

## Articles

### "The Chicken or the Egg - Insurance and Indemnification Clauses in the Same Contract"

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It seems that more and more contracts contain both insurance and indemnity provisions. A business may have contracts requiring the other party to indemnify it and to include it as an additional insured under the other party's insurance. Or vice-versa – a business may sign contracts that require it to indemnify and name the other party as an additional insured.

Either way, while these provisions may be written and/or negotiated separately, the interplay between the provisions must be thought through. Otherwise, consequences beyond what the parties intend may result! Here are a few tips that may help when confronted with contracts having both insurance and indemnity provisions:

1. Chicken or the Egg: Does the contract state which provision is supposed to act first – the indemnification provision or the insurance provision? That is, whether or not the indemnification provision is intended to be excess to the coverage required by the insurance provision?

The United States Fifth Circuit Court of Appeals has repeatedly held that in contracts including both indemnification and insurance clauses, the indemnity requirement acts subsequent to the insurance coverage – that is, the insurance coverage offers the first line of protection and the contractual indemnification only comes into play upon exhaustion or failure of the insurance. Stated differently, the indemnity provision in a contract may apply only to amounts exceeding the coverage provided pursuant to the insurance provision. If the parties to the contract desire the indemnification to apply in the first instance (that is, even in the face of an insurance requirement under the contract), the parties should expressly state that desire.

2. Hold the pickles: Does the indemnity provision in the contract expressly include the word “negligence” when protecting against the consequences of the contracting party’s own negligence?

The “express negligence doctrine” requires a party protecting itself from the consequences of its own negligence to express that intent in specific terms (using the word “negligence”) within the four corners of the contract. Absent the use of the word “negligence,” a contract’s indemnity provision typically will not require one contracting party to indemnify the other for the other’s own negligence.

3. Does that have MSG: Is the indemnification provision conspicuous – that is, set out in larger type; bold, italics, and/or underlined typeset; in a markedly different font; or in a different color?

Using different sized type, different text effects, different fonts, or different colors than other parts of the contract draws attention to the indemnity clause – the eye is naturally drawn to it. The “conspicuousness doctrine” requires an indemnity provision to be conspicuous; or, absent proof of actual awareness of the provision, it may not be enforceable. If the terms of the indemnification provision are not actually negotiated with the other contracting party, text features that make the provision stand out will help enforce it when/if trouble arises.

4. Does it come with a salad: Does the indemnification provision merely provide for indemnification, or does it also require the defense of the party being protected by the provision?

Check carefully -- the indemnification provision may also include a duty of defense. Look to see if the language states that one of the contracting parties agrees to defend the other against loss, damage, or expense by reason of suits, claims, or causes of action arising out of the performance of the contract. A provision that includes the word “defend” has been held in court to mean just that – to require the ‘defending’ party to pay the other’s defense costs. The indemnity provision may provide more than just indemnity – with the right language, it may cover defense costs too.

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5. What about dessert: Does the insurance clause obligate the party providing insurance to obtain coverage of the contractual indemnification clause?

Absent insurance coverage, an agreement to indemnify is only as solid as the financial condition of the protecting party. But, requiring an indemnity obligation to be covered by insurance (or securing insurance coverage for an agreement to indemnify another) provides an additional level of security. Typical commercial general liability policies contain a contractual liability exclusion that often operates to eliminate the insurer's liability for these provisions. However, insurance policy endorsements are available to change the language and eliminate the exclusion. If the risk management department, insurance procurer, or insurance broker is made aware of these provisions in a company's contracts, an endorsement meeting this need can usually be added to the company's insurance coverage.

6. How about a combo meal: If contractually required to name others as additional insureds to a commercial general liability insurance, does the insured business have a broad form/blanket endorsement under its commercial general liability insurance that fulfills the agreement and conforms the coverage to the contract?

It may be time for an insurance check-up! Endorsements are available that provide blanket additional named insured coverage under a commercial liability policy for whomever the business is contractually obligated to provide it for. These same endorsements may include provisions that expressly conform the coverage to the business contract (thereby also potentially covering the indemnification provision if this has not been separately caught and covered by an endorsement)!

The interplay between indemnity provisions and insurance requirements under modern contracts requires careful thought. With good planning, unwanted consequences from their interaction can be avoided!