisee*** ... is against public policy and is void. Nothing in this section shall prohibit any person from purchasing insurance from an insurance company authorized to do business in the state of Ohio for his own protection or from purchasing a construction bond.

**South Carolina Code 32-2-10.** Hold harmless clauses in certain construction contracts. [A] promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building ... ***purporting to indemnify the promisee*** ... against liability for damages arising out of bodily injury or property damage ***proximately caused by or resulting from the sole negligence of the promisee*** ... is against public policy and unenforceable. Nothing contained in this section shall affect a promise or agreement whereby the promisor shall indemnify or hold harmless the ... against liability for damages resulting from the negligence, ***in whole or in part***, of the promisor, its agents or employees. The provisions of this section shall not affect any insurance contract or workers' compensation agreements ...

# Indemnity Principles



## Waiver of Worker's Compensation Immunity

Sometimes includes waiver of immunity generally provided to employers:

The indemnification obligations contained in this Lease shall not be limited by any workers' compensation, benefit or disability laws, and each indemnitor hereby waives any immunity that said indemnitor may have under the [*applicable state worker's compensation act*] and similar workers' compensation, benefit or disability laws.

Allows an end-run around immunity, exposing insured to civil liability for injuries of insured's employees. Coverage for such civil claims may be precluded by Employer's Liability Exclusion in CGL policy.

Must be conspicuous.



# Risk Transfer Best Practices

## Insurance Procurement Provisions:

- Be involved in contract drafting process early;
- Specify the type and amount of insurance requested in writing;
- Specify the insurance company rating;
- Specify who pays deductible;
- Build in a verification process:
  - Cancellation notifications,
  - Direct communication with broker or insurer,
  - Obtain policies and renewals;
- Failures to procure:
  - Penalties,
  - Ability to procure own insurance at their expense.



# Risk Transfer Best Practices



## Additional Insured Status

- The terms of the endorsement will control the nature and extent of any additional insured coverage.
- The additional insured should require that the additional insured coverage be “primary and non-contributory.”
- Require that certificates of insurance and copies of policies with all required endorsements be provided before any work commences and also as a condition precedent to payment.
- Require that certificates of insurance and policies be provided upon each policy renewal or inception of new coverage.
- Identify the specific forms and/or coverages for which additional insured requirements are included.
- Do not rely on certificates of insurance to confirm additional insured status – require copies of policies and endorsements.

# Risk Transfer Best Practices

## Indemnity Provisions

- Avoid boilerplate language
- Know the law in your jurisdiction to determine what conduct can be validly indemnified
  - Standard of care
  - Concurrent/sole negligence
  - Punitive damages
- Consider who should be indemnified
  - Officers, directors, employees, parents, subsidiaries, etc.
- Consider what damages covered
  - Attorneys' fees
  - Losses
  - Special Considerations
- Determine whether caps, minimums, or other limitations should apply
- Match to Insurance Procurement Clause
- Consider whether terms should survive termination of contract
- Consider choice of law provisions

Thank you!