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# CONTRACTUAL INDEMNITY AND ADDITIONAL INSURED COVERAGE

December 10, 2014

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# Using Contract Language To Limit/Shift Liability

- Limitation of Liability Provision
- Contractual Indemnity
  - Insuring indemnity obligations
- Additional Insured Coverage

# Limitation Of Liability

- Monetary caps, exclusion of consequential damages, punitives, etc.
- Often applies only to one party's liability to the other
- May not protect against claims asserted by a third party

# Protecting Against Third Party Claims

- Indemnification/hold harmless provision
- Insurance requirements
- Additional Insured Coverage

# What Is Indemnification?

- A duty to make good any loss, damage, or liability incurred by another and the right of an injured party to claim reimbursement for its loss, damage, or liability from a person who has such a duty
- Black's Law Dictionary 772 7th Ed. 1999

# What Is A Hold Harmless Clause?

- “A contractual arrangement whereby one party assumes the liability inherent in a situation, thereby relieving the other party of responsibility.”
- Black’s Law Dictionary 658 5th Ed. 1979

# What's The Difference?

- Most courts hold that “indemnity” and “hold harmless” are synonymous
  - E.g., Medcom Holding Co. v. Baxter Travelnol Lab., Inc., 200 F.3d 518 (7th Cir. 1999); Praetorian Ins. Co v. Site Inspection, LLC, 604 F.3d 509 (8th Cir. 2010)

# What's The Difference? (cont.)

- Some courts disagree, finding that a “hold harmless” clause is an exculpatory provision releasing the indemnitee from liability to the indemnitor (as opposed to third parties)
  - *E.g., Exxon Mobil Corp. v. New W. Petroleum, LP*, 369 Fed. Appx. 805 (9th Cir. 2010) *Fernandez v. K-M Indus. Holding Co.*, 646 F. Supp.2d 1150 (N.D. Cal 2009)

# Drafting Indemnity Clauses

- Consider the nature of the contract and the type of liability that could arise
- One-way or mutual indemnity
  - Who has the bargaining power?
- Who gets indemnified, i.e., the company, its officers, directors, employees?
  - What about designees?
- For what types of liability?

# Types Of Indemnity Provisions

- Three types
  - Narrow/Limited
  - Intermediate
  - Broad

# Narrow Or Limited Indemnity

- Allows indemnification for losses exclusively caused by the indemnitor's negligence
- Any negligence by indemnitee will bar indemnification
- Mirrors the indemnity obligations imposed by tort law (as opposed to contribution)

# Intermediate Indemnity

- Allows indemnification for loss caused, in whole or in part, by indemnitor's negligence
- Allows indemnification where indemnitor and indemnitee are both at fault (can be full or partial)
- No indemnification for indemnitee's sole negligence

# Broad Form Indemnity

- Indemnitor indemnifies indemnitee for all liabilities, even those arising from indemnitee's sole negligence
- Beware of anti-indemnity statutes or case law limiting or prohibiting broad form indemnity

# Sample Indemnification Clause - Broad

- “To the maximum extent permitted by applicable law and **whether or not caused, directly or indirectly, in whole or in part, by the negligence, willful misconduct or other fault of the party to be indemnified**, Supplier will indemnify and hold harmless Client and its respective officers, directors, employees and agents, from and against any and all claims, causes of action, suits, investigations, and administrative or other proceedings, and all related demands, damages, liabilities, fines, penalties, assessments, costs, expenses (including attorney’s fees) of every kind and nature, **related to or arising out of** the sale of products by Supplier, any breach of this Agreement by Supplier and any act or omission of the Supplier.”

# Sample Indemnification Clause - Limited

- Service Provider shall defend, indemnify and hold harmless Client ... from and against any and all claims, demands, suits, judgments, losses, liabilities, damages, costs or expenses of any nature whatsoever ... caused solely by any: (i) **negligent act or omission** of Service Provider, its officers, directors, agents or employees; (ii) failure of Service Provider to perform the Services in accordance with generally accepted professional standards; or (iii) breach of Service Provider's representations and warranties, agreements, duties or obligations as set forth in this Agreement.

# Indemnification for Injuries to Indemnitor's Employees

- Some states require that an indemnity provision specifically state that an Indemnitor is required to indemnify a third party for injuries to the Indemnitor's own employee

# Indemnification for Injuries to Indemnitor's Employees

- *Bester v. Essex Crane Rental Corp.*,  
619 A.2d 304 (Pa. Super. 1993)
  - “[C]ontracting parties must specifically use language which demonstrates that a named employer agrees to indemnify a named third party from liability for acts of that third party’s own negligence which result in harm to the employees of the named employer. **Absent this level of specificity in the language employed in the contract of indemnification, the Workmen’s Compensation Act precludes any liability on the part of the employer.**”

# Is The Indemnity Obligation Covered By Insurance?

- Standard ISO CGL policies contain an exclusion for liability assumed in a contract:

This insurance does not apply to ...

b. "Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement.

- © ISO Properties, Inc., 2006

# ISO Insured Contract Exception

This exclusion does not apply to liability for damages:

(2) Assumed in a contract or agreement that is an "**insured contract**", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. . . .

- © ISO Properties, Inc., 2006 (emphasis added)

# Insured Contract Defined:

- “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. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.”
- © ISO Properties, Inc., 2006.

# Amended Insured Contract Definition

COMMERCIAL GENERAL LIABILITY  
CG 24 26 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**AMENDMENT OF INSURED CONTRACT DEFINITION**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART  
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

The definition of "insured contract" in the Definitions section is replaced by the following:

"Insured contract" means:

- a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";
- b. A sidetrack agreement;
- c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
- d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
- e. An elevator maintenance agreement;
- f. That part of any other contract or agreement pertaining to your business, including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization, provided the "bodily injury" or "property damage" is caused by you, your employees, agents, or by those acting on your behalf. However, such part of a contract or agreement shall only be considered an "insured contract" to the extent your assumption of the tort liability is permitted by law. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Paragraph f. does not include that part of any contract or agreement:

- (1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;
- (2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:
  - (a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or
  - (b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or
- (3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in (2) above and supervisory, inspection, architectural or engineering activities.

CG 24 26 04 13      © Insurance Services Office, Inc., 2012      Page 1 of 1

However, such part of a contract or agreement shall only be considered an "insured contract" to the extent your assumption of the tort liability is permitted by law.

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# Insurance Requirements In Contracts

- Review types of insurance and limits
- Consider who the insurance is protecting
  - Are you simply requiring that the contracting party has its own insurance, or do you want your company to be able to access that insurance directly?
- Direct access to another party's insurance requires an additional insured clause

# What is Additional Insured Coverage?

- Risk transfer method that allows one party to a business relationship to obtain coverage under another party's policy
- Unlike coverage for liability assumed in an insured contract, which covers the sums the insured incurs pursuant to an indemnity agreement, additional insured coverage allows an additional insured to have direct access to the named insured's policy

# Who Are The Players?

- **Named Insured** – the party whose policy is providing coverage to the Additional Insured.
- **Additional Insured** – the party seeking to take advantage of another party's coverage
  - Beware of using “Additional **Named Insured**”

# Benefits for Additional Insured

- **Coverage without premium.**
- **Doesn't erode additional insured's own limits of liability.**
- **No responsibility for deductibles.**
- **Particularly important for companies who are self-insured or who have retentions on their own policies.**

# Benefits for Additional Insured

- **Supports indemnity obligation, which only has value if the indemnitor has assets to fulfill it.**
- **Defense coverage, without having to wait for a resolution of the indemnity obligation.**
- **Can be independent of, and provide broader protection than, the indemnity obligation, i.e., for the additional insured's negligence.**
  - Important where applicable state's law prohibits indemnification for one's own negligence.

# Implications for Named Insured

- **Pros**
  - Allows transfer of the obligation to defend and indemnify the indemnitee to the insurer.
- **Cons**
  - Erosion of limits.
  - Limits shared by all insureds.
  - Limits used to pay claims for which the Additional Insured may be partly or entirely at fault.
  - Responsibility for deductible.
  - Higher premiums down the road based on loss experience.

# Relationships Giving Rise to Additional Insured Coverage

- **Construction**
  - General contractor requires additional insured status on subcontractors' policies.
- **Vendor/Vendee**
  - Vendor requires additional insured coverage on manufacturer's policy.
- **Service Agreement**
  - Customer requires additional insured status on service provider's policy.
    - Building maintenance
    - Cafeteria operation

# How Does One Become An Additional Insured?

- Generally requires both contract between the parties and an additional insured provision in an insurance policy.

# The Contract

- An obligation to indemnify does not confer additional insured status.
- Does the contract contain an insurance provision?
  - Does it require that the other party name your client as an additional insured?
  - Does it specify the type and amount of insurance coverage to be provided?
    - CGL, Umbrella?
    - Primary or Excess?
    - Limits?

# Broad Additional Insured Provision

- During the Lease term, Tenant shall, at its own expense, maintain in full force a policy or policies of commercial general liability insurance, including property damage, that will insure Tenant *and Landlord and such other persons, firms or corporations as are designated by Landlord*, against liability for injury to persons and property *occurring in or about the Premises*. The liability under such insurance shall be *not less than* \$2,000,000 for bodily injury and \$100,000.00 for property damage.

# The Insurance Policy

- A contractual obligation to provide insurance is ineffective unless the Named Insured's policy contains an Additional Insured Clause.
- Usually in an endorsement.

# Types of Additional Insured Endorsements

- Both ISO endorsements and manuscript endorsements
  - Two varieties
    - Blanket additional insured endorsements – grant additional insured status to categories of Additional Insureds or to those whom the Named Insured has a contractual obligation to insure.
      - Sometimes called automatic additional insureds.
      - If the contract does not specifically require insurance, the endorsement is ineffective.
    - Scheduled additional insured endorsements – lists the name of the additional insured.

# Verifying Additional Insured Coverage

- A certificate of insurance is not proof of insurance
- The Acord form specifically states that additional insured coverage requires an endorsement



## 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. 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).

PRODUCER	CONTACT NAME	PHONE (A/C No. Ext.)	FAX (A/C No.)



**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.**

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GENL AGGREGATE LIMIT APPLIES PER: POLICY <input type="checkbox"/> PRO- JECT <input type="checkbox"/> LOC					GENERAL AGGREGATE <input type="checkbox"/>
					PRODUCTS - COMP/OP AGG <input type="checkbox"/>
					\$
					\$
					COMBINED SINGLE LIMIT (Ex accident) <input type="checkbox"/>
					\$
					BODILY INJURY (Per person) <input type="checkbox"/>
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					BODILY INJURY (Per accident) <input type="checkbox"/>
					\$
					PROPERTY DAMAGE (Per accident) <input type="checkbox"/>
					\$
					\$
					EACH OCCURRENCE <input type="checkbox"/>
					AGGREGATE <input type="checkbox"/>
					\$
					\$
					WORKERS COMPENSATION AND EMPLOYER'S LIABILITY <input type="checkbox"/> Y/N
					ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/EMPLOYEE EXCLUDED? <input type="checkbox"/>
					(Mark if applicable in RM) If yes, describe under DESCRIPTION OF OPERATIONS below <input type="checkbox"/>
					INC STATU- TORY LIMITS <input type="checkbox"/> OTH- ER <input type="checkbox"/>
					E.L. EACH ACCIDENT <input type="checkbox"/>
					\$
					E.L. DISEASE - EA EMPLOYEE <input type="checkbox"/>
					\$
					E.L. DISEASE - POLICY LIMIT <input type="checkbox"/>
					\$
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)

The ACORD name and logo are registered marks of ACORD

**ACORD 25 (2009/09)**

**McCARTER  
& ENGLISH**  
ATTORNEYS AT LAW

# Verifying Additional Insured Coverage

- Ideally, request a full copy of the Named Insured's policy.
- May not be that simple.
  - For some large companies, the extent of their insurance program, including limits and deductibles, is a closely-guarded secret.
  - In that situation, review the additional insured endorsement(s), at a minimum.
  - Review the Other Insurance Clause, if possible.

# Additional Insured – Timely Notice Obligation?

- A typical CGL policy will generally state that “you” must give notice as soon as “practicable” of an occurrence that may result in a claim under the policy
- “You” must also give written notice of a claim or suit against any insured

# Additional Insured – Timely Notice Obligation?

- In *Casualty Insurance Co. v. E.W. Corrigan Construction Co., Inc.*, 247 Ill. App. 3d 326 (Ill. App. Ct. 1993), the court rejected the carrier's attempts to argue that notice to the workers' compensation department is insufficient to provide adequate notice to the liability department for the same carrier.
- “[I]f an insured notifies its insurer of an occurrence and references its workers' compensation policy, it should be considered notice in regards to any general liability policy the insured might have with the same insurer. Consequently, ***it should also be adequate notice to the insurer for any additional insured named on the general liability policy.***” *Id.* at 333.

# Additional Insured – Timely Notice Obligation?

- In some jurisdictions, however, the additional insured must provide notice on its own behalf in a manner consistent with the policy's specific terms and conditions.

# Additional Insured – Timely Notice Obligation?

- In *Liberty Ins. Underwriters Inc. v. Great American Ins. Co.*, No. 09 Civ. 4912(DLC), 2010 WL 3629470 (S.D.N.Y. Sept. 17, 2010), the court determined an additional insured has an implied duty to provide its own notice to the insurance carrier even if the policy does not explicitly require separate notice by the additional insured or the insurer received actual notice of the claim from the named insured or a separate source.

# Additional Insured – Timely Notice Obligation?

- Why is this a problem?
  - In many cases, the only policy information an additional insured has is a Certificate of Insurance
  - Even assuming it contains current policy information, it's unlikely to contain the policy's specific notice requirements

# Whose Coverage is Primary?

- Formerly a hotly-disputed issue.
- ISO attempted to resolve the dispute in the CGL policy itself.
- The 2001 and later versions of the ISO CGL Policy (CG 00 01 10 01) contain an amended Other Insurance Clause (Section IV).

- b. If a claim is made or "suit" is brought against any insured, you must:
- (1) Immediately record the specifics of the claim or "suit" and the date received; and
  - (2) Notify us as soon as practicable.
- You must see to it that we receive written notice of the claim or "suit" as soon as practicable.
- c. You and any other involved insured must:
- (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";
  - (2) Authorize us to obtain records and other information;
  - (3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and
  - (4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.
- d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

### 3. Legal Action Against Us

No person or organization has a right under this Coverage Part:

- a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or
- b. To sue us on this Coverage Part unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured; but we will not be liable for damages that are not payable under the terms of this Coverage Part or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

### 4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

#### a. Primary Insurance

This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.

#### b. Excess Insurance

This insurance is excess over:

- (1) Any of the other insurance, whether primary, excess, contingent or on any other basis:
  - (a) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";
  - (b) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;
  - (c) That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or
  - (d) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion g. of Section I – Coverage A – Bodily Injury And Property Damage Liability.
- (2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.

## b. Excess Insurance

This insurance is excess over:

**(2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.**

- b. If a claim is made or "suit" is brought against any insured, you must:
  - (1) Immediately record the specifics of the claim or "suit" and the date received; and
  - (2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.
- c. You and any other involved insured must:
  - (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";
  - (2) Authorize us to obtain records and other information;
  - (3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and
  - (4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.
- d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

### 3. Legal Action Against Us

No person or organization has a right under this Coverage Part:

- a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or
- b. To sue us on this Coverage Part unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured; but we will not be liable for damages that are not payable under the terms of this Coverage Part or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

### 4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

#### a. Primary Insurance

This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.

#### b. Excess Insurance

This insurance is excess over:

(1) Any of the other insurance, whether primary, excess, contingent or on any other basis:

- (a) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";
- (b) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;
- (c) That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or
- (d) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion g. of Section I – Coverage A – Bodily Injury And Property Damage Liability.

- (2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.

# 2013 Revision no requirement of endorsement

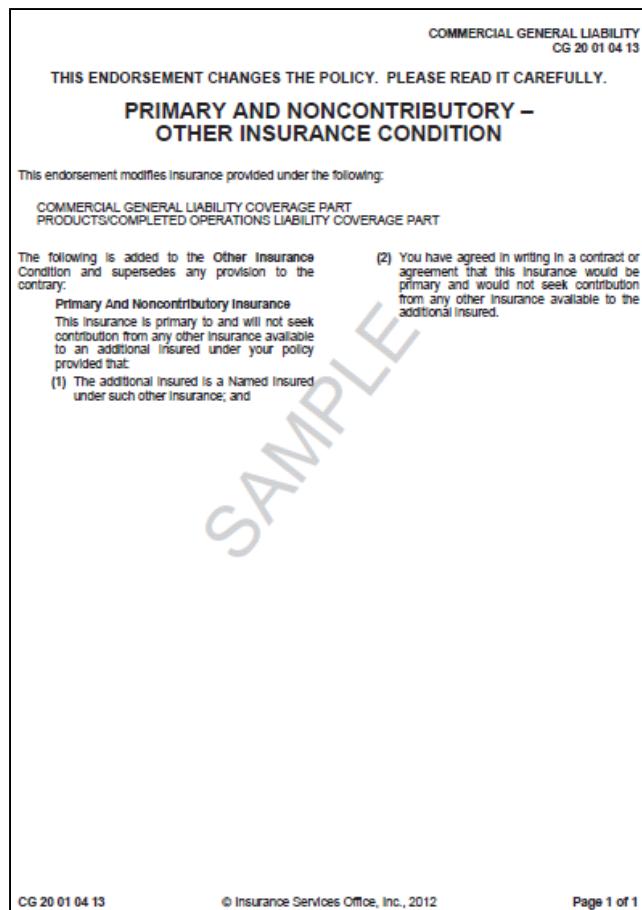
### b. Excess Insurance

This insurance is excess over:

- (2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.**

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# Optional Endorsement: CG 20 01 Primary and Noncontributory – Other Insurance



This insurance is primary to, and will not seek contribution from, any other insurance available to an additional insured under your policy provided that:

1. The additional insured is a named insured under such other insurance.
2. You have agreed in writing in a contract or agreement that this insurance would be primary and would not seek contribution from any other insurance available to the additional insured.

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# ISO 2013 CGL Changes

## Optional Other Insurance Endorsement

- ISO says the new endorsement is superfluous.
- Practical effect: As is frequently demanded of additional insureds, to allow "primary and noncontributory" to be shown on a COI.
  - Absent the new endorsement, the ISO other insurance clause does not use the phrase "primary and noncontributory."

# Contractual Limitations on Additional Insured Coverage

- **Examples:**
  - “The coverage provided to the additional insured shall not exceed, and is limited by, the scope of coverage and limits of liability the Named Insured has agreed by contract to procure for the additional insured.”
  - “Owner shall be included under Contractor’s insurance as an additional insured with respect to claims and/or liability arising out of Work performed for Owner by Contractor, but only to the extent of Contractor’s indemnity obligation in Section 13.b. herein. **In no event shall Owner be an additional insured with respect to claims and/or liability that do not arise out of the sole negligence or other actionable fault of Contractor.**”

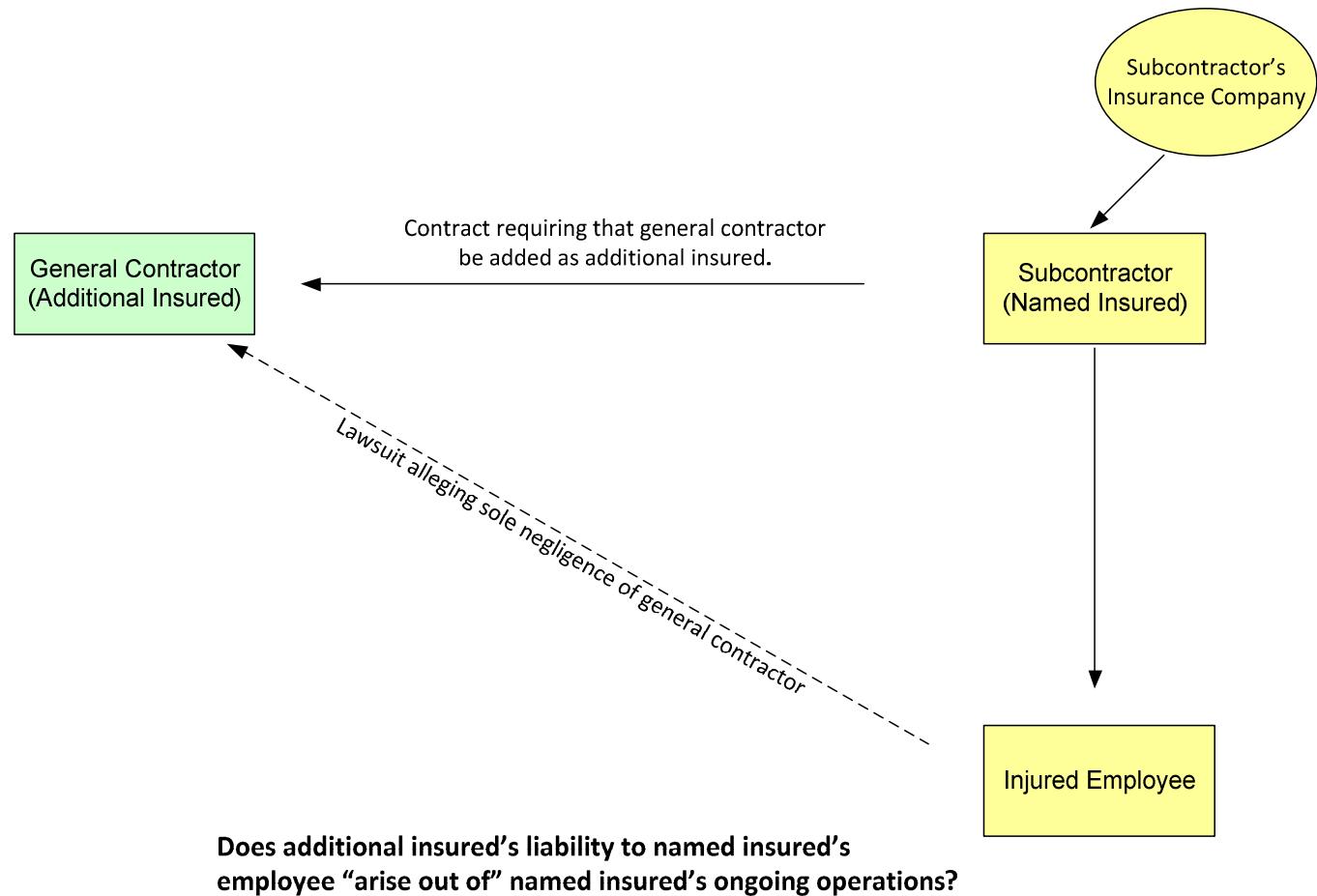
# Scope Of Additional Insured Coverage

- How broad is it?
- Does it essentially back-stop the Named Insured's contractual indemnity obligation?
  - Which clause appears first in the contract – indemnity or insurance?
- Does it cover more than the Additional Insured would be able to recover under the Indemnity Agreement?
  - What if the indemnity agreement contains a monetary cap?
  - What if the insurance provision states that the Additional Insured will receive coverage in the minimum amount of \$\_\_\_\_\_?

# Scope of Additional Insured Coverage

- What if the indemnity agreement is unenforceable?
  - For example, an agreement that purports to indemnify the indemnitee for its own negligence?
  - In a state where such an agreement is void as against public policy?

# Typical Additional Insured Claim



*Gilbane Building Co. v. Empire Steel Erectors, L.P.*, 691 F. Supp. 2d 712 (S.D.Tex. 2010), *aff'd in part, rev'd in part*, 664 F. 3d 589 (5th Cir. 2011)

- Parr, an employee of Empire Steel, a Subcontractor, fell off a ladder at a construction site and sued Gilbane Building Co., the General Contractor.

*Gilbane Building Co. v. Empire Steel Erectors, L.P.*, 691 F. Supp. 2d 712 (S.D.Tex. 2010), *aff'd in part, rev'd in part*, 664 F. 3d 589 (5th Cir. 2011) (cont.)

- Admiral Ins. Co. argued that because the indemnity agreement in the Trade Contractor Agreement was unenforceable under TX law, Gilbane was not covered as an additional insured.
- The District Court rejected this argument, finding that the indemnity and insurance provisions were separate clauses that do not reference each other, are not intertwined or interrelated, and on their face stand independently as separate obligations.
- The 5<sup>th</sup> Circuit affirmed, finding that the indemnity agreement, even though unenforceable, met the policy's definition of an "insured contract" and that Gilbane was an additional insured.

# Norfolk & Dedham Mut. Fire Ins. Co. v. Morrison, 456 Mass. 463(2010), aff'd, 79 Mass. App. Ct. 1128 (Mass. App. Ct. 2011)

- **Dr. Beverly Shafer rented office space from Cummings.**
  - The lease agreement required Dr. Shafer to indemnify Cummings against liability to third parties and to purchase insurance adding Cummings as an additional insured.

# Norfolk & Dedham Mut. Fire Ins. Co. v. Morrison

- One of Dr. Shafer's patients tripped in the parking lot and sued both Dr. Shafer and Cummings.
  - Cummings (landlord) demanded that both Dr. Shafer and Norfolk (Shafer's insurer) indemnify it.
  - Norfolk refused, citing a Massachusetts statute voiding a tenant's obligation to indemnify a landlord.

# Norfolk & Dedham Mut. Fire Ins. Co. v. Morrison

- The Court held that the statutory prohibition against indemnity agreements did not apply to the insurance provision of the lease agreement:
  - “An agreement in a lease that the tenant indemnify or hold harmless the landlord is distinct from an agreement to purchase insurance on the landlord’s behalf, which covers the liability of both in the event of a negligently caused injury.”

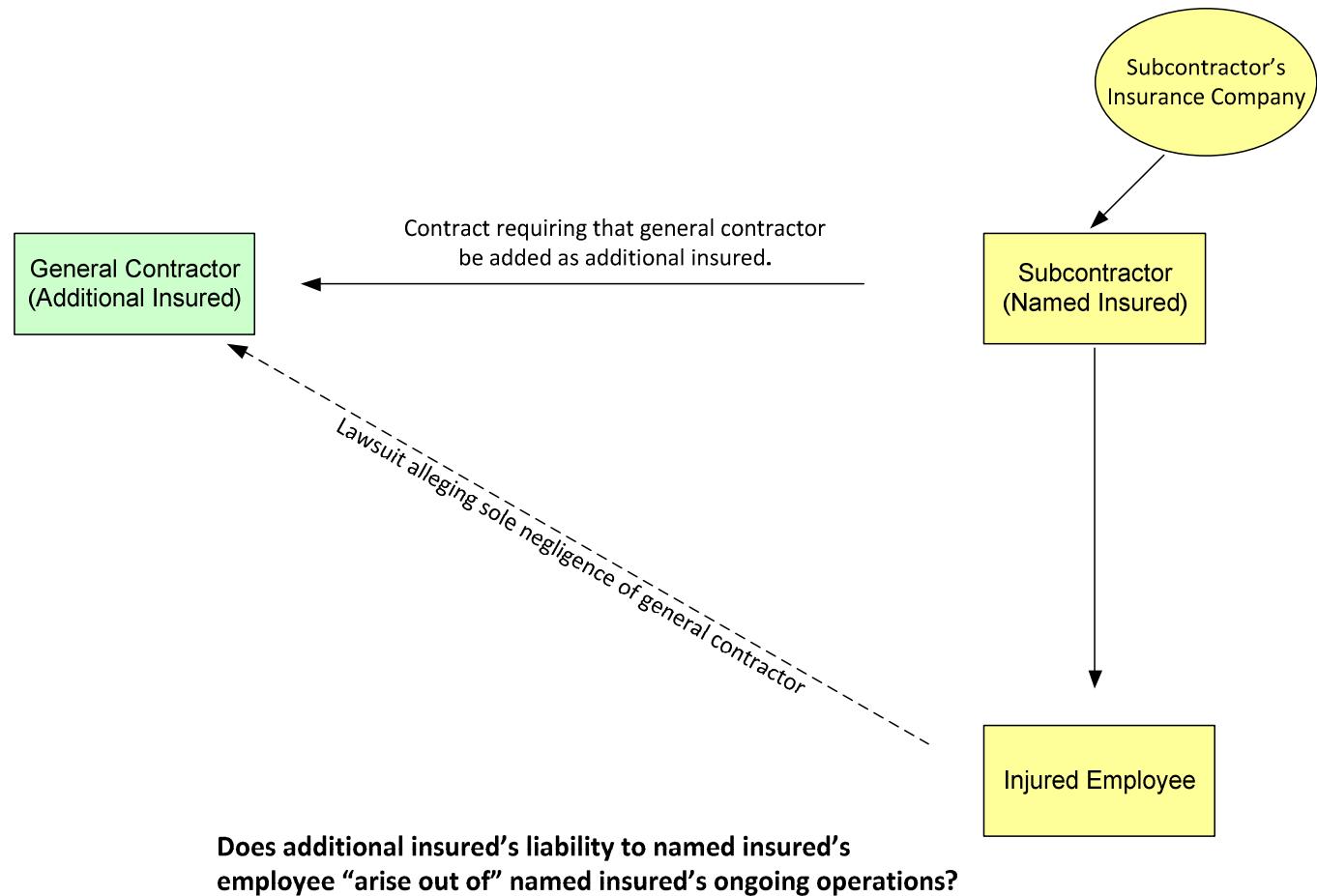
# Impact of Anti-Indemnity Statutes on Additional Insured Coverage

- Recently, some states (e.g., California, Colorado, Kansas and New Mexico) have enacted legislation prohibiting coverage for the additional insured's own negligence where that negligence could not be transferred via an indemnity agreement
- In states where additional insured status is within the jurisdiction of the anti-indemnity statute, an additional insured's coverage cannot be broader than its protection as an indemnitee

# Kansas Stat. S. 16-121

- For example, Kansas Stat. (“KSA”) S. 16-121 (2011) in relevant part provides:
  - (b) “An indemnification provision in a contract which requires the promisor to indemnify the promisee for the promisee’s negligence or intentional acts or omissions is against public policy and is void and unenforceable.”
  - (c) **“A provision in a contract which requires a party to provide liability coverage to another party, as an additional insured, for such party’s own negligence or intentional acts is against public policy and is void and unenforceable.”**

# Typical Additional Insured Claim



# Coverage for Additional Insured's Own Negligence

- *McIntosh v. Scottsdale Ins. Co.*, 992 F.2d 251 (10th Cir. 1993) (festival patron injured on fairgrounds brought suit against township/additional insured. Festival operator's insurer obligated to cover township, even though township stipulated that it was 100% negligent, since injuries "arose out of" Festival's operations).
- *Allen-Stevenson School v. Burlington Ins. Co.*, 2008 N.Y. Misc. LEXIS 10587 (N.Y. Sup. Ct. Mar. 31, 2008) ("The additional insured language...defines coverage...based on the scope of the named insured's work. As long as the claim against the additional insured arises out of the named insured's work, coverage is provided under the Endorsement.").
- *Mid-Continent Cas. Co. v. Swift Energy Co.*, 206 F.3d 487 (5th Cir. 2000) (finding that injuries to named insured's employee "arose out of" named insured's operations, even if the cause of the injuries was the sole negligence of the additional insured).

# The 2004 Amendments to ISO's Endorsements

- In response to these cases, in 2004, ISO amended some of its most commonly-used additional insured endorsements to make clear that the additional insured's sole negligence is not covered.
- Additional Insured only has coverage with respect to liability for BI or PD caused, in whole or in part, by the Named Insured's conduct.

# Comparison Of Pre- And Post-2004 Versions Of ISO CG 20 10

## PRE-2004 CG 20 10

**A. Section II – Who Is An Insured** 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.

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## 2004 CG 20 10

**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.

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# Comparison Of 2004 and 2013 Versions Of ISO CG 20 10

## 2004 CG 20 10

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.

## 2013 CG 20 10

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.

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and
2. 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 such additional insured.

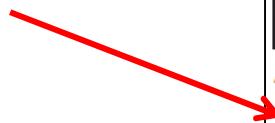
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# Caution – No Coverage If Operations Are Completed

- Carl E. Woodward, LLC v. Acceptance Indem. Ins. Co., Civil Action No. 12-60561 (5th Cir. Feb. 11, 2014)
  - Woodward was additional insured
  - Acceptance refused to defend Woodward
  - Additional Insured coverage limited
    - Woodward insured, but only with respect to liability arising out of [named insured's] ongoing operations performed for [Woodward].
  - Damage Woodward sued for occurred after named insured's operations completed.

# Completed Operations Coverage Requires Separate Endorsement

**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" or "property damage" caused, in whole or in part, by "your work" at the location designated and described in the Schedule of this endorsement performed for that additional insured **and included in the "products-completed operations hazard".**



POLICY NUMBER:	COMMERCIAL GENERAL LIABILITY CG 20 37 04 13
THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.	
<b>ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – COMPLETED OPERATIONS</b>	
This endorsement modifies insurance provided under the following:	
COMMERCIAL GENERAL LIABILITY COVERAGE PART PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART	
SCHEDULE	
Name Of Additional Insured Person(s) Or Organization(s)	Location And Description Of Completed Operations
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	
<b>A. Section II – Who Is An Insured</b> 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" or "property damage" caused, in whole or in part, by "your work" at the location designated and described in the Schedule of this endorsement performed for that additional insured and included in the "products-completed operations hazard". However: <ol style="list-style-type: none"><li>1. The insurance afforded to such additional insured only applies to the extent permitted by law; and</li><li>2. 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.</li></ol>	
<b>B. With respect to the insurance afforded to these additional insureds, the following is added to Section III – Limits Of Insurance:</b> 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: <ol style="list-style-type: none"><li>1. Required by the contract or agreement;</li><li>2. Available under the applicable limits of insurance shown in the Declarations; whichever is less. This endorsement shall not increase the applicable limits of insurance shown in the Declarations.</li></ol>	
CG 20 37 04 13 © Insurance Services Office, Inc., 2012 Page 1 of 1	

# Did ISO's Amendment Resolve The Issue?

- Maybe not --
  - In *Gilbane*, Admiral argued that since the complaint contained no allegations of negligence on the part of Empire (the Subcontractor/Named Insured), or anyone acting on its behalf, the General Contractor, Gilbane, was not covered as an additional insured

*Gilbane Building Co. v. Empire Steel Erectors, L.P.*, 691 F. Supp. 2d 712 (S.D.Tex. 2010), *aff'd in part, rev'd in part*, 664 F. 3d 589 (5th Cir. 2011)

# Did ISO's Amendment Resolve The Issue? (cont.)

- The District Court speculated that the named insured's negligence had not been pled because of the statutory immunity of the Workers' Compensation bar, *but*
- Concluded that the claimant's negligence could be presumed and imputed to the named insured, thus triggering Admiral's duty to defend.

# Did ISO's Amendment Resolve The Issue? (cont.)

- The Fifth Circuit reversed the district court's ruling on the **duty to defend**, finding that Parr's negligence could not be presumed.
  - Applying the eight-corners rule, the Fifth Circuit concluded that Admiral was only obligated to defend the GC/additional insured "if the underlying pleadings allege[d] that Empire, or someone acting on its behalf, proximately caused Parr's injuries." 664 F.3d at 598.

# Did ISO's Amendment Resolve The Issue? (cont.)

- The Fifth Circuit affirmed the district court's finding that Admiral was required to **indemnify** the additional insured:
  - A co-worker's recount of Parr's statement, immediately after he fell, that his “feet got wrapped up in the extension cord” was persuasive.  
664 F.3d at 601.
  - The District Court properly “consider[ed] facts outside of those alleged in the petition in determining the duty to indemnify.” *Id.*

# Revised CG 20 10 Does Not Limit Coverage To Vicarious Liability

- **American Empire Surplus Lines Ins. Co. v. Crum & Forster Specialty Ins. Co.**, No. H-06-004, 2006 U.S. Dist. LEXIS 33556 (S.D. Tex. May 23, 2006) (language of endorsement requiring that Additional Insured's liability arise, in whole or in part, out of Named Insured's conduct, does not limit coverage to vicarious liability, but provides coverage where both Named Insured and Additional Insured are negligent).

# HYPO

- Santa's elves have fallen behind and Santa decides to outsource.
- He places an order with the Bah-Humbug Toy Company.
- While Bah-Humbug's driver, Mr. Scrooge, is unloading boxes at Santa's workshop, he trips over an Elf and is injured.
- Mr. Scrooge sues Santa and Elf.
- Santa and Elf tender the claim to Bah-Humbug for contractual indemnity.
- Santa and Elf also seek coverage as additional insureds under Bah-Humbug's insurance policy.

# HYPO – What does the contract say?

- Bah-Humbug agrees to defend, indemnify and hold harmless Santa, his directors, officers and employees (“Indemnitees”) from any damage, loss, claim, liability, injury, action, suit or other expenses ... asserted against the Indemnitees ***arising out of or relating to any act or failure to act by Bah-Humbug*** or its directors, officers, employees and agents in the performance of this Agreement by Bah-Humbug.
- All insurance policies shall include Santa as an additional insured ***with respect to liability arising out of the performance of Bah-Humbug's work under the contract.***

# Are Santa And Elf Entitled To Indemnity?

- Did Bah-Humbug agree to indemnify for injuries to its employees?
  - Does the state require an explicit statement to that effect?
- Is Elf an indemnitee?
  - Employee vs. independent contractor
- Did Scrooge's injuries arise out of any act or failure to act of Bah-Humbug or its employees?
- What if Elf was negligent?
- Is there an anti-indemnity statute?

# Are Santa And Elf Covered As Additional Insureds?

- The contract only required Santa to be an additional insured
  - What does this mean for Elf's defense costs?
- Did Santa's liability "arise out of" Bah-Humbug's performance of work under the contract?
- What if Elf has been harboring a grudge against Scrooge and deliberately tripped him?
- Can Santa get coverage as an additional insured even if Bah-Humbug's indemnity obligation isn't triggered?

# Contract Review Checklist

- Consider the nature of the relationship and your company's potential exposure
- Who has the bargaining power?
- Carefully review
  - Limitation of liability provision
  - Indemnity clauses
  - Insurance requirements
  - Additional insured requirement
  - Choice of law clause
    - Check state's indemnity/additional insured law
  - Termination/survival clauses

# Contract Review Checklist – Your Company As Indemnitee/Additional Insured

- Is your company seeking indemnification?
  - What are the limitations on the indemnity obligation?
    - i.e., for the sole or gross negligence of the vendor or for your company's negligence?
  - Will your company be indemnified for injuries to the vendor's employees?
  - What state's law applies, and is there an anti-indemnity statute?
- What does the insurance clause say?
  - Will your company be an additional insured?
  - Is your company an additional insured for its own negligence?
  - What limits will be provided and how are they described?
  - Whose coverage is primary?
- Do these obligations survive termination?

# Contract Review Checklist – Your Company As Indemnitee/Additional Insured (Cont.)

- Require proof of insurance?
  - At a minimum, seek the declarations page, other insurance clause, notice provision and additional insured endorsements
  - Offer to keep it confidential and allow redaction of commercially-sensitive information, i.e., premium or additional insured endorsements identifying others by name
- Consider requiring that the other party provide additional insured coverage pursuant to ISO Form \_\_\_\_\_ or its substantial equivalent
- Request the ISO Optional Primary and Non-Contributory Other Insurance Endorsement
- Request that the carrier notify your company of cancellation

# Contract Review Checklist – When Your Company Is The Indemnitor

- Is your company providing indemnification?
  - What are the limitations on the indemnity obligation?
    - i.e., for your company's sole or gross negligence?
  - Who will your company be indemnifying?
  - Will your company's indemnity obligation be covered by your insurance?
  - Specify your company's defense obligation/right
    - Including who gets to control the defense

# Contract Review Checklist – When Your Company Is The Indemnitor (cont.)

- Is your company agreeing to maintain specific types of insurance?
  - **Check with Risk Management**
    - Does your company have the required coverage/limits?
- Is your company providing additional insured coverage?
  - **Check with Risk Management**
    - Does your policy have the promised endorsements?
    - What limits will be provided and how are they described?
    - Whose coverage is primary?



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Pennsylvania  
New York

U.S. Court of Appeals, Third Circuit

U.S. District Court, Eastern District of Pennsylvania

U.S. District Court, Middle District of Pennsylvania

U.S. District Court, Southern District of New York

Joann Lytle is a partner in McCarter & English, LLP's policyholder insurance coverage group. Joann helps corporate policyholders maximize their insurance assets and has recovered hundreds of millions of dollars for a wide range of companies, including those in the food services, manufacturing and health care industries. She has handled disputes involving commercial general liability, umbrella liability, errors and omissions liability, directors and officers liability, employment practices liability and cyber liability policies. In addition to representing policyholders in coverage disputes, Joann also provides insurance coverage advice and counseling to her clients on an ongoing basis. She graduated *maxima cum laude* from LaSalle University in 1987 and obtained her J.D., *cum laude*, from Harvard Law School in 1990. Business Insurance Magazine recognized Joann as one of its 2014 "Women to Watch." In 2014, she was recognized by *Chambers USA* as a "Leader in Their Field." Joann was selected as the exclusive Pennsylvania winner of the Lexology Client Choice Award in 2013 and 2014. Joann has also been recognized in *Best Lawyers in America* since 2008.