



Contractual Risk Transfer and Contractors
Professional Liability

Practical Considerations

February 8, 2018

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Agenda

1. Contractors Professional Liability
2. Contractual Risk Transfer
3. Insurance Market Conditions

Contractors Professional Liability

1. Contractor Professional Liability (CPrL) vs. General Liability
2. Industry Changes – Increased Professional Liability Exposure
3. Insurance Market Changes

General vs. Professional Liability

1. Coverage Trigger
 - A. General Liability
 - B. Professional Liability
2. Coverage Form
 - A. Professional Liability – Manuscript
 - B. General Liability – Based on Industry Standards
3. Coverage Scope:
 - A. General Liability covers unless excluded otherwise
 - B. Professional Liability requires covered “Professional Services”
4. Claims-Made vs. Occurrence

Typical CPrL Exposures

1. Design/Build Contracts
2. Use of Direct/In house design expertise
3. Installation design or field modification
4. Vicarious design liability
 - a. Lower tier specialty (inadequate PL limits)
 - i. Curtain wall sub
 - ii. Surveying claims

Typical CPrL Exposures

1. Evaluate, establish, review and/or assess documents
 - a. Pre, during and post construction
2. Constructability reviews
3. Supervision/management of subcontractors
 - a. Sub selection
 - b. Inspection of work/services of subs
 - c. Failure to detect/inspect
 - d. Safety management
4. Sequencing/scheduling
5. Value engineering
6. Means and Methods (GL/CPrL)

All CPrL Policies are Different

1. Defining Professional Services
2. Negligence versus non-negligence triggers
3. Protective or Rectification Coverage?
4. Green/sustainable construction coverage
5. Construction means/methods
6. BIM coverage
7. Combined CPrL/CPL



Professional Liability Definition

4. Defined Professional Services must be scrutinized:
 1. Construction Management
 2. Safety Services
 3. Pre-con consulting
 4. Supervisory services
 5. Scheduling
 6. Constructability



CPrL Policies Are Expanding

1. Monoline CPrL
2. Combined CPrL/CPL
 - A. Adds Contractors Pollution Liability Insurance
3. Additional Coverage Parts
 - A. Protective Indemnity
 - B. Rectification or Mitigation of Damages Coverage

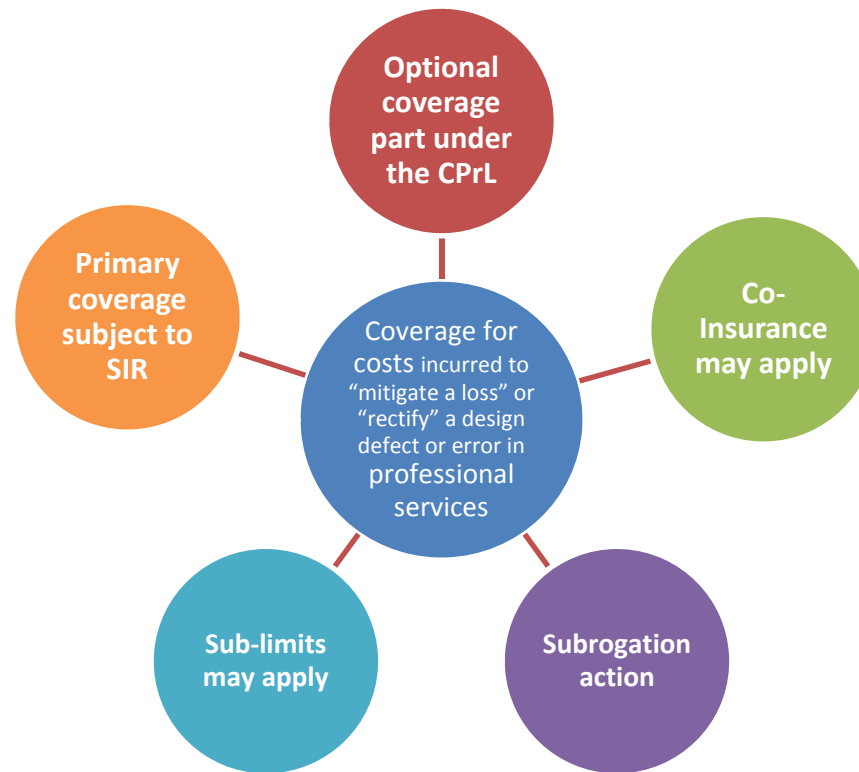


Protective Indemnity Coverage

1. Optional coverage part under the CPrL
2. Indemnity for first party damages incurred by the Contractor excess of the DP's PL insurance
3. Result of DP's negligent acts/errors
4. Legally entitled to recover/LOL issues
5. Contractors under contract with DP's
 1. Design/build, At Risk CM, Program Management
 2. Don't Rule Out GC Contracts!



Rectification/Mitigation of Damages Coverage



Contractors Professional Liability - Example

1. Steel Erector
2. Subcontractor to Fabricator, who works for General Contractor
3. Large portion of critical path work
4. Project is located in Southeast US
5. Timeframe

CPrL Example

1. Company had a combined CPrL/CPL policy with Protective Indemnity and Rectification Coverage
2. Definition of Professional Services: Professional Services Performed by or on your behalf in support of your construction operations.
3. Policy had broad “Knowledge of Occurrence” language – Any insured aware of a claim requires notice
4. Policy Effective Date 1/1/16 to 1/1/17
5. Mobilized in February 2017
6. April 2017 – Request for Hurricane Bracing Plan by GC...

CPrL Claim Example

1. April – May Costs to Re-erect: \$1.5M
2. Client Demand in November: \$2.5M
3. Other Expenses: \$250K
4. Claim Made to Carrier in Mid-January
5. Claim Denied Because of Late Reporting
6. Had to retain coverage counsel to fight for coverage; settled for fraction of total cost

Contractual Risk Transfer - Considerations

1. Indemnification
2. Additional Insured
3. Perspective: Owner/General Contactor or Subcontractor?
4. Jurisdiction
5. Size and Scope of Work
6. Details Matter – High Stakes

Indemnification and Additional Insured Coverage

Two Options for Access to Another Party's Insurance Policy

DOOR #1

Indemnification



DOOR #2

**Additional Insured
Coverage**

Indemnification Provisions

What is an Indemnification Agreement?

1. Non-Insurance Transfer
2. Transfers the Responsibility to PAY for the Indemnitee's Negligence to the Indemnitor
3. Obligation to Indemnify may go beyond Insurance Coverage



Indemnification/Hold Harmless Agreements

Broad Form

Intermediate Form

Limited Form

Is there an affirmative obligation to assume the indemnitee's negligence?

How much of your negligence is your Subcontractor assuming?

Indemnification Example – What Category?

Example: Atlantic Refining leased an A-Plus Mini-Market to Franchisee. The Franchisee's employee got into an argument with a customer and the employee assaulted the customer (Edward Mace) with a baseball bat in the store parking lot. Mace sues both the Franchisee and Atlantic Refining for its alleged negligence in training and supervision.

Indemnification: “Franchisee agrees to indemnify and defend Atlantic Refining from and against all Claims, losses and damages arising out of Franchisee's use and operation. . . , excepting any damage or loss caused solely by the negligence of Atlantic.” *Mace v. Atlantic Refining Marketing Corp.*, 785 A.2d 491 (Pa. 2001)

The court ruled the “excepting” clause does nothing to expand the indemnification obligation and refused to allow the inference that the excepting clause implicated a promise of Franchisee to provide indemnification for Atlantic Refining's own partial negligence. (Limited Form)

Maximizing Indemnification

1. Standards of Interpretation – “Clear & Unequivocal”
2. Use of Standard Indemnification Provisions

“INDEMNIFICATION: Subcontractor agrees to indemnify, hold harmless and defend [Your Organization] and their agents, employees, representatives, officers, directors, stockholders, members, managers and parent, subsidiary, affiliated and successor companies and any entity or individual listed on the attached *Schedule of Additional Indemnified Parties* (individually or collectively, the “Indemnified Parties”) from and against any and all liability **...even for, and if caused in whole or in part by, any act, omission, negligence or strict liability of the Indemnified Parties (your organization)**” (Exhibit 1)

Note: Since we are not your attorneys, we strongly recommend that you have your Corporate Attorney review our suggested wording to be certain it is properly written and legally acceptable.

3. Train your staff to know which words can't be changed

Maximizing Indemnification

So why don't ALL Contracts Require Broad Form Indemnification?

1. Broad Form is NOT Enforceable in many States – Against Social Policy
2. PA is one of the few States that permits Broad Form Indemnification for Construction
3. Most Anti-Indemnity Statutes ONLY apply to Construction

Maximizing Indemnification

Another Option When Broad Form INDEMNIFICATION is Not Permitted Broad Form DEFENSE (Anti-Indemnity Statutes don't apply to Defense):

In addition, Subcontractor shall defend the Indemnified Parties against any claim which may potentially give rise to indemnification of the Indemnified Parties, even if such claim alleges that the Indemnified Parties are wholly or partially at fault or strictly liable for causing the loss. If Indemnification for the Indemnified Parties' negligence is expressly prohibited by law, such defense shall continue until it is conclusively established by a court of competent jurisdiction that: 1) the Indemnified Parties are solely liable for causing the bodily injury or property damage alleged; and 2) that neither Vendor, nor its employees, nor anyone for whom Vendor may be liable, is liable for causing any part of the bodily injury or property damage for which defense and indemnification is sought.

Insurance Coverage for Indemnity Agreements

Is your Subcontractor's assumption of Your Negligence in Indemnification Agreements Covered by your Vendor's General Liability Policy?

1. YES, per the Definition of "Insured Contract"
 - i. "that part of any other contract or agreement pertaining to your business **under which you assume the tort liability of another party** to pay for bodily injury or property damage to a third person or organization."
 - ii. If standard General Liability Policy is NOT Amended
 - iii. Must be an otherwise Covered Claim
2. Without insurance, Indemnification is only as good as the party providing it

Key Take-Aways on Indemnification

1. REQUEST AND GET - BROAD FORM INDEMNIFICATION from Your Subcontractors— Key is Using Standard Agreements and Understanding What to do when someone requests to change them
2. It is a Legal Transfer that goes beyond a Subcontractor's Insurance Coverage
3. Enforceability Issues & Potentially Limited by Anti-Indemnity Statutes



Additional Insured Status

Door #2



**Is it just a pretty door
to look at or does it
Maximize your
Contractual Risk
Transfer to others?**

Additional Insured Status

1. Same Objective as Indemnification: Someone else pays claim against you but a Different Door
2. Additional Insured Coverage: One party to a contract obtains coverage under the other party's policy.
3. When you are an Additional Insured, you have direct access to your Subcontractor's General Liability policy.

Pros and Cons of Additional Insured Coverage

Potential **BENEFITS**:

1. Upfront payment of defense fees and costs.
2. Scope of coverage may be broader than indemnification.
3. Anti-indemnity statutes likely do not apply.
4. Interpreted broadly unlike indemnification provisions.

Potential **DOWNSIDES**:

1. Not able to select defense counsel.
2. Protection is only as good as the Insurance Policy/AI Endorsement
3. Potential Deductibles/self-insured retentions issues
4. Potential Other Insurance clause issues

3 Sizes of Additional Insured Coverage

Sole Negligence

- Coverage provided even for the Additional Insured's Sole Negligence

Partial Negligence

- provided for the Additional Insured's Partial Negligence

Vicarious Liability

- Coverage provided only for the Additional Insured's vicarious liability for the acts of your Subcontractor.

Putting Both Doors Together

Additional Insured

Sole Negligence

Partial Negligence

Vicarious Liability

Indemnification

Broad Form

Intermediate Form

Limited Form

Problematic Claim for Sole Negligence



1) You are the General Contractor and Hire Elvis Electrical

General Contractor

3) Injured Employee also Sues Your Organization – ONLY Names You in Suit (Claim Alleges Your Sole Negligence)



Injured Elvis Electrical Employee

4) You as General Contractor Seek Protection from Your Subcontractor via Indemnification or Additional Insured Coverage

2) Injured Employee Makes Work Comp Claim Against Elvis - Exclusive Remedy for Injury

Elvis Electrical

Maximizing Additional Insured Coverage

Use of Standard Additional Insured Provision:

To the fullest extent permitted by law, [CLIENT] and any other party whom [CLIENT] is required to provide Additional Insured Coverage in their Contract] (including their agents, employees, representatives, officers, directors, stockholders, members, managers and parent, subsidiary, affiliated and successor companies), shall be added/included as ADDITIONAL INSUREDS even for claims regarding their sole negligence on the above General Liability coverage (by the use of ISO Additional Insured Endorsements CG 2010 10 01 and CG 2037 10 01) and the Umbrella Liability and Pollution Liability coverages described above. In the event the above ISO Additional Insured Endorsements are not available from Subcontractor's insurance carrier, Subcontractor may substitute other endorsements which achieve the same effective result and attach a copy of the endorsement with Subcontractor's Certificate of Insurance. The coverage offered to the ADDITIONAL INSUREDS on Subcontractor's liability policies shall be primary coverage to any other coverage maintained by the ADDITIONAL INSUREDS and shall not permit or require such other coverage to contribute to the payment of any loss. In addition, the ADDITIONAL INSUREDS shall also be provided the same Completed Operations Coverage detailed under the Commercial General Liability Coverage Requirements. Subcontractor agrees, for the purpose of additional insured coverage only, that the work is being performed for all ADDITIONAL INSUREDS identified above and that this Agreement is an agreement between Subcontractor and all ADDITIONAL INSUREDS to provide additional insured coverage. Notwithstanding anything to the contrary in the Agreement or in the insurance requirements outlined above, if the Subcontractor has procured any insurance coverage and/or limits (either on a primary or excess basis) that exceed the minimum acceptable coverage specifications and/or limits set forth in the insurance requirements above, the specified coverage and limits listed within the insurance requirements shall increase to the full extent of the coverage and limits of liability obtained under the policy, and in no event shall the coverage and/or limits provided be less than the minimum insurance requirements outlined above.

Key Take-Aways on Additional Insured Coverage

1. Specify AI coverage applies to you and others you must name
2. Specify sole negligence coverage
3. If non-standard forms, subcontractor must provide copies
4. Specify primary/non-contributory coverage
5. Specify completed operations coverage
6. No direct contract requirement in AI endts
7. Limits are greater of contract requirement and policy limits



Waivers

1. What is a waiver?
2. How can a waiver be used to protect your company from liability?
3. When should you request a waiver?



What is a Waiver?

1. A waiver is the voluntary surrender of a legal right, claim, privilege or opportunity.
 - a. Today we will discuss waivers used to release a party from liability for its negligence.
2. Waivers may also be called “releases,” however, a release usually applies to known claims, whereas a waiver more commonly refers to a release of claims that have not yet arisen.

Employee Waiver

1. Two applications:
 - a. Family of Companies
 - b. Customers
2. Waives employee's right to sue third party for injuries which are covered under the Workers Compensation Statute.

Best Practices

1. Written Contract Executed Before Work Begins
2. Contract Specifies
 - A. Indemnification to Fullest Extent Permitted
 - B. Additional Insured (Specific)
3. Consider MSAs with Subcontractors that you work with frequently.
4. Waivers if Possible
5. Stringent Certificate of Insurance Verification

Insurance Market Update

1. 2017 Catastrophic Events:
2. Industry Surplus Capital
3. Short Term Expectations
4. Potential Longer Term Impacts?

Contact Information

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