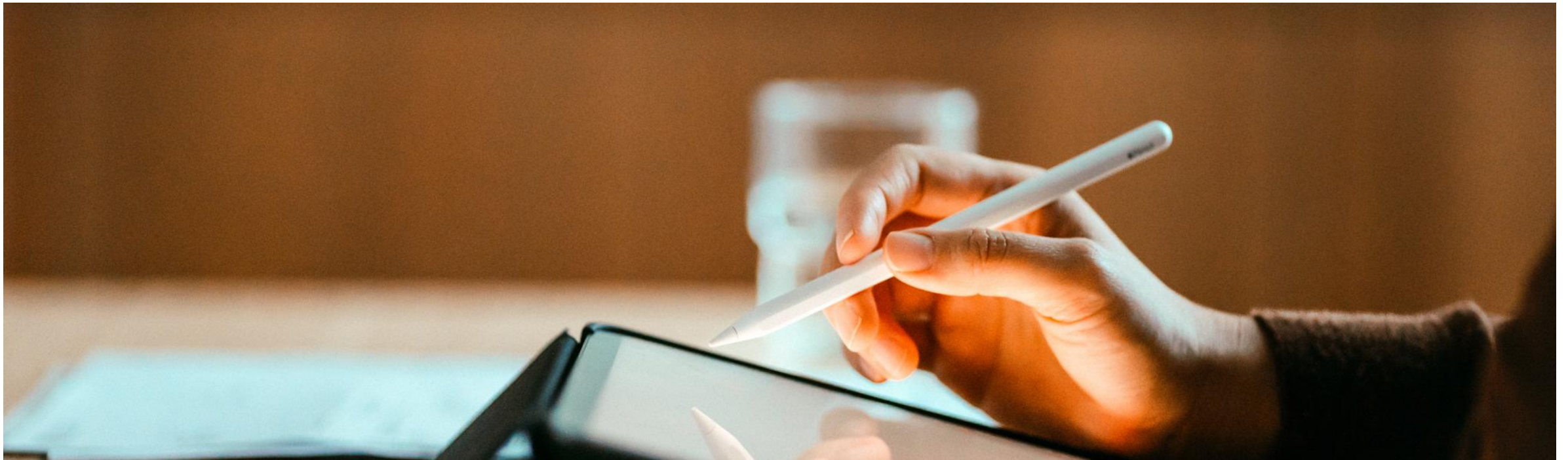


Fundamentals and Effective Strategies for Contract Review

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Agenda

Why is Contract Review Important?

Common Insurance Requirements

Common Contract Terms

Wording to Watch For

Do's and Don'ts

Questions?

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Why is Contract Review Important?

Provides opportunity to negotiate for

- Mitigation of contractual risk that is retained
- Coordination between indemnification and insurance sections
- Appropriate allocation of risk between contracting parties prior to loss

Affects bottom line

- Uninsured, retained & increased losses = profitability
 - Increased loss ratios
 - Higher premiums
 - Increased collateral requirements
 - Decreased profitability

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Two Sides of the Same Contract

Transfer of risk to the other party via risk transfer tools, typically Additional Insured “AI” status and Indemnity provisions. (“Offensive”)

Assumption of risk from the other party via endorsement of AI status on your policy and Indemnity provisions. (“Defensive”)

Business context will dictate which side of the coin you're on -- be prepared to effectively articulate either position. Classic Risk Management theory: party best able to control the risk should retain the risk. Be prepared to argue for or against this principal depending on your positioning

Consider long term consequences of taking an extreme position.

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Common Insurance Requirements

Commonly Requested Casualty Coverage

- 1 **General Liability** – Coverage for for third party bodily injury, property damage, personal and advertising injury arising out of ongoing operations/premises and products/completed operations and tort liability of another assumed in a "insured contract" (i.e. contractual liability)
- 2 **Commercial Auto** – coverage for third party bodily injury and property damage arising out of the use of motor vehicles (owned, non-owned, and hired autos)
- 3 **Workers Compensation** – Coverage for medical costs and wage replacement arising out of injuries or disease to employees, plus Employers Liability – some instances the employee can sue the employer.
- 4 **Umbrella/Excess** – Additional limits above underlying General Liability, Automobile Liability, Employer's Liability

Other Commonly Requested Coverage

Property

Technology E&O /
Cyber Liability

Pollution Liability

Professional Liability

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Deductible vs. Self-insured Retention (SIR):

Deductible

- Deductible applies to each claim. Insured is responsible for paying amounts under deductible.
- Carrier pays amount under deductible for each claim first, and then bills insured for amounts paid under deductible.
- Claim covered by carrier even if insured doesn't pay carrier back for amounts under deductible. Most carriers require collateral in case insured does not pay carrier back.

Self-insured Retention (SIR)

- Insured pays SIR first and carrier only starts to pay claim once SIR is met.
- Coverage applies if insured does not pay SIR, such as may be the case if insured goes bankrupt.
- Generally speaking, larger retentions (depending upon the size of the vendor) can be problematic.

Ultimately ensuring that a vendor's assets can back up their deductible/retention is the most important thing. Smaller vendors should have smaller retentions/deductibles and carry the insurance that you require, because the vendor's insurance is typically one of the only sources of recovery in the event of a claim.

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Occurrence vs. Claims-Made Policy Forms

Occurrence

- Policy covers claims that “occur” (take place) during the policy period, regardless of when claim is filed. Policy will respond to claims that are filed, even after the policy has been cancelled, so long as the incident occurred during the period in which coverage was in force.
- Limits “restore” each year – claims paid for incidents arising in one policy year do not deplete limits available to cover claims from other years. Each year policy is in force represents a separate set of limits.

Claims-Made

Coverage is triggered when a claim is made against the insured during the policy period, regardless of when the wrongful act that gives rise to the claim took place. EXCEPTION – when a retroactive date is applicable to a claims-made policy, then the wrongful act that gives rise to the claim must take place on or after the retro date.

- Examples of policies: Professional Liability/Errors & Omissions, Pollution Liability, Directors and Officers, Employment Practices Liability

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Common Insurance Requirements

Commonly requested insurance across multiple coverage lines

- Additional Insured
- Primary and Non-contributory
- Waiver of Subrogation
- Notice of Cancellation, Non-renewal and Material Change
- Separation of Insureds / Severability of Interest & Cross Liability
- Limitations on Deductibles & Self-insured Retentions (SIR's)
 - Maximum – ex. vendor's SIR's no higher than \$X.XX amount
 - No retention without prior approval of other party
 - Requirement to cover retention for other party
- Minimum required AM Best Rating for carriers



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Common Insurance Requirements

General Liability

- Additional Insureds:
 - On-going operations (ISO CG 20 10)
 - Completed Operations (ISO CG 20 37)
 - Designated Person or Organization (ISO CG 20 26)
 - Manager or Lessor of Premises (ISO CG 20 11)
 - Vendors (ISO CG 20 15)
- Designated Project/Location Aggregate Limits (ISO CG 25 47/ISO CG 25 48)
- Contractual Liability
 - For “insured contracts”, including the tort liability of another assumed in a business contract
- Liquor Liability
- Waiver of Subrogation (ISO CG 24 04)
- Primary and Non-contributory (ISO CG 20 01)



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Common Insurance Requirements

Commercial Auto

- Auto Liability Symbol 1 – Any Auto
- Additional Insured
 - Designated Insured
 - Lessors of Leased Vehicles
- Primary and non-contributory
- Contractual Liability
 - For “insured contracts”, including the tort liability of another assumed in a business contract
- Pollution Liability - Broadened Coverage for Covered Autos (ISO CA 9948)
- Waiver of Subrogation
- MCS-90



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Common Insurance Requirements

Workers' Compensation

- Alternate Employer
- US Longshoremen & Harbor Workers Compensation Act (USL&H)
- Federal Employers Liability Act – for railroad workers
- Maritime / Jones Act – for masters/members of crew of vessels on navigable waters
- Outer Continental Shelf Lands Act
- Foreign Voluntary Workers' Compensation & Employer's Liability – for employees temporarily working outside US
- Stop Gap Employer's Liability – ND, WA, WY, OH
- Waiver of Subrogation
- Officers included
- Defense Based Act – separate policy



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Common Insurance Requirements

Umbrella / Excess Liability

- Additional Insured
- Excess over scheduled primary policies
(replace “follow form”)

Pollution

- Sudden and Accidental
- Non-Owned Site Disposal
- Clean-up Costs
- Additional Insured

Property

- Loss Payee – covers the parties’ insurable interests in buildings, business personal property &/or equipment
- Mortgagee/Lender Loss Payee – provides special coverage for mortgage holders of property



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Common Insurance Requirements

Professional Liability / Errors & Omissions (E&O)

- Technology E&O
 - Usually includes some Cyber Liability coverage
 - For products and services that may have access to the internet
- Architects and Engineers
- Medical Malpractice for doctors
- Attorney E&O
- Insurance Broker E&O

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Cyber Liability

- Network Security
- Privacy Liability

Fidelity / Crime

- Employee Dishonesty



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Common Insurance Requirements

Three Most Common Insurance Requirements Within a Contract

1 Additional Insured

A person or organization not automatically included as an insured under your insurance policy who is included or added as an insured. Greenvolt may want to provide additional insured status to others to protect the other party because of a good business relationship with that party and/or to comply with a written agreement requiring you to do so (ex. landlords or owners of property leased by you).

Often endorsement or policy wording “includes” the parties where you have agreed to provide additional insured coverage in a written contract, also known as “blanket” wording or can be scheduled or actually named on the endorsement.

Three factors determine coverage

1

What does the policy say?

2

What does the contract say?

3

What does the law say?



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Common Insurance Requirements

Three Most Common Insurance Requirements Within a Contract

Additional Insured Wording to Avoid

General Liability, Auto Liability, **Workers' Compensation, Professional Liability**, and **all** Umbrella/Excess Liability policies maintained by [you] pursuant to the Agreement shall include the Owner Group (including Owner **and its successors and assigns, Landlord, Architect, and each of their respective subsidiaries**, directors, officers, **agents, representatives, consultants, subcontractors**, and employees) as Additional Insureds on **CG 2010 (11/85) or its equivalent for any and all liability, including Owner Group's sole negligence**. The amount of insurance available to the additional insureds shall be for the full amount of the loss **up to full policy limits and shall not be limited to any minimum requirements** stated in the Contract Documents.

Better Wording

"Owner, its officers, directors and employees shall be included as Additional Insureds under the required Commercial General Liability, Automobile Liability and Umbrella/Excess Liability insurance with respect to [your] operations under this Agreement."

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Common Insurance Requirements

Three Most Common Insurance Requirements Within a Contract

Implications – Including others as additional insureds

Pros

- Allows transfer of the obligation to defend and indemnify the indemnitee to the insurer
- Supports good business relations between you and your customers, general contractors, suppliers, and other business partners

Cons

- Erosion of your policy limits
- Limits shared by all insureds (You and Additional Insureds)
- Your limits used to pay claims for which Additional Insured may be partly at fault
- You is responsible for paying deductibles and self-insured retentions on behalf of Additional Insureds
- Potential for higher insurance premiums down the road based on loss experience
- Additional insureds may be covered for their negligence

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Common Insurance Requirements

Three Most Common Insurance Requirements Within a Contract

Implications – Receiving additional insured coverage

Pros

- Effectively using the other party's insurance policy
- No erosion of your policy limits.
- Coverage without premium or impacting loss history
- Defense coverage without having to wait for a resolution of the indemnity obligation
- Some states now prohibit requiring additional insured coverage broader than legal limits on indemnification

Cons

- No control over the defense.
- Significant where both the Named Insured and Additional Insured are sued.
- If a potential conflict entitled to independent counsel
- Most carriers will assign different adjustor for the AI claim
- Limits must be shared among all insureds.
- Often no business relationship with carrier.

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Common Insurance Requirements

Three Most Common Insurance Requirements Within a Contract

Other Additional Insured Considerations

- Not all policies of insurance allow for additional insureds.
- Not all policies include blanket additional insured coverage.
- Not all additional insured endorsements are created equal.
- Many insurance carriers will not subrogate against additional insureds.
- Examples of policies where additional insured coverage may not be included:
 - Professional Liability
 - Cyber Liability
- Examples of policies on which additional insureds cannot be added include:
 - Workers' Compensation / Employers Liability
 - Crime

Therefore, for Workers' Compensation and Employer's Liability the waiver of subrogation provision takes on added importance.

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Common Insurance Requirements

Three Most Common Insurance Requirements Within a Contract

2 Primary & Non-contributory

This term is commonly used in contractual insurance requirements to stipulate the order in which multiple policies triggered by the same loss are to respond. For example, the you may be required to provide liability insurance that is primary and noncontributory. This means that your policy must pay before other applicable policies (primary) and without seeking contribution from other policies that also claim to be primary (noncontributory).

Coverage is dependent upon your agreement in a written contract to provide primary and additional insured coverage to an additional insured in a written contract.

Sample Wording

“Additional Insured coverage shall apply on a primary and non-contributory basis with respect to any other insurance or self-insurance programs **maintained** by [you].”

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Common Insurance Requirements

Three Most Common Insurance Requirements Within a Contract

3 Waiver of Subrogation

Subrogation is the right of an insurer to seek recovery from a 3rd party for amounts that it pays on behalf of its insured. Your policies likely contain a blanket waiver of subrogation endorsement, whereby the insurer automatically waives its subrogation rights against another party if you have waived your rights in a written contract in effect prior to loss and if allowed by law.

Often endorsement or policy wording “includes” the parties where you have agreed to provide waiver of subrogation coverage in a written contract, also known as “blanket” wording or can be scheduled or actually named on the endorsement.

Sample Wording

To the extent allowed by law, [You], on behalf of itself and its insurers, hereby waives any right of subrogation against <other contracting party> under (<name lines of coverage>) required herein with respect to losses covered under [your] insurance policies.

Insurance companies typically seek reimbursement from the negligent party if insurance has paid out on behalf of an insured. You may agree to waive subrogation rights because you want to maintain good business relations with another party or waiver is required in the insurance requirements of a written contract.

Some contracts may call for a mutual waiver of subrogation where each party agrees to waive subrogation rights in favor of the other party. This is especially common with regards to property coverage in lease agreements between a landlord and tenant.

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Common Insurance Requirements

Sample General Liability - Additional Insured ISO CG 20 10 vs. Contractual Liability

	Additional Insured (AI) Coverage (ISO CG 2010)	Contractual Liability (CL) Coverage for "Insured Contracts"
Ease of access to coverage?	Very easy, automatic & fast - Additional insured has immediate and direct access to coverage as an insured under Named Insured's policy. They have Additional Insured has right to defense the same as any other insured would have under the policy.	Not easy, automatic, or fast - If you doesn't pay as agreed in contract, then indemnified party can sue you. Court would have to rule that you are contractually liable to pay for indemnified party's defense/loss before indemnified party would get paid back.
Insured status on Named Insured's policy?	Yes. Additional insureds are insureds under your policy and as such they have the right to direct access to insurance carrier.	No. Indemnified party is not an insured and does not have right to direct access to your insurance policy.
Does coverage automatically include waiver of subrogation?	Most (but not all) carriers automatically agree to waive their subrogation rights against additional insureds.	No. Your insurance carrier is not required to waive subrogation rights against indemnified party under contractual liability coverage.
How do policy limits apply?	Coverage is limited to the lesser of policy limits or what contract requires - whichever is less , and limited to what is allowed by law.	Court determines what you are liable for based on contract; however, your policy won't pay more than policy limits.
How does defense apply?	Your carrier covers additional insured's defense costs from the start of a claim, if there is a chance that the claim may be covered. If carrier determines the claim is not covered, then defense coverage ends.	Indemnified party pays for their own defense first. If court finds you to be contractually liable for paying indemnified party's defense costs, then your insurance carrier indemnifies for defense.
Any coverage for sole negligence of other party?	No. Additional Insured endorsement(s) covers liability "caused, in whole or in part, by" you.	This is possible, if there is no specific sole negligence exclusion on the policy to prevent covering the indemnified party's sole negligence.
Choice of defense	Your insurance carrier chooses defense attorneys. Additional insured does not get to choose their own lawyers. Your insurance only pays for reasonable & necessary attorney costs.	Indemnified party can choose their own attorneys and then require you to indemnify them.
Defense - inside or outside policy limits?	Defense is outside the limits. You pay defense costs on a shared basis with carrier in addition to your deductible and/or self-insured retention (SIR) that you are responsible to pay on behalf of additional insured.	Defense is paid inside policy limits and erodes policy limits . Deductible and/or self-insured retention (SIR) per occurrence applies. You pay retention on behalf of indemnified party.

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Common Insurance Requirements

Relationship Between Indemnity Agreement & Additional Insured

Review additional insured requirement in relation to indemnity agreement.

- Additional insured coverage should support indemnification agreement.
- Insurance does not cover everything that may be agreed to in a contract.

Two of the Most Commonly Requested Indemnification Levels:

- **Intermediate Form** - indemnifying party agrees to hold harmless & indemnify indemnitee for claims arising out of agreement except for claims caused by sole negligence of indemnitee
- **Broad Form** - Indemnifying party assumes responsibility for claims related to the agreement irrespective of fault & including those arising out of indemnitee's sole negligence

Try to Match additional insured coverage level to indemnification level.

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Common Insurance Requirements

Uninsurable Items

General Liability, Auto Liability and Umbrella/Excess Liability insurance will not respond to:

- Liquidated damages - a pre-determined amount to be paid by a contracting party if such party is in breach of contract terms (i.e. fails to complete on time)
- Breach of Contract
- Willful/Wanton Misconduct of Other Party – with regards to intentional wrong-doing &/or unlawful acts of individuals
- Warranties & Guarantees



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Common Contract Terms

Hold Harmless & Indemnity Agreements

- ✓ Separate and distinct promise by a non-insurance company to indemnify (and in some cases defend) another person or organization

- ✓ **Not insurance** and should not be confused with insurance

- ✓ Often include requirements beyond the scope of coverage afforded by insurance policies

Examples:

- Breach of Contract – not covered by liability insurance
- Sole Negligence, Gross Negligence, Willful/Wanton Misconduct of other party
- Requirement to cover “any and all” injuries, claims, losses, expenses, costs, penalties, etc. “arising out of” or in any way related to contract



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Common Contract Terms

Sample Wording Showing Indemnification Levels

Intermediate – Does not include sole negligence of Owner

Contractor shall defend at its sole cost **any and all** claims and suits against Contractor and/or Owner or Owner's parties for injuries, death and property damage arising out of or resulting from the work performed by Contractor or by any subcontractor hired by the Contractor. Also, as to any such claims and suits, Contractor shall indemnify and hold harmless Owner and Owner Parties from and against any damage, liability, tort expense, including legal fees separately incurred by Owner, **unless the damage and injuries were caused directly and solely by Owner's negligent acts.**

Broad form – Includes sole negligence

Contractor shall defend at its sole cost **any and all** claims and suits against Contractor and/or Owner and Owner parties for injuries, death and property damage arising out of or resulting from the work performed by Contractor or by any subcontractor hired by the Contractor. Also, as to any such claims and suits, Contractor shall indemnify and hold harmless Owner and Owner Parties from and against any damage, liability, tort expense, including legal fees separately incurred by Owner.

Notice how a slight deletion “**unless the damage and injuries were caused directly and solely by Owner's negligent acts**” can change the intent of the contract?

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Common Contract Terms

Limitation of Liability (LOL)

Definition – a risk transfer device used by contracting parties to manage or limit the risk they may become exposed to when their providing products or services

Impact of LOL on contract

- May impose a cap on damages
 - ex. cap damages at \$500,000 or 2X contract value
- May exclude certain categories of damages recoverable from the liable party
 - ex. neither party to contract responsible for loss of goodwill, lost revenue, indirect, incidental, special, punitive or consequential damages
- Or may do both

Strategies for use of LOL and impact on insurance:

Incoming contracts

- seek to add LOL to cap damages to a specific amount with no carve for insurance and indemnity requirements
 - Benefit- allows you to have a cap on damages you are responsible for

Outgoing contracts

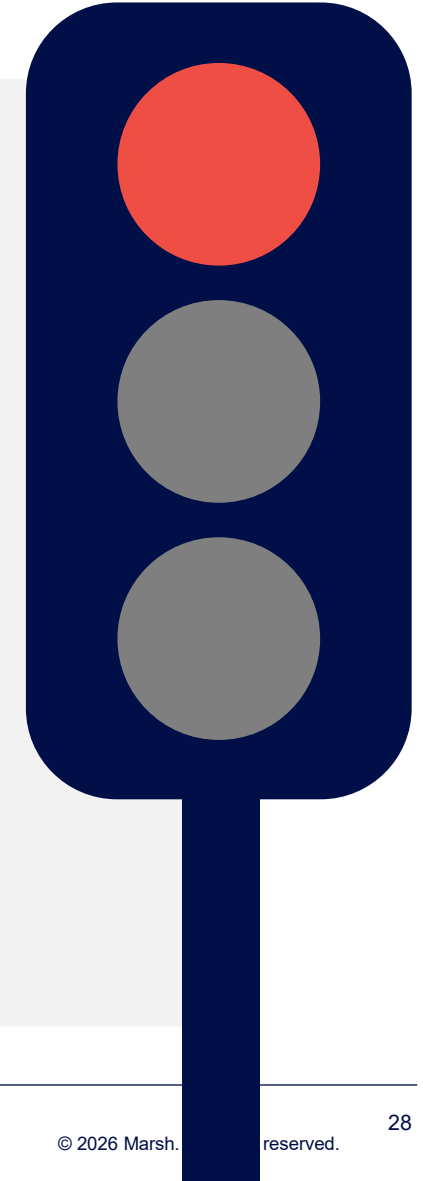
- seek to avoid use of LOL, or if LOL is included, add carve out for insurance and indemnity requirements
 - Benefit - avoid capping damages your vendors are responsible for under indemnification and insurance limits



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Wording to Watch For – Requirements Imposed on You

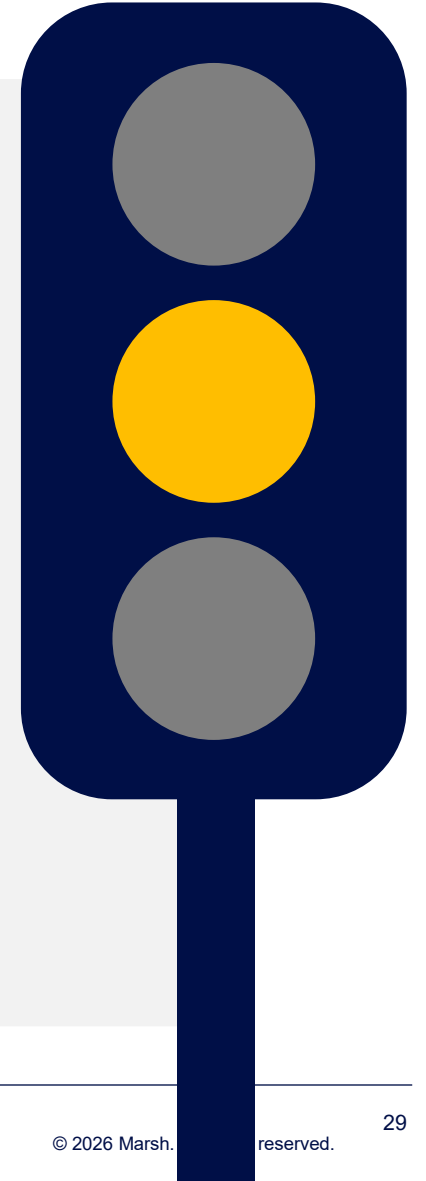
- **Sole Negligence** of Additional Insureds = CG 2010 11/85 or CG2010 10/01 + CG2037 10/01 or equivalent – **strike edition dates**
- **“Arising out of or related to”** language – change to **“caused, in whole or in part, by”**
- **“Follow Form”** Umbrella / Excess Liability – change to **“excess basis over underlying”**
- **“No exclusions or restricted endorsements”** - **strike**
- **“Broad Form”** Contractual Liability or “Contractual Liability **covers everything included under indemnification**” or similar language – **strike except for “Contractual Liability”**
- “Additional **Named** Insured” – strike “Named”
- **Third party request for copies of your insurance policies** – **strike**
Tip – ok to share copies of required endorsements
- Your insurance to cover **“any and all”** claims, etc. - **strike**
- **“Minimum”** or **“Not Less Than”** & **“Full”** policy limits for Umbrella/Excess Liability – **strike**



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Wording to Watch For – Requirements Imposed on You

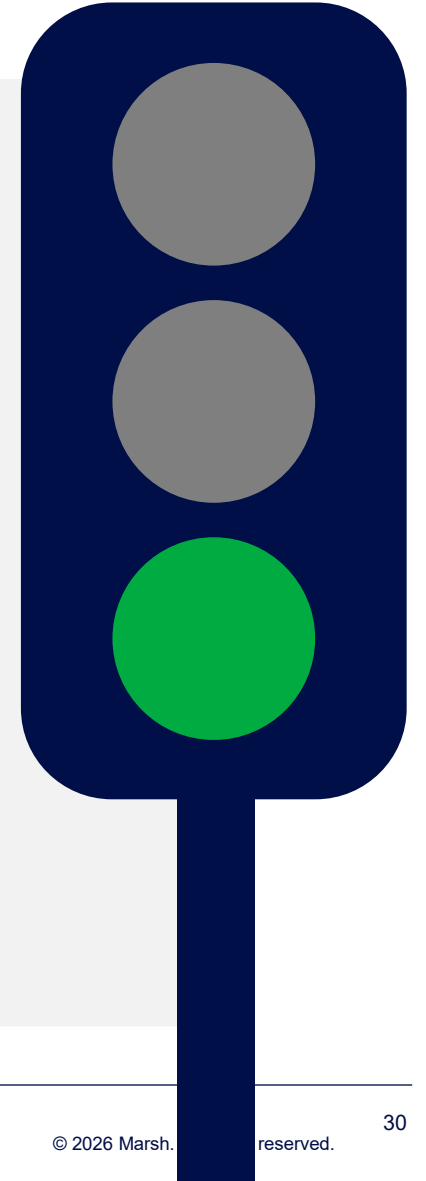
- Request for evidence of insurance on “**third party forms**” – **change to “Acord form certificate of insurance”**
- **Any other coverage other party may later require** – open ended request - **strike**
- **Pre-approval by other contracting party of your deductibles &/or self-insured retentions** - **strike**
- **Insurance carrier notice** of non-renewal and/or policy cancellation – if your policy is not endorsed for insurer to provide notice to certificate holders, then **change to you to provide notice**
- Notice of “**Material Change**”
- “**Minimum**” & “**Not Less Than**” & “**Full**” policy limits for General Liability, Auto Liability and Umbrella/Excess Liability – **strike if possible**
 - Tip - ok to accept for Employer’s Liability



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Wording to Watch For – Requirements Imposed on You

- “**Comprehensive**” General Liability – **change to “Commercial” or strike**
- “**Comprehensive**” Automobile Liability – **change to “Commercial” or strike**
- “**Public**” Liability – **change to “General”**
- “**Broad Form**” Property damage
- No “**XCU**” Exclusions (Explosion, Collapse, Underground)



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Do's & Don'ts of Contract Review

-  **DO** Manage expectations.
-  **DO** Review the company's insurance policies to see if something is or is not covered
-  **DO** Identify any insurance or insurance related requirements of the contract this is not included in your current insurance program.
-  **DO** If you have questions reach out to your broker.
-  **DO** Document your conversations with all parties involved.

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Do's & Don'ts of Contract Review (cont.)

 **DO NOT** Rush through a contract review.

 **DO NOT** State, guarantee, or promise that insurance will meet the terms of the contract. Policy terms, conditions, and exclusions apply. Insurance never covers everything that may be agreed to under a contract.

 **DO NOT** Assume you know if something is or is not covered. Refer back to the policy and/or get the carrier's statement in writing.

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Questions?

Questions?



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from an insurance perspective.

**Thank you for
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