



CONTRACTUAL RISK TRANSFER STRATEGIES

Presented by

Jack P. Gibson, CPCU, ARM
President
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Contractual risk transfer is a fundamental part of contracting. However, transferring risks effectively requires an understanding of how insurance coverages respond to various contractual risk transfer techniques, as well as how reliable the transfers are when scrutinized by a court. Are liabilities assumed under a hold harmless agreement covered by my CGL policy? Does providing additional insured status expose my insurance program to unintended liabilities? Are workers compensation insurance waivers of subrogation counterproductive? What mistakes are commonly made in drafting enforceable and fair insurance requirements? This session provides background information on the most common elements of contractual risk transfer and the insurance tools used to effect these transfers without giving away the farm.

Tuesday, November 14, 1:30–3:00 and 3:30–5:00 p.m.

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President
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Mr. Gibson is presenter for Workshop E, “Contractual Risk Transfer Strategies,” on Tuesday. He has been an integral part of International Risk Management Institute’s management team since 1982, and became president of IRMI in 1985. Prior to joining IRMI, Mr. Gibson was a consultant with a leading national risk management firm. His consulting practice focused on financial institutions, public entities, and contractors.

Mr. Gibson majored in risk management at the University of Georgia where he received a bachelor of business administration degree, *cum laude*, in 1977 and a master of business administration in 1979. In 1996, he was honored as Georgia’s Outstanding Insurance Alumnus of the year. He is a Chartered Property and Casualty Underwriter (CPCU), a Chartered Life Underwriter (CLU), and holds the Associate in Risk Management (ARM) designation.

Mr. Gibson is the coauthor of 11 reference works on insurance and risk management, all of which have been published by IRMI. In addition to his management duties, he continues as editor of *The Risk Report*, and is currently editor-in-chief of IRMI.com. A sought-after and highly rated seminar speaker, Mr. Gibson has been a presenter at the annual conventions or meetings of virtually every major industry trade association serving the risk management and insurance communities as well as many construction industry and lawyer seminars and meetings. He serves as cochair and presenter at the IRMI Construction Risk Conference. In 1999, Bill McIntyre and the IRMI staff surprised Jack by bestowing him with the Words of Wisdom (WOW) award.

Notes

This file is set up for duplexed printing. Therefore, there are pages that are intentionally left blank. If you print this file, we suggest that you set your printer to duplex.

CONTRACTUAL RISK TRANSFER STRATEGIES

*Jack P. Gibson, CPCU, CLU, ARM
International Risk Management Institute, Inc.*

I. Contractual Risk Transfer Defined

- A. Allocation of Risk From One Party To Another In A Business Contract.
 - 1. Indemnity Clauses
 - 2. Insurance Requirements
- B. Reasons For Insurance Requirements.
 - 1. “Fund” Indemnity Obligations
 - 2. Source of Funds for Direct Suit Against Other Party

II. First Focus on Perspective of the Transferor

III. Transferor Tactic #1

- A. Don't Use Outmoded Insurance Terminology.
 - 1. Accelerated Pace of Policy Revisions
 - 2. Many Firms Haven't Updated Clauses In Years
- B. Do Periodically Update Insurance Clauses.
 - 1. Eliminate Use Of Old Terms
 - 2. Use Clear, Current, Unambiguous Insurance Terminology

IV. Transferor Tactic #2:

- A. Don't Use Overly Restrictive Requirements.
 - 1. Size Of Insurer
 - 2. Specific Primary And Excess Limits
 - 3. No Deductibles or SIRs
 - 4. Manuscript Modifications
- B. Recognize The Need To Allow Flexibility.
 - 1. Programs Tailored To The Insured's Needs
 - 2. Possibility of Marketplace Changes

V. Transferor Tactic #3

- A. Don't Use An Unenforceable Indemnity Agreement.
 - 1. Anti-Indemnity Statutes In 44 States¹
- B. Tailor Indemnity Clauses To State Law.
 - 1. Conform To State's Statutes
 - 2. Conform To State's Common Law

¹Wielinski, Patrick J., Woodward, Jeffrey W., and Gibson, Jack P., *Contractual Risk Transfer*, Section IV “Indemnity Provisions,” International Risk Management Institute, Inc., Dallas, TX

VI. Transferor Tactic #4

- A. Don't Rely Solely On An Indemnity Agreement.
 - 1. May Prove To Be Unenforceable
 - 2. A Question Of Defense
 - 3. Exception If Seeking Only Comparative Negligence Indemnification
- B. Do Use Additional Insured Status To Back Up Indemnity Agreements.
 - 1. Direct Rights As An Insured
 - 2. Affirmative Defense In Addition To Limits
 - 3. Subrogation Waiver

VII. Transferor Tactic #5

- A. Don't Agree To Provide Reciprocal Or Mutual AI Status.
 - 1. No Standard Endorsement
 - 2. Standard Endorsements Override Intent
 - 3. End Up Sharing The Loss²
- B. Do Craft Tailored Indemnity Wording For The Contract To Effect Reciprocal Indemnification.

VIII. Transferor Tactic #6

- A. Don't Require AI Status On A Manuscript Form.
 - 1. Difficult To Obtain And Administer
 - 2. Won't Achieve Significant Additional Protection

²See for example *Crown Center Redevelopment v. Occidental Fire & Casualty Co. of North Carolina*, 716SW2d 348 (Mo Ct App 1986)

- B. Do Require Appropriate Standard AI Endorsement.
 - 1. CG 20 10 Provides Broad Coverage Grant³ (Exhibits A and B)
 - 2. Avoid Insurer-Imposed Restrictions

IX. Transferor Tactic #7

- A. Deal Properly With The Other Insurance Problem.
 - 1. One Attempted Solution To The Problem.
 - 2. A Better Solution!
- B. Don't Require The Other Party To Endorse Its Policy To Be Primary And Noncontributory.
- C. Do Deal Proactively With The Other Insurance Problem.
 - 1. Make Sure Your Policy Is Excess When You Are An AI⁴
 - a. Standard 1998 Form or Endorsement (See Exhibit C)
 - b. Lamb-Weston Rule States⁵
 - 2. Develop A Strategy To Tender Coverage

³See for example *McIntosh v. Scottsdale Insurance Co.*, 992 F2d 251 (10th Cir 1993), *American States Ins. Co. v. Liberty Mutual Ins. Co.*, 683 NE2d 510 (Ill App 1997), *Maryland Casualty Co. v. Chicago & Northwestern Transp.Co.* 466 Ne2d 1091 (Ill App 1984)

⁴See for example *Transamerica Ins. Co. v. Turner Construction Co.*, 601 NE2d 473 (Mass App 1992)

⁵According to Joe Postel in "Survey of 1997 Decisions Involving Additional Insured Issues," *CGL Reporter Volume 10* (International Risk Management Institute, Inc., 1998), the states that have consistently followed the Lamb Weston Rule are: Alaska, Arizona, Delaware, Idaho, Indiana, Nevada, Oregon, and Rhode Island. Maine, Michigan, Louisiana, and Tennessee have applied it inconsistently.

X. Transferor Tactic #8

- A. Don't Require A Cross Liability Endorsement On Liability Policies.
 - 1. Suit By One Insured Against Another Insured
 - 2. Coverage Or Exclusion?
 - 3. No Standard Endorsement
- B. Do Affirmatively State That Liability Policies Should Provide Cross Liability Coverage.
 - 1. Include Statement In Contract To Avoid Exclusion
 - 2. Don't Require Unneeded Endorsement

XI. Transferor Tactic #9

- A. Don't Put Too Much Faith In Certificates.
 - 1. Standard ACORD Form Has Little Legal Validity⁶ (Exhibit D)
 - 2. Are Manuscript Certificates Worth The Effort?
- B. Do Check Certificates Against Insurance Requirements.
 - 1. Reissued ACORD Form Was Enforced By One Court⁷
 - 2. Failure To Review May Waive Rights Later

XII. Transferor Tactic #10

- A. Don't Require Copies Of Insurance Policies.
 - 1. Probably Haven't Been Issued Yet.

⁶See for example *Pekin Insurance Company v. American Country Insurance Company*, 213 Ill App 3d 543, 572 NE2d 1112 (1991) and *Granite Construction Co. v. Bituminous Insurance Cos.*, 832 SW2d 427 (Tex App, Amarillo, 1992).

⁷See *Bucon, Inc. v. Pennsylvania Manufacturing Association Insurance Co.*, 151 AD2d 207, 547 NYS2d 925 (1989)

- 2. If You Get Them, You Must Review Them.

- B. Do Contractually Reserve the Right to Obtain Copies of Policies.

XIII. Focus on the Perspective of the Transferee

XIV. Transferee Tactic #1

- A. Don't Simply Accept Requirements as Offered
- B. Do Negotiate for Reasonable Requirements

XV. Transferee Tactic #2

- A. Don't Negotiate a Less Onerous Indemnity Clause and Negate if with AI Status
- B. Do Refuse to Provide AI Status or Limit Its Application

XVI. Transferee Tactic #3

- A. Don't Forget to Comply with Requirements for AI Status
- B. Do Use a Blanket Endorsement to Reduce the Chances of a Breach

XVII. Transferee Tactic #4

- A. Don't Get Blindsided with a Completed Operations AI Requirement
 - 1. 1985 Edition CG 20 10 Covered Operations⁸
 - 2. 1997 Edition CG 20 10 Excludes Completed Operations
- B. Plan a Response
 - 1. Negotiate a Requirement That Allows Completed Operations To Be Excluded

⁸See *Pardee Construction Co. v Insurance Company of the West*, Cal 4th App Dist Div 1 (D 03 1946, 2000).

2. Ask Underwriter To Respond with Coverage
 - a. 1985 Edition CG 20 10
 - b. Current Edition CG 20 26 (Additional Insured—Designated Person or Organization)

XVIII. Transferee Tactic #5

- A. Don't Forget Your Limits are Diluted Every Time You Sign a Contract
- B. Do Consider Your Contractual Obligations when You Choose Your Limits

XIX. Transferee Tactic #6

- A. Don't Cap the Limit Available to an AI Unless You Cap the Indemnity
- B. Do Try to Cap Both

Exhibits

EXHIBIT A

1997 Edition CG 20 10—Excluding Completed Operations

CG 20 10 03 97—Additional Insured—Owners, Lessees or Contractors— Scheduled Person or Organization

Who Is An Insured (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability *arising out of your ongoing operations* performed for that insured. [Emphasis Added]

CG 20 10 03 97

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EXHIBIT B

1985 Edition CG 20 10—Covering Completed Operations

CG 20 10 11 85—Additional Insured—Owners, Lessees or Contractors (Form B)

WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of “your work” for that insured by or for you.

CG 20 10 11 85

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EXHIBIT C
EXCERPTS FROM THE 1998 OTHER INSURANCE CLAUSE

4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.

b. Excess Insurance

This insurance is excess over:

- (2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.

When this insurance is excess, we will have no duty under Coverages A or B to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

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EXHIBIT D
ACORD CERTIFICATE DISCLAIMERS

This certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below.

The policies of insurance listed below have been issued to the insured named above for the policy period indicated. Notwithstanding any requirement, term or condition of any contract or any other document with respect to which this certificate may be issued or pertain, the insurance afforded by the policies described herein is subject to all of the terms, exclusions, and conditions of such policies.

Should any of the above described policies be cancelled before the expiration date thereof, the issuing insurer will endeavor to mail ___ days written notice to the certificate holder named to the left, but failure to do so shall impose no obligation or liability of any kind upon the insurer, its agents or representatives.

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EXHIBIT E
AVOID OUTDATED AND MISLEADING TERMINOLOGY IN CONTRACT
INSURANCE REQUIREMENTS

ANTIQUATED TERMINOLOGY	CURRENT TERMINOLOGY
CGL	CGL
Comprehensive general liability	Commercial general liability
Public liability insurance	Commercial general liability and umbrella liability insurance
Manufacturers and contractors (M&C) liability insurance	Commercial general liability insurance
Owners, landlords and tenants (OL&T) liability insurance	Commercial general liability insurance
Contractual liability insurance	Commercial general liability insurance
Additional named insured, named insured, coinsured	Insured status using ISO endorsement CG 20 XX or equivalent (Use CG 20 10 for construction contracts, CG 20 11 for real property leases, CG 20 15 for vendors, CG 20 28 for equipment leases.)
Cross-liability endorsement	Cross-liability coverage as provided under standard ISO "separation of insureds" condition
Broad form comprehensive general liability (CGL) endorsement	Commercial general liability insurance
Broad form property damage endorsement	Commercial general liability insurance
Combined single limit (CSL)	Per-occurrence limit, general aggregate limit, products-completed operations aggregate limit
Auto	Auto
Comprehensive auto liability insurance	Business auto coverage form
Additional insured or coinsured status (other than lessor of vehicle)	Business auto coverage form
Cross-liability endorsement	Cross-liability coverage as provided under standard ISO "separation of insureds" condition
Combined single limit	Each accident limit
Workers Compensation	Workers Compensation
Workmen's compensation insurance	Workers compensation and employers liability insurance
Borrowed servant endorsement	Alternate employer endorsement
All states coverage/broad form all states coverage	Other states coverage
<i>In rem</i> endorsement	Maritime coverage endorsement
Property	Property
Fire and extended coverage or extended coverage endorsement	Basic causes of loss form
Additional named insured	Additional insured, loss payee or mortgagee clause