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## **Step Right Up! The Circus of Indemnity Claims**

### **I. Introduction to Relevant Concepts and Terms**

**Risk-transfer:** In such contexts as construction, personal injury or premises liability claims, there are a variety of tools (and related strategies) that can be employed to transfer risk to a third-party when a claim is made against you, your insured or your client. The concept of risk-transfer generally refers to the idea that a third-party should be responsible for the defense and resolution of a claim against you (or your insured or your client). The following concepts and terms are important to effective risk-transfer.

**Indemnity:** Indemnity generally is defined as the duty to make good any loss, damage or liability that another has incurred. It also includes the right of one party to reimbursement for its losses, damages or liabilities from another who has such a duty. Indemnity can arise in the context of an insurance policy, a written contract and, in some jurisdictions, through common law principles.

**Tender:** A tender, very simply stated, is a formal demand to a third-party indemnitor that it satisfy its duty to defend and/or indemnify. A tender may be used in the context of making a claim for insurance under a policy, whether as a primary or additional insured – just as it may be used in the context of seeking to enforce a contractual or common law duty to defend and/or indemnify.

### **II. Risk Transfer Tools**

#### **Contracts**

A contract that clearly defines the rights and responsibilities of the parties can help significantly with risk transfer. Indemnity provisions, especially those that define the duty to defend from/against claims by third-parties, can be very powerful risk-transfer tools. However, any party seeking to transfer risk to another party would be well-served to investigate that other party, to confirm that it is a reputable entity, with assets sufficient to meet its indemnity obligations.

## Example Indemnity Clause

Tenant shall indemnify and hold harmless Landlord from and against any and all claims arising from Tenant's use or occupancy of the Premises, including the common areas and the parking lot; or from the conduct of Tenant's business or from any activity, work or things done, permitted or suffered by Tenant in or about the Premises and shall further indemnify and hold harmless Landlord from and against any and all claims arising from any breach or default in the performance of any obligation on Tenant's part to be performed under the terms of this Lease, or arising from any acts or omissions of the Tenant, or any of Tenant's agents, contractors, or employees and from and against all costs, attorney's fees, expenses and liabilities incurred in the defense of any such claim or any action or proceeding brought thereon; and in case any action or proceeding be brought against Landlord by reason of any such claim, Tenant upon notice from Landlord shall defend the same at Tenant's expense with counsel selected by Landlord. Landlord will indemnify and hold harmless tenant for its gross negligence as determined in a non-appealable final decision by a court having jurisdiction. The party entitled to indemnification hereunder shall (i) promptly notify the other party in writing of any claim for which indemnity is sought (ii) afford the other party the opportunity to assume control over the defense and settlement of such Claim at its own cost and expense and (iii) provide reasonable assistance in connection therewith at the other party's expense.

A warranty also can make clear the responsibilities of the parties to a contract, whether related to products or services – and those warranties can be relevant to defining the scope of an indemnity obligation (and, in some jurisdictions, certain warranties can *create* an indemnity obligation). Limitation of liability provisions (or “carve-outs”) further give the parties to a contract an opportunity to define their responsibilities to one another for such things as claims by third-parties.

Likewise, confirming that the party to whom one would seek to transfer risk has insurance – and that you (or your insured or your client) is named as an additional insured under the policy is very important. The issues surrounding additional insured (aka “AI”) certificates and endorsements can be complicated; therefore, it is important to understand the differences between the different forms of endorsements available – and to secure the correct, intended forms.

Finally, a definition of the circumstances that might require one party to defend, indemnify and/or insure another party can help the parties respond to a third-party claim and to avoid

unnecessary fees/costs litigating the issue of risk transfer, on top of defending against the third-party claim in the first instance.

### **Early and Detailed Tenders**

An early, detailed and substantiated tender letter is critical to the transfer of risk. That is, a tender letter should be issued as early as reasonably possible and should provide the indemnitor and/or insurer with sufficient background information to understand (a) the underlying claim and (b) the basis for the tender and claim for indemnity, defense and/or insurance.

### **Insurance**

Securing and understanding insurance policies allows parties to plan for the allocation of risk and facilitates clear tenders, whether on behalf of a primary or additional insured. Understanding the answers to the following questions, for example, will help to avoid surprises and to create a roadmap for how to respond to something like a third-party claim that you (or your insured or your client) thinks should be covered by an insurance policy.

Understanding rights under insurance policies obviously starts with securing the relevant documents, including not only the policies themselves, but also any/all certificates and endorsements. From there, the following, important questions likely can be answered:

- What does the policy cover?
- What doesn't the policy cover?
- Do I (or does my client) qualify as an insured?
- What are the insured's obligations upon receipt of notice of a potentially covered claim?
- What limitations are there to an additional insured?