

ABA Forum on the Construction Industry
Workshop C: Why Should I Pay For Your Mistakes?
Thursday, October 12, 2006
Scottsdale, Arizona

**Indemnification:
Addressing the Contract Language Details**

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E&O Insurance

Contractual Liability Exclusion

- “Contractual Liability. This Policy does not apply to any damages, claims, or claim expenses based upon or arising out of liability assumed by You under any oral or written contract or agreement, including but not limited to hold harmless and indemnity agreements, agreements to defend others, and liquidated damages clauses, except that this exclusion shall not apply to a Claim where legal liability exists in the absence of such contract or agreement and arises from Design Professional’s Wrongful Act....”

Example A

Broad Form Indemnity

- “Consultant shall indemnify, defend and save harmless the Client ... from and against all liability ... by reason of liability imposed upon the Client, arising out of or related to Consultant’s services, whether caused by or contributed to by the Client or any other party indemnified herein (including active and passive negligence of the Client).”

Example B

Intermediate Form

- “The Consultant shall indemnify and hold harmless the Client for all damages, losses and claims arising out of or in connection with the performance of the Agreement.”
 - Note that “performance” may include non-negligent acts

Example C

Narrow Form

- “Engineer agrees to indemnify Owner from and against damages to the extent caused by Engineer’s negligent acts, errors, or omissions.”
 - Indemnity is limited to the extent damages are caused by the consultant’s negligence – consistent with E&O policy coverage

Example D

- “Design Professional shall indemnify and hold harmless the Owner from any and all claims, damages, suits, and expenses caused by or arising out of the acts, omissions, errors or negligence of the Design Professional.”

Revise Example D

- Because “negligence” is placed at the end of the phrase, it stands alone and does not modify the terms “acts,” “errors,” or “omissions.”
- Revise to read “negligent acts, errors or omissions.”

Example E

- “Consultant shall ...indemnify Owner... unless such Claims have been specifically determined by a trier of fact to result from the sole negligence of the Indemnitees.”

Revise Example E

- Revise to state that instead of applying to everything but sole negligence of the client, the indemnity will apply “to the extent damages are caused by the negligence of Consultant.”
 - Courts view this as general indemnity not applicable to client’s own negligence because it does not specifically say negligence is indemnified.

Example F

- “The Architect shall indemnify and hold harmless the Owner for all damages, losses, or claims that arise as a result, in whole or in part, from the negligence, or error, omissions, or failure to perform by the Architect, his employees, his agents, or his Consultants.”

Revise Example F

- Replace “in whole or in part” with “to the extent caused by”
 - The current language requires indemnity for 100 percent of the damages even if caused only in part by the Indemnitor.
 - Insured only to extent consultant required to indemnify client for damages arising from consultant’s negligence.

Example F Trick

- Note the trick in the following language:
 - “from the negligence, or error, omissions, or failure to perform by the Architect”
 - The comma between negligence and “or error” means Architect must indemnify for ALL errors and not merely Negligent ones.

Example G

- Subconsultant contract clause provides:
 - “Subconsultant shall have the same indemnity obligations to the Engineer and Owner that the Engineer has agreed to in its Agreement with the Owner.”

Revise Example G

- Incorporation by Reference.
 - Have you reviewed the Prime engineering agreement?
 - Did engineer limit its indemnity to negligence?
- Amend subagreement to limit consultant's indemnification obligation to only apply to its negligence and willful misconduct.

Example H

- A/E agreement contains this clause to require owner to require contractor to indemnify A/E:
 - “Owner will require Contractor or Subcontractors performing work in conjunction with Contract Documents for this Project to indemnify the Owner and the Engineer... from damages arising out of the Contractor’s (or Subcontractor’s) performance....”

Example I

- “... The obligations of the Engineer under this Indemnification Article shall not be limited by the amounts or types of insurance....”

Revise Example I

- Why not limit indemnity to insurance?
- Consider limiting liability with separate Limitation of Liability (LoL) Clause
- If liability (and indemnification) is limited to insurance coverage – it should be tied to coverage specified by contract instead of “available insurance.”

Example J

- Consultant agrees to indemnify Client from damages arising out of the death or bodily injury to any person or the destruction or damage to any property, to the extent caused, during the performance of Services under this Agreement, by the negligent acts, errors or omissions of the Consultant or anyone for whom the Consultant is legally responsible, subject to any limitations of liability contained in this Agreement.

Comment on Example J

- Indemnity is limited to the extent of one's own negligence
- Indemnity is limited by LoL established by contract
- Indemnity is limited to BI and PD
- Mutuality of indemnity (not shown here)
 - Contract has almost identical reciprocal indemnity

Contractor CGL Policy Contractual Liability Exclusion

- Coverage A (BI and PD) - exception to the exclusion for “liability that the insured would have in the absence of the contract or agreement” and for “liability assumed in an ‘Insured Contract.’”

What is covered?

- “Insured Contract” includes:
 - “f. That part of any other contract related to the insured’s business operations in which the insured assumes the tort liability of another party with respect to third-party ‘bodily injury’ or ‘property damage.’”
- Only tort liability is covered.
- Assumption of another party’s contractual liabilities for breach of contract is not covered by insurance.

Defense Costs

- Unless Indemnitee is added as “additional insured,” the contractually assumed defense costs may not be covered as “damages” as defined by the policy.
- Even if deemed “damages” there may be a question whether carrier has duty to defend the Indemnitee or just an obligation to reimburse the defense costs after they are incurred.

Other Issues with Defense

- Conditions under which the carrier is obligated to defend Indemnatee are specified in the “Supplementary Payments” section.
 - Indemnitor & Indemnatee both named in suit.
 - Indemnatee agrees to notify other insurers whose policies may be triggered by claims

CGL Contractual Liability Endorsements

- ISO CG 21 39 deletes coverage for contractual liability that would arise under part f. of the definition of “insured contract.”
- ISO CG 24 26 eliminates contractual liability coverage for Indemnitee’s sole negligence by changing part f. to require that liability must arise out of injury or damage “caused, in whole or in part, by [the named insured] or by those acting on [the named insured’s] behalf.”

AIA A201 Contract Indemnity Clause

- 3.18.1 ...Contractor shall indemnify and hold harmless the Owner, Architect, ... from and against claims ... arising out of or resulting from performance of the Work, provided that such claim ...is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor ... regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder....

Coverage for A201 Indemnity

- Coverage for the BI and PD indemnity “only to the extent caused by the negligent acts or omissions” of the contractor.
 - Owner or other indemnified party may also be at fault but
 - Indemnification does not extend to cover an indemnitee’s own fault

Concluding Comment

- Because indemnification provisions may appear in multiple provisions of the contract, it is necessary to obtain and review the entire contract.
- Insurance provisions of the contract should be reviewed— particularly if they purport to bind the carrier to cover the contractual obligations.