

ACI's 2nd Forum on Construction Claims & Litigation

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ISO's Additional Insured Endorsement, the Effect of Recent Anti-Indemnity Statutes in Different Jurisdictions, Impact of Indemnification Agreements, and the Latest Wave of Claims on Indemnification

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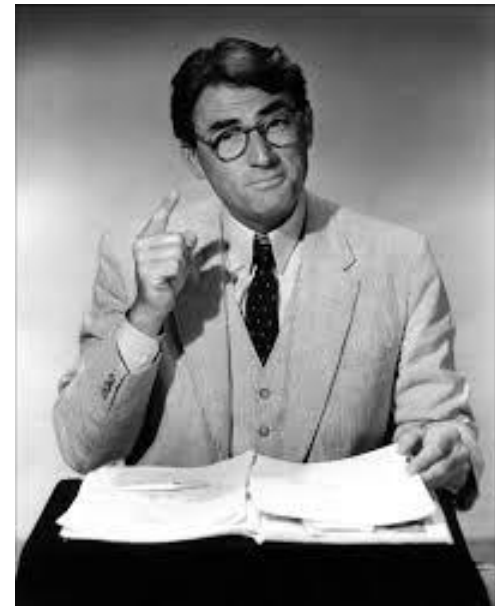


Tweeting about this conference?
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Provisions Difficult to Overcome

- Risk Transfer Provisions
- Indemnity
- Exculpatory
- Reverse Indemnity
- Insurance Requirements
- Additional Insured Endorsements



Contractual Defenses and Contract Risk Management



- Review the Contract Terms!
- Obtain the Policies that are Supposed to respond to the Contractual Promises Made!

Contractual Obligations to Defend / Indemnify / Provide Coverage?

- PL covers professional services of its insureds only
- Distinction between PL and GL
 - Caveat: what is promised in contract may not be provided under promisor's policy
- Design/Build professionals need both
- Contract Language is key
 - Risk transfer
 - Trigger duty to defend



Indemnity – Clauses in Contract

Type 1: Indemnify for Owner's negligence

Type 2: Indemnify for Owner's passive negligence, not active

Type 3: No indemnification if Owner was negligent in any way



Insurance Clauses in Contract

- Certificate of Insurance is NOT enough
- Suggested language:
 - Policy of another
 - Primary basis
 - Coverage and indemnification consistent but NON-CONTINGENT
 - Seek additional insured status



Takeaways

Contract Risk Transfer

- A. Review for consistency
- B. Make sure policies respond accordingly
- C. Keep policies up to date
- D. Check to see what your afforded as a third party beneficiary
- E. Anti-indemnity statutes (*very* state specific)



Additional Insured: Sitting Pretty in the Shoes of a Named Insured

- Design Professionals v. Contractors
 - Get the policy under which you claim you are an AI
 - Be cautious when negotiating to be an AI under another policy
 - Know your status...



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Are You an Additional Insured or a Contractual Indemnitee?

- Coverage considerations versus a party's contractual obligations to insure
- Coverage on a primary, non-contingent basis
- Certificates of insurance – no limitations; what do they really mean
- Contractual malaise - Contracts and Coverage...keeping up with emerging risks and legal precedent; Do policies under which you seek coverage really respond to the obligations under the contract?



Be Careful What You Ask For...

Negotiating Magic Language

- Trigger for Alleged Negligence (Not Actual)
 - For injury to your own employees and property regardless of your own “alleged” or actual negligence
 - Avoid Overreaching (In Whole or In Part)
- Resist risk transfer through language ambiguities
- Know Your Law - Statutory Anti-Indemnity
- State specific as to language that will be enforced to be afforded contractual protection
- Additional Insured with “no limitations”
- Cert. of Ins.
- Non-contingent



Avoid Agreeing to Defense Obligation

Design Professionals must frequently negotiate with Owners who demand that they be defended

It is ultimately a business decision as to whether to encounter this risk

If Design Professional agrees to defense language, we recommend that it be in the form of a reimbursement after the Design Professional is found liable by way of final judgment



Anti-Indemnity Statutes

- Type I: Statutes Barring Indemnity for Indemnatee's Sole Negligence
- Type II: Statutes Barring Indemnity for Indemnatee's Negligence
- Type III: Statutes Barring Indemnity of Design Professional
 - 4 states: void only this type of indem. and lack broader general anti-indem. Statute
 - 3 states: general anti-indem. statute applicable to others on project and a separate law for design professionals
 - 12 states: general anti-indem and expressly excludes design professionals.



Provisions Difficult to Overcome



- Risk Avoidance Provisions
- Limitation of Liability
- Consequential Damage Waivers
- Warranty Waivers or Disclaimers

Hold Harmless may be Harmful, but Limiting Liability is Not That Offensive

- An argument for fairness based on risk and reward
- An effective tool in the majority of jurisdictions
- Construct a sensible limitation of liability clause
- If the prime contract includes a limitation clause, pass it on to subconsultants



Consequential Damage Waiver

The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes:

1. damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
2. damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.



Warranty Waiver

- Design Professional has made no warranties or guarantees except as expressly written within this Agreement.



Provisions Difficult to Overcome or Deal With

- Liquidated Damages
- Contractual Statutes of Limitations
- Prevailing Party Attorneys' Fees
- Dispute Resolution
- Forum Selection



Drafter Beware: Contracting as a Team Effort

- Interpretation law
 - Generally against drafter
 - But, document negotiations on the contract
- Resisting risk transfer through arguing language ambiguity



Complex Construction Defect Claim Resolution: Does our Team have what it Takes?

- Picking the Starting Quarterback
- Delays in the game:
- Pre-Litigation ADR Requirements
 - Contractual
 - CC&Rs
 - Statutory
- When Is the Right Time to Trade?



The Best Offense?

- **Prevailing Party Status**

- Mitigate Run Away Fees
- Take Leverage from Plaintiff
- Inclusion of Fee Waivers in ADR Provisions?

- **Indemnity**

- Specific v. General
- Express v. Equitable



Leveraging Coverage

- How do we get coverage from subcontractors who do not have AI's or maybe a subcontract
 - Fact discovery in lieu of subcontract – what will win the day
 - Passive indemnity where it still exists
 - Insurance policy provisions that might surprise you
 - Supplemental Payments
 - Insured Contract
 - State-wide or General Contractor AI provisions not tied to a project



Triple Duties Increase Odds to Win:

- You owe me defense, indemnification, and insurance coverage!
- Three separate and distinct duties
- Different states treat and enforce obligations differently
- Strength and obligations vary for contractors versus design professionals.

