



**YOUR CONTRACTS  
ARE SHOWING!**

**AGENCY RISK MANAGEMENT  
WEBINAR**

**Avoiding E&O  
with Additional  
Insureds in  
Contracts**



## Presenter

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# TODAY'S OBJECTIVES

## 1. Understand Indemnity Clauses in Contracts

- Definitions, Uses, Goals, Limitations
- Legal Impact
- How to Support with Insurance

## 2. Additional Insured Coverage

- Definitions and Uses

## 3. Indemnity vs. Additional Insured

- Scope Comparison
- Sample Wording to Watch

## 4. Key Takeaways and Action Items



# Key Takeaways & Action Items



## Understand

How indemnity and limitation of liability work. Understand how Additional Insured coverage can help support indemnity obligations in clients' contracts.



## Know

The three basic levels of indemnity and Additional Insured coverage. Know what wording to watch for to identify levels of Additional Insured coverage.



## Review

Clients' liability policies to see what Additional Insured coverage is included. Discuss with clients and request endorsements to support contractual obligations.

# OBJECTIVE #1

## **1. Understand Indemnity Clauses in Contracts**

- **Definitions, Uses, Goals, Limitations**
- **Legal Impact**
- **How to Support with Insurance**





## Definitions

### Indemnity

- **Compensation** to a party **for a loss or damage that has already occurred** or to guarantee through a contractual clause to repay another party for loss **or damage that may occur in the future**
- When one party agrees to **assume liability of others** and pay for their liability
- Laws vary by state if indemnity automatically includes **hold harmless**, and/or **defense**, or if these need to be specifically required in contract

### Indemnify

- To **pay or compensate** the other party for its **legal liabilities or losses**.
- Can **indemnify for damages**, which **typically don't arise until the end** of a case or resolution, or
- Can **indemnify for liabilities**, which are **broader** and require the indemnitor to **pay as soon as the indemnitee becomes liable**



## Indemnatee

- Party that **receives compensation** from the indemnitor for incurred injury, loss, or damage
- Person or organization that **is held harmless** in a contract (by the indemnitor)

## Indemnitor

- Party that **agrees to assume liability** of others and **pay** for their liability
- Person or organization that **holds another (the indemnatee) harmless** in a contract
  - **E.g., insurance policy** is an **indemnity agreement**.  
Indemnatee = Named Insured  
Indemnitor = insurance carrier

## Claimant

- **Party who files a claim** against Indemnatee



## Hold Harmless

- A clause in a legal contract **absolving one party of legal liability** for any injuries or damages suffered by another party
- Ensures that **one party cannot hold the other party legally responsible** for any risks incurred from services provided

## Defend

- **Requires indemnifying party to engage attorneys and manage litigation or other proceedings** when a claim covered by the indemnification provision is brought against indemnitee
- Obligation **includes defending, financing a defense, or reimbursing an indemnitee** for defending a claim
- **Duty to defend arises as soon as a claim is asserted** against an indemnitee
- **Some states (e.g., CA), don't require indemnitor to be found liable before there is a duty to defend** if contract specifically requires defense



## How are Indemnity Agreements Used?

- **Protects** the indemnified party **from liability arising from third-party claims** by legally **transferring financial risk** from the indemnitee to the indemnitor
  - Non-insurance contractual risk transfer—**risk financing technique**
- **May prevent** indemnitor **from making claims** against the indemnified party (hold harmless).
- **May require** indemnitor to provide **defense** for indemnitee



## Some Limitations on Indemnity

- **Contract** requirements
- **State laws**
- Interpretation by **courts**
- Indemnitor's lack of **financial capabilities**
- **Insurance** coverage—or lack of it
  - Does not prevent **reputational damage**
  - Does not free indemnitee from **responsibility to third party**
  - **Indemnitee may still be held accountable** for injury or damage



## Some Limitations on Indemnity (cont.)

- No indemnity for **illegal acts**
  - **Can't be used to shield** indemnitees **against liability and fines for illegal acts**
- Creation of **Uninsurable Losses**
  - Insurance typically does not cover **intentional misconduct & illegal acts**
  - All **insurance policies include limitations** and **exclusions**.
  - If you are required to indemnify for these, **you could be paying out of pocket** for uninsured losses



- **Limitation of Liability (LoL)**
  - Clause in contract that limits the amount of money or damages that one party can recover from another party for breach of contract or failure to perform
  - Can be used to add a cap on amount of damages the organization will have to pay under certain circumstances
  
- **Limitation of Liability (LoL) Caps are Common**
  - Examples
    - Indemnitor only liable for losses up to \$500,000.
    - Indemnitor only liable for amounts paid to indemnitor by indemnitee over past 12 months





- **Pro Tip!**—Limitation of Liability (LoL) clauses may also cap insurance requirements
- **Consider how LoL caps may impact you**
  - **For example**
- If you are the **indemnitor**, you may prefer to have an **LoL cap in your own favor** to limit your liability to the indemnitee
- If you are the **indemnitee**, you may **prefer no LoL cap or** only want to permit an **LoL cap in your favor**



## Some Limitations on Indemnity (cont.)

- **Duration of Liability**
  - **Liability can end when contract ends or continue** beyond contract term
- **Statutory Limitations**
  - **Legal proceedings must be initiated within a set time period** determined by law or you waive your right to sue.
  - **Statute of Repose** – Laws add **time limit to file suit after some action by the defendant, even if the plaintiff has not yet been injured.**
  - **Statute of Limitations** – Time limit on a potential plaintiff's right to file a civil lawsuit **after suffering some kind of harm**



## Are All Indemnification Clauses Enforceable?

- In general, **courts don't enforce provisions that are:**
  - **Ambiguous**
  - **Unfair**
    - The result of **gross negligence**
    - Protection against **illegal acts**
  - **Violate public policy**

# Typical Indemnity Goals

Which side of the table are you on?



If you are the **indemnitee**, you may want

- Indemnitor to **fully indemnify you regardless of who was at fault**
- **Protection to the fullest extent legally possible**
- **Limitation of Liability cap only in your favor** and none for indemnitor—no limit on indemnity & insurance paid to/for you



If you are the **indemnitor**, you may want

- Indemnity agreement that **only holds you liable for your own negligent acts for third party claims & breach of contract**
- **Limitation of Liability cap in your favor, without carve out for insurance—caps indemnity & insurance limits paid to indemnitee**





## Some Additional Indemnity Goals

- **Use clear language** and avoid any ambiguity
- **Consider the scope of work.** Draft indemnity requirements to specifically cover anticipated losses without being overly broad
- Try to avoid agreeing to indemnify others for **uninsurable losses**
- **Beware of “unlimited” indemnity clauses** that can put your company at significant legal risk
- Consider adding a **Limitation of Liability** cap in your favor
- **Clarify the trigger** for indemnification

## Impact of Law on Indemnity

- **State laws impact if, and how, indemnity may apply**
  - Well-drafted indemnity agreements may supersede common law, allowing indemnification from indemnitors, sometimes even **for indemnitee's sole negligence**.
  - **Don't assume all indemnity provisions are void** when assuming liability for another's **sole negligence**.



**For construction contracts**, most states do not allow indemnification for indemnitee's **sole negligence**

- Many states consider this **against public policy**, as indemnitees may not be as careful if they know they can transfer financial risk of their sole negligence to an indemnitor
- If written **broader than law allows**, courts **may throw out indemnity clause** altogether





## OBJECTIVE #2

### **2. Additional Insured Coverage**

- Definitions and Uses





# How to Support Indemnity with Insurance

Indemnity

Additional  
Insured

Contractual  
Liability

## Definitions

- **Named Insured** – persons or entities to whom the policy is issued
- **Automatic Insured** – persons or entities who are automatically provided with insured status in the policy because they are members of a group with close ties to the named insured, such as the named insured's directors and officers
- **Additional Insured (AI)** – persons or entities who are granted insured status in conjunction with business relationship and/or contract requirement
- **Pro Tip!** – an AI is not an **Additional Named Insured**, even if the AI is *named* on the AI endorsement

## Why Add Additional Insureds?

- One company may have a desire to **protect another party because of close relationship with that party.**
  - For example:
    - Wanting to protect church members performing services for the insured church
- A company (named insured) may need to **comply with a contractual agreement** requiring the named insured to add an additional insured to their liability policy.
  - For example:
    - Project owners, customers, or owners of property leased by the named insured

## Common Uses for AI Coverage

- **Often used in coordination with indemnity agreement** between named insured (indemnitor) & AI (indemnatee)
- **Transfers contractual risk**
  - Contracts require add upstream parties as AI on downstream parties' policies.
    - E.g., general contractor added as AI on Contractor's policies
- **Helps support indemnity obligations**
  - "Belt & Suspenders"
    - Backup option if indemnity is unenforceable
    - Another source of money if indemnitor does not (or cannot) pay



## OBJECTIVE #3

### 3. Indemnity vs. Additional Insured

- Scope Comparison
- Sample Wording to Watch



Scope	Indemnity	Additional Insured Coverage
Comparative Indemnity / Limited Additional Insured	<p>Each party is responsible for acts caused by their own negligence.</p> <p>Neither party provides indemnity to the other party for <u>other party's</u> negligence.</p>	<p>Provides coverage for the <b>named insured's</b> negligence.</p> <p><b>Does not provide</b> any coverage for the <u>additional insured's</u> negligence.</p>
Partial / Intermediate	<p>One party indemnifies the other party for the <b>1st party's</b> negligence and <b>other party's</b> partial negligence.</p> <p><u>Does not provide</u> indemnity for indemnitee's <b>sole negligence</b>.</p>	<p>Provides coverage for the <b>named insured's</b> negligence.</p> <p><b>Can provide</b> coverage for additional insured's negligence, <u>provided the named insured is at least partly at fault</u>.</p> <p><u>Does not cover sole negligence</u> of additional insured.</p>
Full / Broad	<p>One party indemnifies the other party <b>regardless of who is at fault</b>.</p> <p><u>May provide</u> indemnity for indemnitee's <b>sole negligence</b>.</p>	<p>Provides coverage for the <b>named insured's</b> liability.</p> <p><b>Can provide</b> coverage for the additional insured's negligence, <u>even if the named insured is not at fault</u>.</p> <p><u>Can provide</u> coverage for <b>additional insured's</b> sole negligence.</p>

## Indemnity vs. Additional Insured

Sample Wording	Indemnity	Additional Insured Coverage
Comparative Indemnity / Limited Additional Insured	Contractor and Owner hereby agree to indemnify, defend, and hold each other harmless, <b>to the extent of each party's comparative negligence</b> , from and against claims, damages, losses, and expenses, including but not limited to reasonable attorney's fees, with respect to this Agreement.	Owner shall be included as an additional insured <b>as per ISO forms CG 20 38 12 19 and CG 20 40 12 19 on a vicarious liability basis</b> , with regards to Contractor's Commercial General Liability insurance, with respect to liability for bodily injury and property damage. Such coverage shall apply <b>only to the extent caused by or resulting from</b> Contractor's ongoing and completed operations under this Agreement.
Partial / Intermediate	Contractor shall indemnify, hold harmless, and defend Owner from and against any and all claims, damages, losses, and expenses, including but not limited to reasonable attorney's fees, <b>arising out of or resulting from performance of the Work, except such obligations shall not apply with respect to Owner's sole negligence.</b>	Owner shall be included as an additional insured <b>as per ISO forms CG 20 38 12 19 and CG 20 40 12 19</b> with regards to Contractor's Commercial General Liability insurance, with respect to liability for bodily injury and property damage <b>caused, in whole or in part, by</b> Contractor's ongoing and completed operations under this Agreement.
Full / Broad	Contractor shall indemnify, hold harmless, and defend Owner against any and all claims, damages, losses, and expenses, including but not limited to reasonable attorney's fees, <b>arising out of or resulting from performance of the Work.</b>	Owner shall be included as an additional insured <b>as per ISO form CG 20 10 11 85</b> with regards to Contractor's Commercial General Liability insurance, with respect to liability for bodily injury and property damage <b>arising out of or in connection with</b> Contractor's ongoing and completed operations under this Agreement.

## Indemnity vs. Additional Insured

# Indemnity – Sample Nexus Wording



# Limited Indemnity Example

Contractor agrees to indemnify, defend, and hold harmless Owner, from and against claims, damages, losses, and expenses, including but not limited to reasonable attorney's fees, **solely to the extent directly caused by or resulting from** Contractor's negligence in performance of Contractor's operations under this Agreement



## Broad Indemnity Example

**Contractor shall indemnify, hold harmless, and defend Owner from any and all losses, claims, liens, demands, and causes of action of every kind and character including, but not limited to, the amounts of judgments, penalties, interest, court costs, legal fees, and all other expenses incurred by Owner arising in favor of any party, including claims, liens, debts, personal injuries, death, or damages to property (including employees or property of Owner) and without limitation by enumeration, all other claims or demands of every character occurring, or in any way incident to, in connection with, or arising, directly or indirectly out of, the contract or agreement.**

# Key Takeaways & Action Items



## Understand

How indemnity and limitation of liability work. Understand how Additional Insured coverage can help support indemnity obligations in clients' contracts.



## Know

The three basic levels of indemnity and Additional Insured coverage. Know what wording to watch for to identify levels of Additional Insured coverage.



## Review

Clients' liability policies to see what Additional Insured coverage is included. Discuss with clients and request endorsements to support contractual obligations.

## Contact Information

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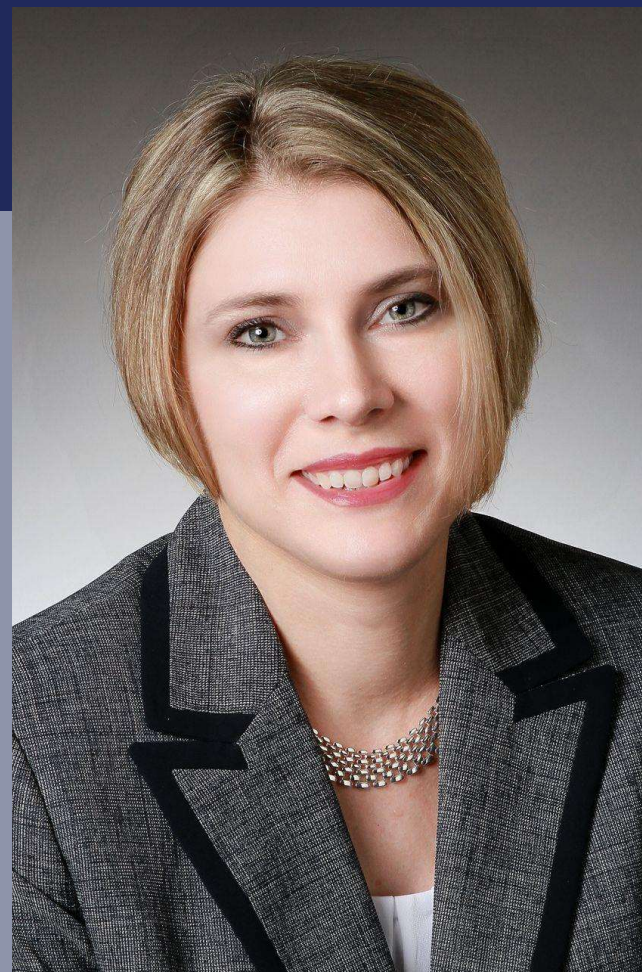
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