

Additional Insured Coverage in Construction Contracts and Interplay With Contractual Indemnification Clauses

THURSDAY, JUNE 24, 2021

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

James P. (Jamie) Bobotek, Partner, **Pillsbury Winthrop Shaw Pittman LLP**, Washington, D.C.

Vincent E. Morgan, Partner, **Bracewell LLP**, Houston

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 1.**

Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-877-447-0294** and enter your **Conference ID and PIN** when prompted. Otherwise, please **send us a chat** or e-mail sound@straffordpub.com immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

Viewing Quality

To maximize your screen, press the 'Full Screen' symbol located on the bottom right of the slides. To exit full screen, press the Esc button.

Continuing Education Credits

FOR LIVE EVENT ONLY

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For additional information about continuing education, call us at 1-800-926-7926 ext. 2.

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the link to the PDF of the slides for today's program, which is located to the right of the slides, just above the Q&A box.
- The PDF will open a separate tab/window. Print the slides by clicking on the printer icon.

Recording our programs is not permitted. However, today's participants can order a recorded version of this event at a special attendee price. Please call customer service at 800-926-7926 ext.1 or visit Strafford's web site at www.straffordpub.com.



Additional Insured Coverage in Construction Contracts and Interplay with Contractual Indemnification

James P. Bobotek – Pillsbury Winthrop Shaw Pittman LLP
james.bobotek@pillsburylaw.com

Vincent E. Morgan – Bracewell LLP
vince.morgan@bracewell.com

Contract Risk Transfer Methods

- ❖ Objectives for Managing Risk in Contracts
 - Agreed distribution of liabilities between parties
 - Clear and unambiguous terms and conditions
 - Appropriate interplay between insurance programs and risks identified/distributed in the contract

Contract Risk Transfer Methods

- ❖ Careful attention must be paid to interplay among:
 - Scope of Work
 - Risk-Transfer Contract Terms
 - Insurance Requirements

Scope of Work

- ❖ What services are being performed?
- ❖ Are they “core” services offered by the performing party as a matter of course?
- ❖ What are the key risks exposures associated with the work performed?
- ❖ Are the key risk exposures covered by insurance?
- ❖ Will any work be subcontracted?
- ❖ Are there any unique hazards or exposures?

Indemnification



- ❖ A contractual commitment to reimburse another party for loss, damages or liability
- ❖ Risk-shifting device where one party assumes someone else's responsibility

Indemnification

- ❖ Who will be indemnified?
 - Depends on contract terms
 - Consider terms giving or receiving
 - Open-ended language
 - “Representative”
 - “Agent”
 - “Designee”

Indemnification

- ❖ What does the indemnification cover?
 - Depends on contract terms
 - Typically BI/PD
 - Infringement of IP rights
 - Breach of warranty or representation
 - Third-party v. first-party claims?
 - Capped v. uncapped?

Indemnification

- ❖ Indemnity for receiving party's own/sole negligence?
 - Depends on contract terms, but also applicable state law
 - Most jurisdictions bar indemnification of another's gross and/or sole negligence
 - Consider causation language

Indemnity Agreements

- **Broad Form Indemnity**
- **Intermediate Form Indemnity**
- **Comparative (Limited) Form Indemnity**

Types of Indemnity Agreements

Broad Form Indemnity:

- ❖ The indemnitor agrees to be responsible for any and all liability arising out of the contractually-provided products or services, including liability that is the result of the sole negligence of the indemnitee.
- ❖ Most states prohibit, or severely limit, the use of broad form indemnity provisions in construction contracts.

Types of Indemnity Agreements

Intermediate Form Indemnity:

- ❖ The indemnitor agrees to be responsible for liability arising out of the contractually-provided products or services that is the result of the indemnitor's sole fault or negligence, as well as liability for which the indemnitee and indemnitor are jointly at fault.
- ❖ The indemnitor is not responsible for liability incurred as a result of the sole fault or negligence of the indemnitee.

Types of Indemnity Agreements

Comparative (Limited) Form Indemnity:

- ❖ The indemnitor agrees to be responsible for liability arising out of the contractually-provided products or services that is the result of the indemnitor's fault or negligence, but only to the extent of such fault or negligence.
- ❖ This type of agreement mirrors the obligations imposed by tort law.

AIA A201 Indemnity Provision

- ❖ The unedited AIA A201 provides that the contractor (indemnitor) will indemnify the owner (indemnitee) for loss to the extent caused by the negligent acts or omissions of the contractor, its subcontractors, or others providing goods or services on behalf of these entities.
- ❖ This constitutes a **comparative form indemnity provision**, which limits the contractor's indemnification obligation "only to the extent of" its negligence.

Tips for Drafting Solid Indemnity Clauses

- ❖ “To the fullest extent permitted by law”;
- ❖ Do not run afoul of state-specific statutory anti-indemnity provisions;
- ❖ Include defense/indemnification obligation for allegations, even if disputed by indemnitor;
- ❖ Do not forget to consider indemnity for economic loss – this may require revisions to the waiver of consequential damages provision;
- ❖ Make first-party damages, or damages sustained directly by the indemnitee, a part of the indemnity agreement;
- ❖ Include language that allows for fees and costs associated with enforcing the indemnity obligation.

Insurance Requirements

❖ Potential Insurance Requirement Issues

- “Any and all liabilities” indemnity wording
- Extension of insurance coverage beyond bodily injury and property damage
- Coverage for breach of contract or contractual indemnification
- Intentional acts wording
- Terms like “usual and customary insurance”

Types of Insureds

- ❖ Three categories of insureds under a typical commercial general liability policy:
 - (i) named insureds;
 - (ii) “automatic” insureds; and
 - (iii) additional insureds.

What is an additional insured?

- ❖ Additional insured status provides a party with the benefits of insurance coverage obtained by another party, usually under the latter's commercial general liability (CGL) insurance.
- ❖ Historically, the scope of coverage was determined by:
 - the policy's additional insured endorsement;
 - and other policy terms.
- ❖ Now, parties must look to:
 - the policy's additional insured endorsement;
 - other policy terms; and
 - **the underlying contract.**

Why Seek Additional Insured Status?

- ❖ Shifts the risks to the party that is undertaking the activities.
- ❖ Reinforces indemnity provisions by providing the additional insured with direct rights under the indemnitor's policy.
- ❖ Provides the additional insured with the right to an immediate defense (without affecting policy limits) by the named insured's insurer, rather than seeking reimbursement of defense costs from an indemnitor or seeking a defense under its own coverage.

Why Seek Additional Insured Status?

- ❖ May prohibit the indemnitor's insurer from subrogating against the indemnitee when a loss is caused by the indemnitee's acts or omissions.
- ❖ Insured losses may not affect the "loss history" of the additional insured, thus enabling additional insured to avoid related increases in insurance premiums.
- ❖ May substantially increase the limits of insurance available to the additional insured for a given operation or project.
- ❖ May decrease the chance that the additional insured will be forced to sue the indemnitor directly to be made whole following a claim or suit.

Disadvantages

- ❖ No control over the defense or selection of defense counsel.
- ❖ Limits must be shared among all insureds, such that payment of judgment or settlement as to one party may use up the applicable limit of insurance in a liability policy, thereby ending insurer's right and duty to defend.
- ❖ Additional insured often has no business relationship with Named Insured's carrier.
- ❖ Policy may not provide complete indemnity or may provide less than contracted for limits.
- ❖ Additional insured must comply with conditions of policy in order to obtain and retain coverage, including notice and cooperation.

Types of Additional Insureds

- ❖ Additional Insured;
- ❖ Additional Named Insured;
- ❖ Loss Payee (right to receive payment);
- ❖ Lenders Loss Payee (slightly broader rights than loss payee).

Types of Additional Insureds

7. Separation Of Insureds

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:

- a. As if each Named Insured were the only Named Insured; and
- b. Separately to each insured against whom claim is made or "suit" is brought.

Additional Insureds

- ❖ Requires a separate endorsement to the basic CGL form - can be either specifically scheduled or a blanket endorsement.
- ❖ Terms of the endorsement must be reviewed.
 - Coverage for the additional insured's own negligence?
 - Coverage for completed operations?
 - Priority of coverage?
- ❖ General Rule – the more words included, the narrower the coverage
- ❖ One size does not fit all.

Additional Insureds

❖ Blanket Endorsement

Who Is An Insured is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy.”

- ❖ Courts are inconsistent on whether this requires contractual privity between the named insured and additional insureds.

Additional Insured Endorsements

- ❖ Different forms for different uses (ISO issues approximately 33 separate AI forms):
 - CG 20 07 Engineers, Architects or Surveyors
 - **CG 20 10 Owners, Lessees, or Contractors-Scheduled Person or Organization**
 - CG 20 11 Managers or Lessors of Premises
 - CG 20 15 Vendors
 - CG 20 26 Designated Person or Organization
 - CG 20 33 Owners, Lessees or Contractors-Automatic Status When Required in Construction Agreement with You
 - **CG 20 37 Owners, Lessees or Contractors—Completed Operations**

Additional Insured Endorsements

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – SCHEDULED PERSON OR ORGANIZATION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Limitations to Coverage

- A. Section II – Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:
1. Your acts or omissions; or
 2. The acts or omissions of those acting on your behalf;
- in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

Additional Exclusions

- B. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:
- This insurance does not apply to "bodily injury" or "property damage" occurring after:
1. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or
 2. That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

Additional Insureds - Policy Endorsements

❖ CG 20 10 11 85

WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule as an insured but only with respect to liability arising out of your operations or premises owned by or rented to you.

Additional Insureds - Policy Endorsements

❖ CG 20 10 11 85

- Provides the additional insured with coverage for liability **arising out of** the named insured's work for the additional insured;
- Covers the additional insured's sole negligence, as long as some causal connection between the additional insured's liability and the named insured's activities can be demonstrated;
- Has been interpreted by courts to provide coverage for completed operations claims.

Additional Insureds - Policy Endorsements

❖ CG 20 10 03 97

WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of your **ongoing** operations **performed for that insured** ~~or premises owned by or rented to you.~~

Additional Insureds - Policy Endorsements

❖ CG 20 10 03 97

- Provides the additional insured with coverage only for liability arising out of the named insured's ongoing operations;
- Intended to limit the term of the additional insured's insurance coverage to the time period during which the named insured is actually performing operations;
- Does not include coverage for completed operations.

Products-Completed Operations: 3-Part Test

- ❖ Must occur away from your premises.
- ❖ Must arise out of “Your Product” or “Your Work,” terms defined in the CGL form.
- ❖ Does not apply if the work has not yet been completed or abandoned.

Additional Insureds - Policy Endorsements

❖ **CG 20 10 10 01 - adds two exclusions.**

- This insurance does not apply to “bodily injury” or “property damage” occurring after:
 - ❑ All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or
 - ❑ That portion of “your work” out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

Additional Insureds - Policy Endorsements

❖ CG 20 10 10 01

- Provides the additional insured with coverage only for liability arising out of the named insured's ongoing operations;
- Expressly excludes injuries or damages suffered after: (i) the "named" insured's work at the site of the covered operations has been completed; or (ii) the relevant portion of named insured's work has been put to its intended use;
- Adopted in conjunction with CG 20 37 10 01, a new standard form endorsement that will, if used in conjunction with this form, provide coverage similar to the CG 20 10 11 85.

Additional Insureds - Policy Endorsements

❖ CG 20 37 10 01

- Provides additional insured with coverage products-completed operations hazard arising out of the named insured's work;
- Only applies to completed operations;
- No coverage for premises or operations;
- When used in conjunction with CG 20 10 10 01, provides coverage similar to CG 20 10 11 85.

Additional Insureds - Policy Endorsements

❖ CG 20 10 07 04

Section II Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability . . . ***caused, in whole or in part, by:***

1. Your acts or omissions; or
2. The acts or omissions of those acting on your behalf; in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

Additional Insureds - Policy Endorsements

❖ CG 20 10 07 04

- Intended to result in the elimination of coverage for liability attributed to the additional insured's sole negligence.
- Competing interpretations of "in whole or in part":
 - ❑ a broad construction that allows coverage for the additional insured as long as the alleged liability arises out of the named insured's work;
 - ❑ a narrow construction that limits coverage for an additional insured to its vicarious liability for the named insured's work; and
 - ❑ a measured construction that requires that both the additional insured and named insured have some amount of joint liability, or that the named insured's conduct be a proximate cause of the claimant's alleged injury or damage.

Additional Insureds – April 2013 ISO Changes

❖ CG 20 10 04 13

- The insurance afforded to such additional insured only applies ***to the extent permitted by law.***
- If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured ***will not be broader than that which you are required by the contract or agreement to provide*** for such additional insured.
- With respect to the insurance afforded to these additional insureds, the following is added to Section III -- Limits Of Insurance:
If coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance:
 1. Required by the contract or agreement; or
 2. Available under the applicable Limits of Insurance shown in the Declarations;***whichever is less.***

Additional Insureds – April 2013 ISO Changes

- ❖ Dramatically changed the landscape.
- ❖ Placed heightened emphasis on parties' contractual language.
- ❖ Likely will restrict a CGL insurer's coverage obligations to additional insureds to the specific terms of the named insured's contracts with third parties.
- ❖ Historically, scope of coverage was governed, for the most part, by the terms of the applicable insurance contract.

April 2013 ISO Changes – Three Are Significant

- ❖ Additional insured coverage is provided only “to the extent permitted by law”;
- ❖ Coverage for the additional insured will be no broader than required under the contract; and
- ❖ Limits of additional insured coverage will be limited to the amounts required by the underlying contract.

Tips For Drafting Additional Insured Requirements

- ❖ Specify the form endorsements through which the additional insured coverage is provided.
- ❖ Require that the additional insured coverage be “primary and non-contributory” (this may require an additional endorsement).
- ❖ Require indemnification of self-insured retentions.
- ❖ Understand the difference between additional insured and additional named insured.
- ❖ Do not rely on certificates of insurance to confirm additional insured status – require copies of policies and endorsements.

Drafting Tips to Overcome 2013 ISO Endorsement Issues

- ❖ Include the following two clauses in the additional insured requirements section:
 - *Coverage for the additional insured shall be at least as broad as that afforded the first named insured.*
 - *The limits of insurance provided to the additional insured shall be the greater of: (i) those set forth in the contract, or (ii) the full per occurrence limit set forth in the policy.*

Certificates of Insurance

❖ What they are:

- Confirmation of insurance issued to the policy's named insured.

❖ What they are not:

- Evidence of the terms and conditions of coverage.
- Evidence of coverage for additional insureds.
- Evidence of waivers of subrogation.
- Evidence of any other special endorsements to the named insured's insurance policies.

Acord Certificate of Liability Insurance

ACORD CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY)

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

PRODUCER: COMPANY NAME, PHONE (A/C, H/A, Ext), FAX (A/C, No.), EMAIL ADDRESS, ADDRESS

CUSTOMER TO: INSURER(S) AFFORDING COVERAGE, NAIC #

INSURED: INSURER A:, INSURER B:, INSURER C:, INSURER D:, INSURER E:, INSURER F:

COVERAGES, CERTIFICATE NUMBER, REVISION NUMBER

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

TRF	TYPE OF INSURANCE	APPLICABLE	INSTR	WVSD	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY TER (MM/DD/YYYY)	LIMITS
	GENERAL LIABILITY							EACH OCCURRENCE \$
	COMMERCIAL GENERAL LIABILITY							COVERGE TO RENTER \$
	CLAIMS-MADE							PREMISES (Ea occurrence) \$
								MED EXP (Any one person) \$
								PERSONAL & ADV INJURY \$
								GENERAL AGGREGATE \$
								PRODUCTS - COMP/OP AGG \$
								COMBINED SINGLE LMT (Ea accident) \$
								BODILY INJURY (Per person) \$
								BODILY INJURY (Per accident) \$
								PROPERTY DAMAGE (Per accident) \$
								EACH OCCURRENCE \$
								AGGREGATE \$
								EACH OCCURRENCE \$
								AGGREGATE \$
								E.L. EACH ACCIDENT \$
								E.L. DISEASE - EA EMPLOYEE \$
								E.L. DISEASE - POLICY LIMIT \$

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (Attach ACORD 101, Additional Remarks Schedule, if more space is required)

CERTIFICATE HOLDER: _____ CANCELLATION: SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.

AUTHORIZED REPRESENTATIVE: _____

ACORD 25 (2009/09) © 1988-2009 ACORD CORPORATION. All rights reserved. The ACORD name and logo are registered marks of ACORD.

Insurance Company

Named Insured

Policies and Coverage

Specific Limitations

Certificate Holder

Certificates of Insurance

		CERTIFICATE OF LIABILITY INSURANCE		DATE (MM/DD/YYYY)
<p>THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.</p> <p>IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).</p>				
PRODUCER	CONTACT NAME:		E-MAIL ADDRESS:	
	PHONE (A/C, No, Ext):	FAX (A/C, No):		
INSURED	INSURER(S) AFFORDING COVERAGE			NAIC #
	INSURER A:			
	INSURER B:			
	INSURER C:			
	INSURER D:			
	INSURER E:			
	INSURER F:			

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (Attach ACORD 101, Additional Remarks Schedule, if more space is required)
Company XYZ is included as Additional Insured as respects Endorsement #21 with regard to the services provided by the Named Insured.
CERTIFICATE HOLDER
CANCELLATION

Notes specific endorsement

Acord Certificate of Insurance – 03/16

This certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not affirmatively or negatively amend, extend or alter the coverage afforded by the policies below. This certificate of insurance does not constitute a contract between the issuing insurer(s), authorized representative or producer, and the certificate holder.

Acord Certificate of Insurance – 03/16

IMPORTANT: If the certificate holder is an **ADDITIONAL INSURED**, the policy(ies) must have **ADDITIONAL INSURED** provisions or be endorsed. If **SUBROGATION IS WAIVED**, subject to the terms and conditions of the policy, certain policies may require an endorsement. **A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).**

Acord Certificate of Insurance – 03/16

❖ Notice of cancellation

➤ Earlier Acord form language:

Should any of the above described policies be cancelled before the Expiration date thereof, the ***issuing insurer will endeavor to mail _____ days written notice to the certificate holder named to the left***, but failure to mail such notice shall impose no obligation or liability of any kind upon the insurer, its agents or representatives.

➤ 3/2016 Acord form language:

Should any of the above described policies be cancelled before the expiration date thereof, notice will be delivered ***in accordance with the policy provisions***.

Acord Certificate of Insurance

- ❖ **Suggested contractual insurance requirements language in response to the Acord form notice revisions:**

All policies shall be endorsed to state that such insurance shall be non-renewed, canceled or modified to reduce the limits only after written notice to the Owner from such insurance company or companies, mailed to the Owner in the same method as would be required under the law of the jurisdiction in which the Project is located for mailing such notice to the first named insured, no less than thirty (30) days in advance.

Interaction Between Insurance and Indemnification

Risk allocation is the common thread between insurance and indemnification – they should work in tandem but are separate concepts.

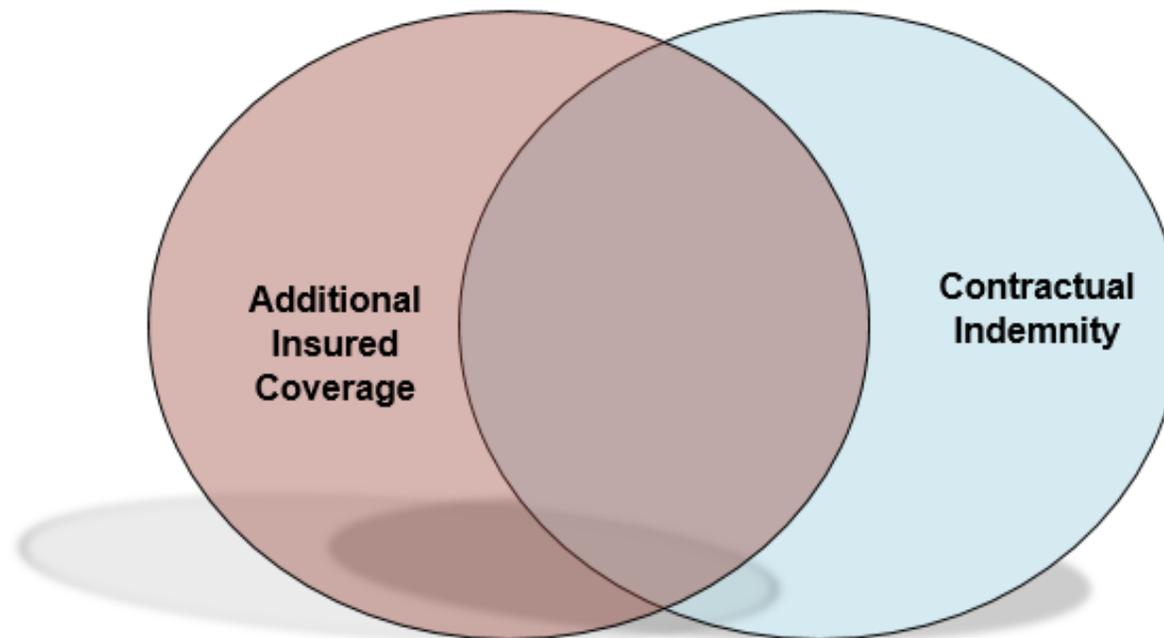
- Insurance shifts risk of costs and liability from the insured to its insurance company.
 - Claim should be made to the insurance company.
 - However, if contracting party failed to procure proper insurance, may result in breach of contract claim against contracting party.
- Indemnification shifts risk of costs and liability from one contracting party to another.
 - Claim should be made to the indemnitor.

Interaction Between Insurance and Indemnification

KEY POINT:

- Insurance and contractual indemnification are two separate mechanisms of avoiding risk.
- While insurance may cover **SOME** risks shifted to a party through indemnification, it does not cover **ALL** risks shifted to a party through indemnification.

Interaction Between Insurance and Indemnification



Do Not Commingle Indemnification and Additional Insured Clauses

- ❖ Some courts have held that an additional insured provision is void if it is inextricably tied to an indemnification clause that is void under the applicable state's anti-indemnification statute.

Tender Best Practices

- ❖ Send a tender letter to both the indemnifying party and the party's insurer.
- ❖ Make clear that you are seeking both contractual indemnification (from the indemnifying party) and additional insured coverage (from the insurer).
- ❖ Cite the language of both the indemnification provision and the insurance provisions of the relevant contract in the letter.
- ❖ Attach a copy of the contract and complaint (or any written description of the claim).
- ❖ Request a copy of the insurance policy, including additional insured endorsements.