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CONTRACTUAL RISK TRANSFER: TYPES OF INDEMNITY - PART 2 OF 3

In [my last blog post](#) I set the stage to talk about the importance of Contractual Risk Transfer as an essential part of an effective risk management program. To briefly recap, the word “indemnify” means to make compensation to another for hurt, loss or damage. There are three levels of indemnification - broad, intermediate and limited form:

Broad Form Indemnity

Broad Form Indemnity requires one party to assume the obligation to pay for another party’s liability even though that other party is solely at fault. One of the key indicators an indemnity agreement is Broad Form is the inclusion of the phrase “caused in whole or in part.”

One of the most common examples of a claim scenario where Broad Form Indemnity could come into play is when injured employees sue an employer to get an additional pay out beyond workers’ compensation benefits. Injured employees are barred from suing their employer if workers’ compensation insurance has been provided, so they sue the owner alleging that the owner was 100% negligent and caused their injury. The owner of the project is going to argue that they were not 100% at fault and they will tender the claim back to you. Since the employee’s allegation is that the owner is solely at fault, a Broad Form Indemnity would be required to respond to the owner’s tender of the claim to you. Unfortunately, determining liability can be a long and costly process, especially without coverage for Broad Form Indemnity.

Intermediate Form Indemnity

Intermediate Form indemnifies a party for its own negligence, except if that party is solely at fault. A key indicator an indemnity agreement is Intermediate Form is the inclusion of the phrase “caused in part.”

The omission of the word “whole” is what keeps this from being Broad Form, and what is left being covered is the partial negligence of the party seeking indemnity. Granted, partial negligence can be as much as 99%.

Limited Form Indemnity

Limited Form is not really indemnity at all since it does not indemnify a party for its own negligence. The key phrase to look out for with Limited Form is “only to the extent.”

Validity of Indemnity Provisions

Indemnity agreements are complicated because they detail all the various parties who are owed indemnity and what caused these parties to be owed indemnity. In my experience, most indemnity agreements provide such extreme detail that the agreement becomes unclear and counterproductive to its intended purpose.

State-by-State Case

In most states, the courts require an affirmative assumption of the indemnitee’s negligence, and anti-Indemnity Statutes limit the types of indemnity that are allowed in each state.

Most states do not allow Broad Form Indemnity for construction contracts. It is important to note that Broad Form Indemnity is allowed for non-construction contracts in most states. Even though the majority of the contracts you enter into are related to construction, every business enters agreements with suppliers, banks, consultants, etc. that are not subject to the anti-indemnity statutes.

Operations in Multiple States



Many contractors operate in multiple states, yet they only have one standard subcontract agreement. With no indemnity uniformity between the states on what is and isn't permitted, your company could be unnecessarily exposed to additional risk because of an inadequate or non-compliant subcontract agreement in that neighboring state.

Therefore, it is important to be aware of the state specific anti-indemnity statutes and different standards each state requires to have an enforceable indemnity provision so you can properly craft your contracts with subcontractors.

Insurance Considerations

Most insurance policies will back up the indemnity obligations placed on your company as long as the duty to provide that indemnity is rooted in an "insured contract." The phrase "insured contract" is a defined term in most insurance policies and includes things such as a contract to lease a premises, an easement or license agreement, an obligation to indemnify a municipality, or any other contract which requires you to assume the tort liability of another party to pay for bodily injury or property damage.

The definition of an insured contract limits coverage to pay for bodily injury or property damage. The standard unendorsed commercial general liability insurance policy's wording provides Broad Form Indemnification coverage. Even though the commercial general liability policy provides coverage for the broadest form of indemnity, not all indemnity obligations are covered by insurance.

In recent years, we have seen more insurance companies try to amend the definition of an "insured contract" to limit the scope of coverage their policies provide for indemnity agreements. Some carriers try to amend the policy to provide Intermediate Form Indemnity and some strive for Limited Form. Without insurance coverage to back up an indemnity agreement, your company's balance sheet is exposed to a potential significant uninsured event.



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