I’m Not an Attorney But I Play One at Work – Risk Managing Contracts

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Agenda

- Risk Manager’s Process of Contracts
- What to do when you have a Claim
- Sample Language
- Insurance Broker’s Items to Consider

Contract Process

- Centralized process run by Contract Governance Department
  - Vendor cannot be paid without a contract/purchase order

- Risk and Value Based

- Master Services Agreement covers most areas
  - Specialized contracts for certain services
    - Transportation
    - General Contractors
    - Maintenance
    - IT
    - Contracts involving PII
    - Marketing/Advertising
    - Leases
    - Products

  - Contracts have terms and conditions that cannot be changed unless business owner approves
    - One of the top areas that we get request for changes is Insurance

Contract Process

- How do we evaluate types of insurance and levels of insurance:
  - Claim History
  - New Emerging Risk
  - Weighing the Business & Operational Risk

- Developed a Matrix by types of Vendors and levels of Insurance required
  - Language and levels of insurance are modified by country

- Exceptions must be approved by Sr. Management within the business area

- Certificates of Insurance are required under the contract, but we do not track them.
  - We rely on the contract not the certificate

How to determine levels of Risk for Contracts

- Review Loss History:
  - Review incidents and claims
    - What type of claims are an issue from a frequency or severity
    - Can you protect yourself from those claims by contract language?
    - Ask Claims Administrator or Attorneys if the outcome of the claim would have been better with a stronger contract

- Loss Control & Mitigation:
  - Make sure to minimize your risk and not only rely on contracts to protect you.

- Develop a Risk Matrix
  - What areas are high risk?
  - Develop insurance requirements and work with counsel on strong indemnification language
  - Determine what is negotiable
  - Develop real life examples of why the insurance language is important

Items to Consider in Reviewing Contracts

- Do not allow any language in the contract that you cannot abide by.
  - For example, you are required to insure the building but there is no coverage under the property insurance
  - Per Location vs. Blanket Policy
- Do not put language in the contract that you will review a vendor's insurance policies for compliance unless you plan on doing it.
- Do not allow your policies to be reviewed.
- Do not allow vendor/landlord to dictate your insurance program
  - Limits/Deductibles
- Decide what appropriate limits you want to provide in contracts and what you want to require
  - May be due to Risk Determination
  - Benchmarking
  - Broker Recommendation Review
  - Loss History

Items to Consider in Reviewing Contracts

- Damage & Destruction Clause: in Leases
  - No language that rebuilding efforts are tied to receipt of insurance proceeds
  - Always remove language from the lease where Landlord seeks control of Insurance Funds/Proceeds

- Indemnification
  - Make sure to add language that the vendor will also indemnify any party you are required to indemnify, i.e., landlord

- Review other Sections of the Contract that my limit your recovery – Loss & Damage Section or Limitation of Liability
  - Transportation Contracts – Limit recovery regardless of insurance limits
  - Privacy/Cyber Claims

- Self-Insurance Language
  - Ensure having language that you have the right to self insure and the ability to use captives
  - For Vendors add parameters for their ability to self insure

Identify Opportunities for Risk Transfer

- Identify potential parties for subrogation or indemnity

- Tender early & often

- Look for contractual relationships between your insured and its vendors or other parties
  - Indemnity or additional insured requirements
  - Venue provisions
  - Prevailing Party Attorney's Fee provision

Identify Opportunities for Risk Transfer

- Identify the Risk Transfer:
  - Is your client/insured the indemnitor or the indemnified party?
- Obtain a copy of any and all agreements (contracts, lease, service agreements, etc.) and confirm there is an indemnity provision.
- If you represent the Indemnitor, immediately notify the client and develop a strategy for providing a defense, discuss potential conflicts and whether waivers will be necessary.
- If your insured/client is owed an indemnity, immediately tender the claim and diligently demand a defense and indemnity.

Tender ASAP

- Tender as early as possible. In California, the duty to defend is triggered upon tender. (*Haskel v. Superior Court* (1995) 33 Cal.App.4th 963, 974.)

- What this means is that **every dollar your client spends defending a case <u>prior</u> to the date of their initial tender will not be recouped from an insurance company if and when the duty to defend is triggered**.

- Consider filing a Cross-Complaint against the Indemnitor

To Whom Do You Tender?

When tendering a claim, the goal is to obtain as much coverage as possible for your client and therefore you want to cast as broad of a net as possible.

- Contractors
- Subcontractors
- Vendors
- All potential insurance carriers

Sample Indemnification Language

Article 8 Indemnification:

The INDEMNITOR shall defend, Indemnify and hold harmless (including reasonable attorney's fees) the INDEMNIFIED PARTIES **and all of their corporate affiliates, parent companies, subsidiaries, divisions, and related companies, and each of their respective officers, directors, partners, members, shareholders, employees, contractors, representatives and agents, <u>and any entity the INDEMNIFIED PARTIES have contractually agreed to indemnify, defend and hold harmless for any loss in connection with the Services pursuant to a separate agreement</u> (the "Indemnified Parties")** against all claims, demands and judgments made or recovered against them related to….(ii) services performed and/or products provided under this Agreement to the extent that such damages, Injury or death were **caused by the negligence or willful misconduct of Indemnitor or its subcontractor or its employees or agents provided, however, that such indemnification and hold harmless obligation shall not apply to the extent such damages arise from negligence or willful Misconduct of the INDEMNIFIED PARTIES** or any of them, as finally determined by a court of competent jurisdiction; and, provided, further, that such Indemnification and hold harmless obligation is expressly conditioned on the following;

Sample Indemnification Language Contd.

Article 8 Indemnification:

(a) that Indemnitor shall be notified in writing promptly of any such claim or demand,

(b) that Indemnitor shall have sole control of the defense of any action or such claim or demand and of all negotiations for its settlement or compromise provided that any settlement or compromise which requires contribution from the Indemnified Parties must be approved by the Indemnified Parties; and that

(c) the Indemnified Parties shall cooperate with Indemnitor and at a reasonable way and at Indemnitor's expense to facilitate the settlement or defense of such claim or demand. The Indemnified Parties may, at their expense and option, use counsel of their choosing to observe the defense of any such claim.

Sample Indemnification Language Contd.

Indemnity

Seller/INDEMNITOR shall defend, indemnify, save and hold Buyer, its parent company, affiliated companies, directors, officers, agents and employees**,** free and harmless from and against all claims, demands, causes of action, damages and liabilities of any nature, and all costs and expenses incurred in connection therewith (including, but not limited to, attorneys' fees) for (i) death or injury to any person or persons (including, but not limited to, agents and employees of Seller and its Suppliers and damages characterized as special, direct, consequential, loss of consortium, or future earnings); (ii) damage or loss of any property (including, but not limited to, loss of use, lost profits, or diminution in value) arising directly or indirectly out of or in connection with Seller's performance of the Contract, (iii) claims by Seller, Seller's employees or its Suppliers and their employees for wages, benefits and other compensation; and by claims by governmental agencies or others for taxes or contributions allegedly due by reason of Seller or its Suppliers performing the Contract Work; (iv) **acts or omissions under the Contract**; and (v) infringement of any third party intellectual property rights, **in all including, without limitation, claims, demands, actions, damages and liabilities <u>based in whole or in part</u> on the negligence or other theory of liability of Seller/INDEMNITOR or their Suppliers**, **and excluding only claims and liabilities based on Buyer's/INDEMNIFIED PARTY'S <u>sole</u> negligence or willful misconduct**. **Buyer/INDEMNIFIED PARTY has the sole right to designate the attorney or law firm that will defend and represent it in regard to any suit, claim, or action that is subject to an indemnity provision in the Contract.**

Selection of Defense Counsel

- Who selects the defense counsel providing the defense?

- If it’s ambiguous, consider negotiating the parameters for retaining defense counsel for the indemnified party, e.g., provide a list of defense counsel previously retained or approved by the client/indemnified party.

- Consider whether certain defense counsel may pose a conflict for the Indemnified Party or if there’s been a breakdown in relationship between the proposed defense counsel and Indemnified Party.

Example Additional Insured Language

Insurance

Unless otherwise stated in the Contract, and without prejudice to Buyer's rights and Seller's indemnity obligations under Indemnity Section of the Contract, Seller shall keep and maintain in effect, at its sole cost and expense, the following policies of insurance:

- Commercial General Liability insurance with coverage to include broad form property damage, personal injury, premises, completed operations, and products and contractual liability for the liability assumed under the Contract and independent contractors; and with a minimum bodily injury and property damage with a limit of $2,000,000 per occurrence and $2,000,000 in the aggregate.

Each such policy shall be underwritten by an insurance company with minimum A.M. Best ratings of "A-, VII" or equivalent and shall provide that it is primary insurance to and noncontributing with any other insurance carried by Buyer. **The policies referred to above in paragraphs (a) and (b)(i) shall name Buyer as an "additional insured".** The policies referred to above in paragraphs (b)(ii), (b)(iii), (c) and (d) shall contain a waiver of subrogation in favor of Buyer.

Additional Insured Status

- In California, additional insureds have many, if not all, of the same rights to coverage as the named insured.

- The failure to defend an additional insured can create exposure to bad faith damages. (See e.g., *Campbell v. Superior Court* (1996) 44 Cal.App 4th 1308.)

- As an additional insured, the additional insured can sue for the tort of breach of implied of covenant of good faith and fair dealing and seek recovery of attorney's fees. (*Brandt v. Superior Court* (1985) 37 Cal. 3d 813.)

Items to Consider

- Dual employment – employees hired through agencies: Example: an employer hired an employee through an agency. The agency will provide EPL and on a primary basis. The employer didn't want to be covered by the agency's EPL because the retention was much higher, $100,000, versus $25,000. In this situation, you are bound by the contract that states the agency's EPL is primary.

- Make sure your intent is achieved via policy endorsements. Example: daycare company renting space from a school district. Per the contract, the daycare shall add the school district as an AI. It was added, but the claim involved alleged molestation. In this case, there was a separate endorsement providing for molestation coverage, but you separately had to be added on that endorsement. In this case, the school district wasn't added, and the carrier denied coverage.

- Cargo freight carriers: Example: contracts limiting the cargo carrier's liability to $100,000 per load. That's fine if you're shipments do not exceed $100,000. Otherwise, you're limited, and you will have to go through your cargo carrier for recovery, less deductible.

Items to Consider

- Management liability policies, such as EPL, D&O and E&O do not allow for additional insureds. So, no matter what the contract states, no contracts can bind the management liability carrier.

- Mutual defense/indemnification provisions: Be careful if you have mutual indemnification because that gives a carrier the ability to argue whether the other party is owed indemnification. It's cleaner, if possible, to have the indemnification requirements be one way only.

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Thank You