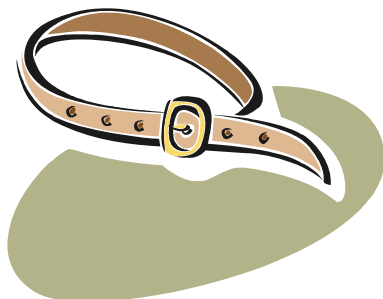


**Everything You've Wanted to Know about Additional Insured, Indemnity Agreements and Contractual Liability
Contractual Risk Management – A Potential Hot Potato – RIMS 2008**



I. Belt and suspenders

– Are both necessary?

A. Indemnity agreements

1. **Pros** - from perspective of Indemnitees:
 - a. Most states permit **Indemnitor (IR)**- the party providing the indemnity - to hold harmless **Indemnitee (IE)** – party receiving the indemnity - for IE’s joint & contributory negligence, and in some cases IE’s sole negligence
 - b. IE’s control their own defense (in most cases)
 - c. IE’s are not subject to “other insurance” clauses found in most liability policies
 - d. Scope of indemnity normally broader than scope of insurance coverage – valuable to extent IR has assets in addition to contractual liability insurance
2. **Cons** - from perspective of Indemnitees:
 - a. Unless IR’s insurer defends IE under supplemental payments of CGL (easier said than done) – defense costs incurred by IE erode IR’s (remaining) aggregate policy limits
 - b. IE is not an insured, cannot make direct claim against insurer
 - c. Anti-indemnity statutes may negate coverage to extent claims arise from IE’s negligence (more on this)

B. Additional Insured

1. **Pros** - from perspective of additional insured
 - a. The **Additional insured (AI)** is normally provided a prompt defense under CGL policy of **Named Insured (NI)**
 - b. The AI’s defense costs under standard ISO CGL policies are in addition to policy limits
 - c. The AI can avoid some or all the impact of anti-indemnity statutes (more on this)
 - d. The AI may avoid effect of standard exclusions in their own policy (severability of interests)
 - e. Most states prohibit insurers from subrogating claims against their insured (at least to the extent of shared coverage)

2. **Cons** – from perspective of additional insured
 - a. NI's insurer has strong desire to limit coverage afforded AI, will attempt to do so for any number of reasons including but not limited to:
 - Liability did not arise from work / operations of NI, or from use or occupancy of premises by NI
 - AI's liability arose from sole negligence of AI
 - AI has other insurance – priority of payments
 - Scope of AI coverage exceeds anti-indemnity statute (not problem in most states – trend is changing)
 - b. AI has minimal control over defense provided by insurer
 - c. Standard and manuscript AI endorsements becoming more restrictive, no longer include completed operations, require some fault of NI, some even limit coverage to vicarious liability only – the AI must review the endorsement!!!!

II. Insuring Indemnification Agreements

- A. Three main types of indemnity agreements not including hybrids. A “limited” form is where IR indemnifies IE for IR's own negligence; an “intermediate” form is where IR indemnifies IE for IR's own negligence - plus the joint or contributory negligence of IE, finally a “broad” form indemnity is where IR indemnifies IE for IR's own negligence, plus the joint, contributory *and sole* negligence of IE. Putting aside issues of fairness – *many states permit broad form indemnity agreements – even if the new additional insured endorsements don't cover them!*
- B. Anti-indemnity statutes are a moving target – it is beyond the author's ability to keep track of them. As of 2005:
 1. 12 states have anti-indemnity statutes with no exceptions (since this article written other states have enacted statutes)
 2. 13 states have no anti-indemnity statutes
 3. 23 states have anti-indemnity statutes (sole, partial or both) **except** when insurance applies – this is problematic in that insurance, as used in statutes, does not or may not encompass self-insurance, fronts, large deductibles or SIR's
- C. It is not possible to insure a broad form indemnity if state prohibits sole fault indemnification - and extends the statute to coverage afforded an additional insured
- D. It is possible to insure a broad form indemnity in states that permit same, but only if NI has sufficient leverage with insurer to obtain pre-July 2004 version of additional insured endorsement (not limited to “caused in whole or in part” by NI). The ability of those downstream to provide broad AI coverage to those upstream should be a major consideration in awarding contracts – the cheapest contractor may not have the broadest coverage!

III. Optimal indemnity language from Indemnitor's perspective

- A. Indemnity should track with CGL insurance coverage (BI and PD)

- B. Indemnity should only apply only to third party liability claims
- C. Indemnity should apply “*only to extent* (IE’s) liability arises from work or operations performed by or on behalf of IR (or use or occupancy)”

IV. Optimal indemnity language from perspective of indemnitee

- A. Indemnity should apply to all losses (insured or not) arising from IR’s work, operations *and completed operations* (or use or occupancy)
- B. To extent not in violation of statutes, indemnity should include liability arising from IE’s joint, contributory or sole negligence with respect to IE’s general supervision (including safety and security), if any, of work or operations performed by or on behalf of IR
- C. In states with statutes that permit broad from indemnity, agreement should apply to “all liabilities arising from work or operations of IR” (regardless of negligence)
- D. In states with statutes that permit intermediate form indemnity, agreement should apply to “all liabilities arising from work or operations of IR when caused in whole or in part by IR, even if caused in part by the IE”

V. Optimal additional insured endorsements

- A. Manuscript AI endorsements can be broader than “ISO” AI endorsements, which are becoming more limited with each new version. Ideally, scope of coverage afforded AI should track with scope of coverage required under contract. Well written AI endorsements should “follow form” with the contract as respects:
 - 1. Status as an AI for products and completed operations
 - 2. Primary and non-contributory coverage if required, otherwise excess
 - 3. Negligence of additional insured – should be vicarious unless contract provides otherwise
 - 4. Responsibility for deductibles or retentions
- B. Other clauses which should be in a well written blanket additional insured endorsement include
 - 1. The limits afforded AI shall not exceed those provided in the policy or required under contract or agreement, whichever is less
 - 2. The coverage afforded the AI shall not exceed that which is required under written contract or agreement