Contractual Armor: Strengthening Additional Insured and Indemnification Provisions

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In an era marked by heightened geopolitical tensions, shifting regulatory environments, and increasing financial uncertainty, contractual risk transfer is no longer a routine legal formality—it's a strategic necessity. However, the pressure to close transactions quickly can often overshadow the importance of carefully reviewing, analyzing and negotiating contractual provisions in favor of relying on standardized, outdated and often insufficient risk transfer language.

When properly structured, risk transfer provisions can protect a company from legal disputes, reputational damage and financial exposure. However, misalignment between contractual provisions, including key provisions providing for indemnification and requiring the placement of insurance, can seriously undermine the effectiveness of these provisions and leave companies without recourse when faced with existential threats.

I. Understanding and Strengthening Indemnification Provisions

Indemnification is a contractual agreement whereby the indemnitor promises to compensate the indemnitee for certain losses or damages. Typically, indemnification provisions provide that the indemnitor agrees to "indemnify, defend and hold harmless" the indemnitee from any claims arising out of performance of the contract. This language, however, may take various forms, and each term – "indemnify," "defend" and "hold harmless" – has a distinct role in the indemnity clause.

A. Understanding Indemnification Provisions

To "defend" generally requires that the indemnitor engage attorneys and manage litigation or other proceedings when a claim that is covered under the indemnification provision is brought against the indemnitee. This obligation may include defending, financing the defense, and reimbursing the indemnitee for expenses incurred in defending the claim. Various jurisdictions have found that this duty to defend (as distinguished from the duty to indemnify) does not first require a finding of indemnitor liability to be triggered if the duty to defend is expressly stated in the contract. See, e.g., *Crawford v. Weather Shield Mfg., Inc.*, 44 Cal. 4th 541, 187 P.3d 424 (2008); *Sero v. New York Cent. Lines, LLC*, No. 07-CV-6397-CJS, 2010 WL 2294440, at *5 (W.D.N.Y. June 4, 2010).

Separately, to "indemnify" means that the indemnitor must pay for the indemnitee's losses or damages. Often, the indemnitor's obligation to indemnify the indemnitee is limited in the agreement to those losses arising out of indemnitor's negligence or wrongdoing – and does not apply to the sole negligence of the indemnitee.

Some contracts, however, do specify that the indemnification obligation applies even if the indemnitee is solely negligent. Jurisdictions are divided as to whether such absolute indemnification is permissible. For example, under Florida law, parties are permitted to enter into indemnification agreements for the negligence of the indemnitee so long as the provision is clear, and the agreement provides a monetary cap on such indemnification. See, e.g., Container Corp. of Am., 707 So.2d at 736 (citing other cases); see also On *Target, Inc. v. Allstate Floridian Ins. Co.*, 23 So. 3d 180, 185 (Fla. Dist. Ct. App. 2009). However, in contrast, North Carolina and South Carolina have anti-indemnity statutes that invalidate indemnification clauses that purport to provide indemnity for the indemnitee's own negligence (in whole or in part). See, e.g., N.C. Gen. Stat. § 22B-1; S.C. Code § 32-2-10.

Lastly, indemnification provisions may also use the language, "hold harmless," which indicates a promise to pay any costs that may result from a claim covered by the indemnity provision. The majority of courts hold that "hold harmless" is duplicative of "indemnify." However, some courts have held that "hold harmless" can add to the indemnity terms by releasing the indemnitee from payment obligations due to the indemnitor for the indemnitee's own actions. See, e.g., *Queen Villas Homeowners Assn. v. TCB Prop. Mgmt.*, 149 Cal. App. 4th 1 (Cal. App. Ct. 2007).

B. Strengthening Indemnification Provisions

When drafting or reviewing indemnification provisions as the indemnitee, companies should approach the process with a clear understanding of the legal and practical implications involved.

First, companies should identify whether the indemnification provision includes language requiring the indemnitor to "defend" in addition to "indemnify" or whether there is a carve out requiring the indemnitee to pay its own defense costs. In some jurisdictions, absent an express agreement for the indemnitor to defend, the duty to defend will not automatically apply.

Second, as the indemnitee, companies should ensure to the extent practicable that the indemnification provision contains clear language stating that indemnification is not limited only to the negligence of the indemnitor, but that it also covers alleged wrongdoing (in whole or in part) of the indemnitee. While this language may have no effect in some jurisdictions where such provisions are deemed void, in other jurisdictions it will give the indemnitee an argument that it is entitled to defense/indemnity even where the allegations include those of the indemnitee's own negligence.

Third, all indemnification provisions should state clearly whether the indemnitor's obligation is separate and apart from any obligation to procure insurance or name the indemnitee as an additional insured. The contract should also expressly state whether the indemnitor must provide a full defense and indemnity regardless and independent of available insurance.

These three drafting principles are also important to understand if the company is entering into a contract as the indemnitor. As the indemnitor, companies should understand the breadth of the protection they are offering their indemnitees, and the potential financial implications of such. For example, if the company seeks to limit its potential exposure, the company may choose to offer or negotiate a more limited indemnification provision (i.e., only offering to indemnify and not defend, or limiting indemnification to claims arising out of the companies' negligence).

II. Maximizing Protection Through Well-Drafted Additional Insured Language

Separately, and in addition to an indemnification provision, agreements should also include insurance requirements which require that the counterparty obtain insurance coverage for the company as an additional insured. With respect to general liability coverage, such provisions typically direct the counterparty to maintain both primary and excess policies with specified minimum limits covering the company as an additional insured.

It is important to remember that the agreement to obtain additional insured coverage is an agreement solely between the company and the counterparty. This agreement is not between the company and the insurance company. Therefore, if the counterparty fails to obtain such insurance, or the company is found to not be an additional insured under the policy (because of the counterparty's failure to obtain the correct coverage), the company's redress is breach of contract against the counterparty – not against the insurance company. In other words, insuring requirements in the agreement between the parties do not alter the provisions of the insurance policy. Conversely, if the company is the party offering to procure the insurance, it is important that the company obtains the requisite insurance coverage to avoid a future breach of contract claim in the event a loss arises.

A. Understand the Key Differences between Blanket and Named Additional Insured Coverage

Additional insured protections vary based upon the terms of the specific insurance policy and the language in the agreement. For example, contracts typically use the language "provide and maintain" to indicate that a party is required to procure additional insured coverage on behalf of its counterparty. In turn, the indemnitor's insurance policy will often include what is referred to as a Blanket Additional Insured Endorsement which automatically provides coverage to any party to which the named insured is contractually required to provide coverage. Under this type of endorsement, the insurance requirements in the indemnification agreement will typically trigger coverage of the company as an additional insured under the insurance policy within the contract.

In the absence of such endorsement, however, the company should be aware of whether the insurance policy requires the company to be specifically named as an additional insured under the policy. Where the agreement includes express language requiring that the company be "name[d] … as an additional insured," it is important that the company ensure that the policy name the specific or relevant entity as an additional insured – typically by endorsement to the policy. See e.g. *North American Roofing Services, Inc. v. Nat'l Trust Ins. Co.*, No. G-08-038, 2010 WL 723781, at *1-2 (S.D. Texas, Galveston Div. Feb. 25, 2010); *Thunder Basin Coal Co., LLC v. Zurich Am. Ins. Co.*, 943 F.Supp.2d 1010 (E. D. Mo. May 2, 2013); *Deville v. Conmaco/Rector, LP*, No. 09-7391, 2011 WL 1464180 (E.D. La. Apr. 15, 2011).

B. Identify Whether Additional Insured Coverage Under the Policy Limits Coverage to Claims for Vicarious Liability

When drafting or reviewing an additional insured insurance provision in a contract, from the standpoint of an indemnitee, it is crucial to ensure that the language does not limit the company's status as an additional insured to claims of vicarious liability or direct claims against the indemnitor. Some contractual additional insured provisions, particularly those that are narrowly worded, may restrict additional insured status in the policy to situations where the named insured is solely at fault, or where liability arises through the actions of the named insured. This can leave the additional insured exposed in scenarios involving shared or concurrent negligence. Certain courts have held that, under such circumstances, the additional insured is not entitled to coverage for direct claims against it. See, e.g., *Security National Insurance Co. v., City of Miami Beach*, 22-22357-CIV, 2022 WL 16541134 (S.D. Fla. Oct. 28, 2022). To avoid this gap in protection, the provision in the contract should be broadly drafted to demonstrate an intent that additional insured coverage be extended for claims of the additional insured's own negligence.

For example, under Florida law, an additional insured is only covered under the policy for claims of vicarious liability – not direct claims – unless the contractual agreement between the parties (i) indicates that the parties agreed to provide coverage for such direct claims, and (ii) the insurance policy contains explicit language indicating broader coverage. See, e.g., *Container Corp. of Am. v. Maryland Cas. Co.*, 707 So. 2d 733, 735 (Fla. 1998). The court in *Comcast Cable Communications Management, LLC v. Liberty Insurance Corporation*, et al., No. 1:24-cv-22284-MD (S.D. Fla. Mar. 17, 2025) recently clarified Florida law on this point. In Comcast, the insurance policy provided that "[i]f the written agreement obligates [the named insured] to procure additional insured coverage for the additional insured's sole negligence, then the coverage for the additional insured shall conform to the agreement …." In turn, the agreement between the parties provided that "[n]o insurance policy shall be limited to liability arising from or caused by the sole negligence of the Contractor or any Subcontractor…." The court found that based upon the language in the policy and the agreement, the insurance company had a duty to defend the additional insured for direct claims against it. The court noted that it is the insurance company's obligation to "specifically exclude claims for direct liability or put differently, require[] claims based on vicarious liability." That said, ensuring that the agreement clearly memorializes the parties' intent for additional insured coverage to extend to claims for direct liability increases the likelihood that coverage will be available when needed.

C. Avoid Contribution Disputes By Including "Primary and Non-Contributory" Language

Lastly, the insurance requirements should provide that the counterparty is required to procure additional insured coverage for the company (both primary and excess) on a "primary and non-contributory" basis. This language will dictate which primary insurance policy (if others are available) is first triggered. That is, when this language is included, courts typically hold that the company is entitled to coverage as an additional insured before any of its own primary policies are triggered.

Some jurisdictions (such as California), however, have held that the "primary and non-contributory" language only applies when determining priority between primary policies, but does not apply where the question is between additional insured coverage under an excess policy and the company's own primary policy. See, e.g., *Continental Cas. Co. v. St. Paul Surplus Lines Ins. Co.*, 803 F. Supp. 2d 1113 (E.D. Cal. 2011); *JPI Westcoast Constr., L.P. v. RJS & Assocs., Inc.*, 156 Cal. App. 4th 1448 (2007). In that scenario, certain California courts have held that additional insured must first exhaust its own primary insurance before it is entitled to coverage under the excess policy as an additional insured. In such circumstances, California courts have reasoned that in order to avoid this situation, parties seeking additional insured coverage should negotiate for higher primary limits.

In contrast, other courts (such as the Eighth Circuit) have held that the terms of the parties' agreement control and therefore, the excess policy will be triggered prior to the indemnitee's own primary policy where such protections were negotiated in the agreement. See, e.g., *Wal-Mart Stores, Inc. v. RLI Ins. Co.*, 292 F.3d 583, 587 (8th Cir. 2002) (holding that "the indemnity agreement controls the outcome, not the 'other insurance' clauses" and therefore, because the indemnitor made a valid promise to indemnify the indemnitee, the indemnitor's excess insurance company was obligated to provide liability insurance that covered both the settlement and the indemnitor's indemnification obligation to the indemnitee).

Additionally, sometimes insurance policies will include an endorsement acknowledging that the insurance coverage is to be considered primary where required by written agreement. The presence of this endorsement (if accompanied by language in the contract) provides a strong basis for contending that the policy is primary to all other insurance if accompanied by similar clear intent in the contractual agreement between the parties.

III. Harmonizing an Indemnification Provision's Right to Independent Counsel with the Insurance Company's Obligation to Defend an Additional Insured

Contracting parties should also be mindful of situations where insurance and indemnification provisions, when read together, may create unintended financial exposure. For example, some indemnification provisions specify that, in the event a claim arises, the indemnitor must allow the indemnitee to the right to select independent counsel, and direct and control its own defense. Conversely, under an insurance policy, when the indemnitor's insurance company steps in to provide a defense, the insurance company typically retains the right to appoint defense counsel. This is standard under most commercial general liability policies (unless there is a right to independent counsel, which is an entirely separate issue).

A conflict may arise, therefore, when the contract allows the indemnitee to choose its own counsel, but the insurance policy does not. In such cases, the insurance company may refuse to pay for counsel that is not appointed by the insurance company. As a result, the parties need to understand that giving the indemnitee the right to select independent counsel may create financial exposure for both parties. For the indemnitor, this may mean that the company is obligated to pay for the indemnitee's defense out of pocket. For the indemnitee, if the indemnitor cannot cover these legal fees (for instance, due to insolvency), the indemnitee may be left without reimbursement for its defense costs.

In light of these potential risks, companies should take a few steps to better understand the implications of the language in their contracts and limit their potential exposure. As a threshold matter, companies (whether the indemnitor or the indemnitee) should understand that most insurance companies do not allow policyholders to select their own defense counsel and therefore, that companies may be obligated to use insurance company approved panel counsel – irrespective of the language in the agreement. As the indemnitee, the company should engage in due diligence to ensure that the companies they are contracting with have the financial ability to pay for defense counsel. Indemnitees should also request that the indemnitor discuss the right to select counsel with their insurance company. As the indemnitor, if the company seeks to avoid the potential risk of paying out of pocket for the defense, the company should negotiate with the indemnitee in order to avoid using such language in their agreement.