



Latest Trends and
Risks Associated with
Additional Insured
Status

Christine Trimarco
Michael Alberico

2019 CFMA Midwest
Regional Conference

TODAY'S OBJECTIVES

(1) WRITTEN CONTRACT

(2) BASIC INSURANCE REQUIREMENTS

(3) ENSURING DOWSTREAM RISK TRANSFER

(4) CONTRACTUAL INDEMNITY

(5) TENDERING YOUR DEFENSE



The Evolution of the Additional Insured

» **CG 20 10 11/85**

- » Liability “arising out of your work” by or for the named insured
- » Sole Negligence/Broad Form Indemnity
- » Completed operations coverage included

» **CG 20 10 10/01**

- » Liability “arising out of your ongoing operations”
- » Sole Negligence/Broad Form Indemnity
- » No completed operations coverage
- » Add CG 20 37 10/01 for completed operations

» **CG 20 10 07/04**

- » Liability caused “in whole or in part by you or your subcontractors’ acts or omissions”
- » Contributory Negligence/Intermediate Form Indemnity
- » No completed operations coverage
- » Add CG 20 37 07/04 for completed operations



The Evolution of the Additional Insured

» CG 20 10 04/13

- » Liability caused “in whole or in part by you or your subcontractors’ acts or omissions”
- » Contributory Negligence/Intermediate Form Indemnity
- » Coverage required by contract or agreement is no broader than the contract requires (New)
- » No completed operations coverage
- » Add CG 20 37 04/13 for completed operations
- » *Observation* – doesn’t address direct or indirect contract relationship as this issue is unique to only a few states (e.g. Illinois)
- » *Observation* – new forms are untested in the courts and put the better and more widely accepted forms further into review



Additional Insured

» Other Issues

» Blanket or Scheduled

- *Blanket* – easier to manage, but may have limitations for additional insureds you have no direct relationship with
- *Scheduled* – difficult to manage, and each additional insured could be underwritten and scrutinized

» Manuscript Additional Insured

- 100's of carrier manuscript forms
- Some are good and some are bad

» Executed Contract

- “As required by signed contract”

» Direct Contract

- Some additional insured endorsements imply the named insured is working and contracted directly for the additional insured
- Recent court decision found that “such person or organization” only extends additional insured protection to whom you have a direct contract with

The Importance of the Contract

- (1) the contract is the primary written memorialization that sets forth the intentions and obligations of the parties
- (2) the contract outlines the risk allocations between the parties
- (3) each party should understand the risks it is taking on and how those risks can be transferred to another party
- (4) each party should understand what losses may be covered by insurance and those that may not, subject the party to a personal loss\$\$\$
- (5) subsequent changes to an executed agreement should be in writing

Contract Basics Continued

- (6) the contract serves as the basis for the tender of defense and indemnity to a subcontractor's insurance carrier
- (7) the contract should clearly set out the obligation of the parties with respect to insurance coverage
- (8) the contract should be signed
- (9) the parties should be aware of clauses that limit liability and loss
- (10) understand that a form agreement does not fit all situations
- (11) the standard agreement you are using should be regularly reviewed and revised
- (12) the contract should incorporate all upstream requirements

What Type of Agreement Should My Business Be Using?

(1) Formal Subcontract Agreement

- Work with an attorney to ensure that all key provisions are in the agreement

(2) Purchase Order

- PO's should be used in limited circumstances
- If using PO's make sure that they contain the necessary risk transfer clauses

(3) Form Contracts For Purchase

- There are organizations, such as American Institute of Architects (AIA), that sell form agreements that are a good starting point.

Basic Insurance Requirements

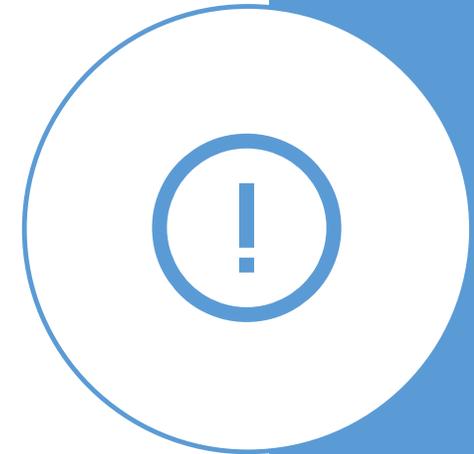
What insurance should I require from the subcontractor and why?

- What work is taking place?
- What does the prime contract require?
 - General Liability
 - Workers Compensation
 - Commercial Auto
 - Excess Liability or Umbrella
 - Pollution Liability

Basic Insurance Requirements Continued

- (6) Professional Liability
- (7) Builders' Risk
- (8) Railroad Protective
- (9) Jones Act, U.S. Longshore & Harbor Workers' Compensation

- What Other Types of General Requirements on The Policies?
 - (1) Set out specific limits per occurrence/aggregate
 - (2) Waiver of subrogation
 - (3) Primary non-contributory
 - (4) Coverage for Waivers of Limited Contribution



Certificates of Insurance

A certificate of insurance is a document issued by insurer or agent that displays the subcontractor's insurance.

- The certificate contains the insured and insurer information, coverage limits, and dates of coverage.
- Certificates do not guarantee coverage.
- Being listed as an additional insured on the certificate does not guarantee coverage.

A general contractor should have a system in place to manage certificates.

- Review certificate prior to contractor beginning its work to determine compliance.
- Review necessary endorsements.
- Develop procedure for non-compliance.

Downstream Risk Transfer

What is risk transfer? It is a risk management strategy that involves the contractual shifting of risk from one party to the other.

Your exposure for a loss could negatively impact financial strength, insurance programs and costs.

- Successful risk transfer can minimize this exposure.

Risk transfer can be accomplished through: (1) a contractual requirement to provide insurance coverage for another party's benefit; or (2) contractual indemnification.

Accomplishing Risk Transfer

- (1) Additional Insured
 - (a) In order to be entitled to additional insured coverage, the subcontract agreement must state that “the following [should be set out specifically] shall be named as additional insured on the subcontractor’s commercial general liability and umbrella policy.” Do not use language that the general contractor shall be named an additional insured on the certificate of insurance.
 - (b) Without a written requirement in the subcontract agreement, the general contractor may not be able to tender its defense to the subcontractor.
 - Commercial General Liability policies require a written agreement that the named insured agreed to add the party requesting coverage as an additional insured.*
 - *Some GL endorsements require that the contract be signed.



Accomplishing Risk Transfer – Not All Additional Insured Endorsements Are Equal

- (c) There are several standard ISO Endorsements that convey additional insured coverage. Some are better than others.
 - (a) the broadest endorsements are (CG 20 10 10 01 and CG 20 37 10 01) and (20 10 04 13 and 20 37 04 13).
- (d) Be careful of “equivalent” endorsements. There are several hundred carrier manuscript forms. Some are good and some are bad.

Contractual Indemnity

Contractual indemnity is a clause in an agreement providing for one party (or both) to indemnify another for one's conduct. This usually includes attorneys' fees, costs and other damages.

Contractual indemnity is separate from additional insured coverage.

Contractual indemnity is normally excluded by insurance.

State laws vary regarding the enforceability of an indemnification clause in a contract.

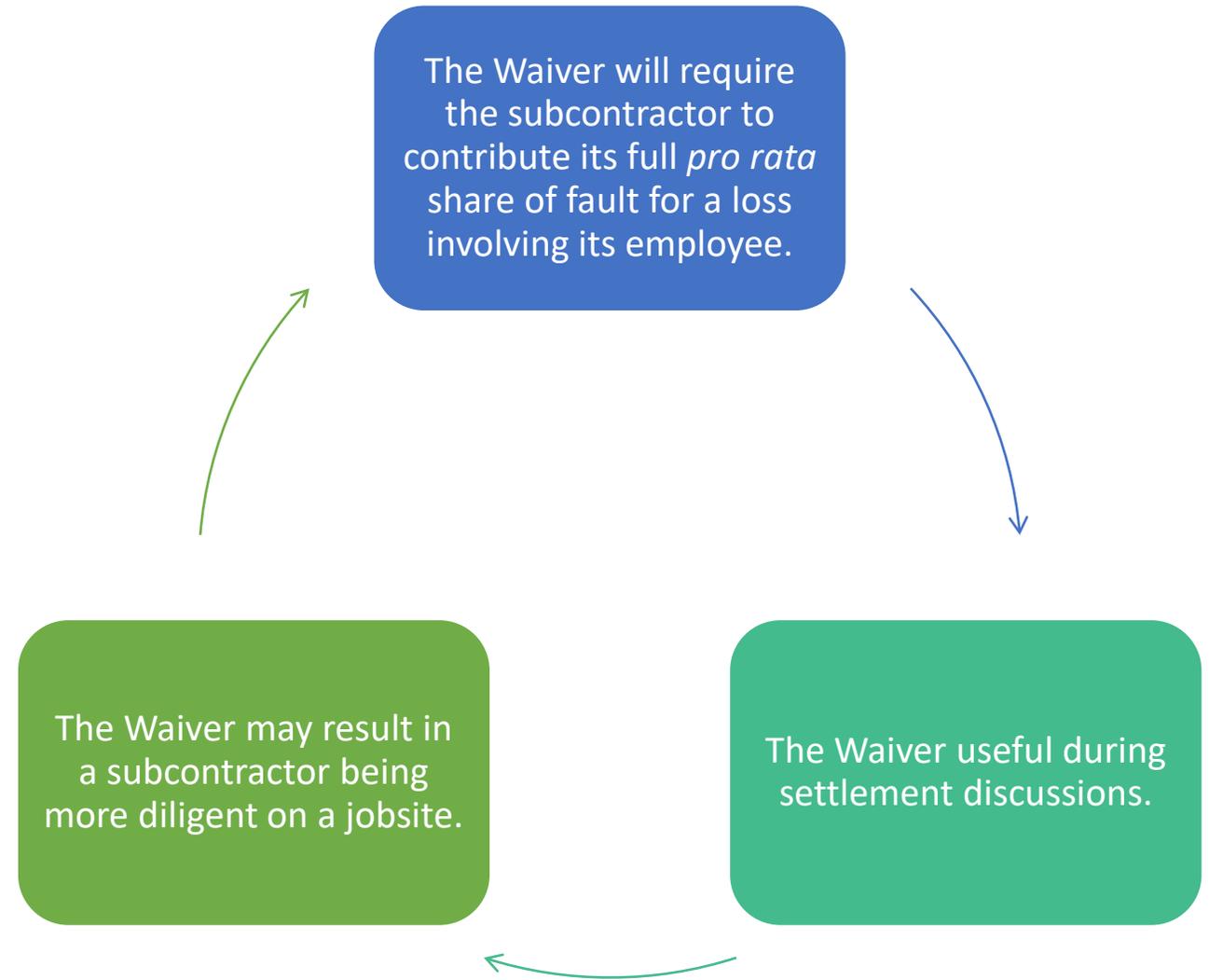
Standard Indemnity Clauses

- (1) to the fullest extent permitted by law, subcontractor shall defend, indemnify, indemnify, save and hold harmless, Contractor, Owner, from all claims, loss, damage, injury, causes of actions, fines, penalties, damages,
- (a) indemnity clauses bind a party to indemnify the other party for a loss regardless of whether it is covered by insurance.
- (2) *Kotecki* waivers (in Illinois) – in many states, an employer can waive its right to limited liability in 3rd party over actions

Waiver of Limited Liability

- Illinois employer enjoy statutory immunity from third party over actions under the IL Worker's Compensation Act. However, that immunity can be waived by contract.
- The contract with the employer needs to clearly state that the employer is waiving this limited liability.
- Sample Language: The indemnification obligation under this paragraph shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the Subcontractor under any workmens' compensation act.

Why Require a Subcontractor to Waive Limited Contribution?



Tendering Your Defense



A TENDER IS A DEMAND TO ANOTHER PARTY TO DEFEND AND INDEMNIFY PURSUANT TO CONTRACTUAL OBLIGATIONS.



WHEN A CLAIM/OCCURRENCE/LAWSUIT ARISES AGAINST YOU, REVIEW YOUR CONTRACTS TO DETERMINE WHO YOU CAN TENDER YOUR DEFENSE. YOUR TENDER MAY BE MADE TO MULTIPLE PARTIES' INSURANCE CARRIERS.



THE TENDER OF DEFENSE/INDEMNITY SHOULD BE MADE AS SOON AS PRACTICABLE OR YOUR TENDER COULD BE TIME BARRED.



THE TENDER SHOULD BE DIRECT TO THE INSURANCE CARRIER. IF YOU DON'T KNOW WHO THE INSURANCE CARRIER IS, DIRECT THE TENDER TO THE THIRD-PARTY SUBCONTRACTOR DEMANDING THAT THEY FORWARD THE TENDER TO THEIR CARRIER.



BEST PRACTICE IS TO SEND THE TENDER VIA CERTIFIED AND REGULAR MAIL.

The Tender Letter and Insurance Carrier's Response

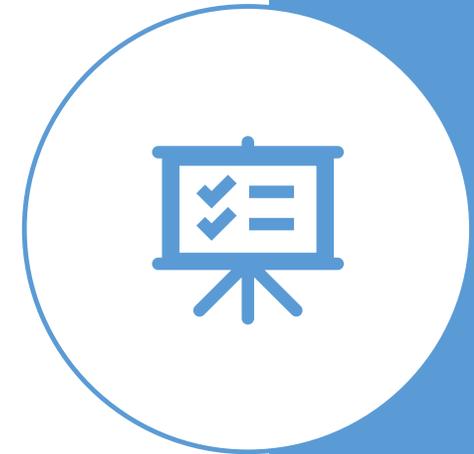
A tender letter at a minimum should contain (1) general information of the claim (e.g., Lawsuit or incident report); (2) citation to and a copy of the agreement whereby you are claiming additional insured coverage; and (3) the certificate of insurance.

In response to the tender a carrier might: (1) deny the tender; (2) accept the tender under a reservation of rights; or, (3) accept the defense without a reservation.

The response from the third party's carrier should be in writing and clearly outline where coverage is triggered and where it is not.

Common Problems With Perfecting Risk Transfer

- (1) The contract language is out of date.
- (2) The contract does not clearly set out who is to be named as an additional insured.
- (3) The contract does not clearly set out the insurance requirements.
- (4) Your contract did not bind the subcontractor to the Prime Agreement.
- (5) There is no contract.
- (6) Late notice.



Late Notice

- We continue to see insureds lose out on coverage because of late notice.
 - All policies require a duty to report a claim OR an occurrence that the insured should reasonably know would give rise to a claim. Note that the definition of claim is broadly defined in the policy.
 - Do not delay reporting a claim.
 - Do not handle the claim, thinking it will go away, and then later report it.
 - If you are unsure whether there is a duty to report yet, contact your broker and review the policy language.
 - It is difficult to overturn an insurance carrier's denial of coverage due to late notice.
 - Your duty to timely report applies to tenders of defense for additional insured coverage.

Questions

