



IRMI[®]

CONTRACTUAL RISK TRANSFER SEMINAR

CONTRACTUAL RISK TRANSFER TACTICS

Presented by

**Jack P. Gibson
President
International Risk
Management Institute, Inc.**

Monday, October 29, 9:00 a.m.-5:00 p.m.

CRT

The ACE Group of Insurance & Reinsurance Companies.

www.acelimited.com



Jack P. Gibson
President
International Risk
Management Institute, Inc.

Mr. Gibson is a presenter for Monday's all-day seminar, "Contractual Risk Transfer," and will also be a keynote speaker for Tuesday's General Session #1, "Focus on the Future." 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. Included among these works are *Contractual Risk Transfer*, *Construction Risk Management*, and *The Additional Insured Book*. 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, and received the Words of Wisdom (WOW) award. Mr. Gibson is an active member of the CPCU Society. He has held many committee and officer positions, including president, in the Dallas Chapter. Additionally, he served on a national level from 1985 through 1999, when his 3-year term on the Board of Directors ended.

Notes

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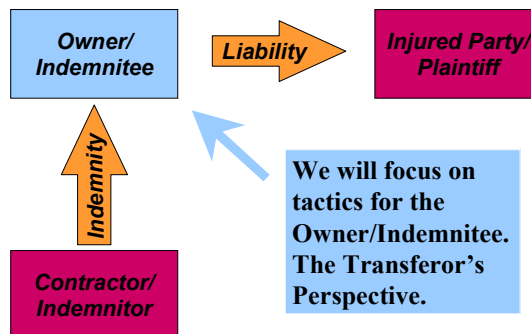
CONTRACTUAL RISK TRANSFER TACTICS

Jack P. Gibson
International Risk Management Institute, Inc.

Objectives

- Review and summarize some of the issues covered earlier today
- Give you a list of action items to check on when you get back to your office
- Keep in mind there is no single “right way” and you must decide your own philosophy

Contractual Risk Transfer



Transferor Tactic #1

- Don't use outmoded insurance terminology.
 - Accelerated pace of policy revisions
 - Many firms haven't updated clauses in years
- Do periodically update insurance clauses.
 - Eliminate use of old terms
 - Use clear, current, unambiguous insurance terminology
 - Handout - Exhibit F

Transferor Tactic #2

- Don't use overly restrictive requirements.
 - Size of Insurer
 - Specific primary and excess limits
 - No deductibles and SIRs
 - Manuscript Modifications
- Recognize the need to allow flexibility.
 - Programs tailored to the insured's needs
 - Possibility of marketplace changes

Transferor Tactic #3

- Don't use an unenforceable indemnity agreement.
 - Anti-indemnity statutes in 44 states
 - Generally apply to specific types of contracts (i.e., construction)
- Tailor indemnity clauses to state law.
 - Conform to state's statutes
 - Conform to state's common law

Transferor Tactic #4

- Don't rely solely on an indemnity agreement.
 - May prove to be unenforceable
 - A question of defense
 - Exception if seeking only comparative negligence indemnification
- Do use additional insured status to back up indemnity agreements.
 - Direct rights as an insured
 - Affirmative defense in addition to limits
 - Subrogation waiver

Transferor Tactic #5

- Don't agree to provide reciprocal or mutual AI Status.
 - No standard endorsement
 - Standard endorsements override intent
 - End up sharing the loss
- Do craft tailored indemnity wording for the contract to effect reciprocal indemnification.

Transferor Tactic #6

- Don't require AI status on a manuscript form.
 - Difficult to obtain and administer
 - Won't achieve significant additional protection
- Do require appropriate standard AI endorsement.
 - Broad coverage grant
 - Avoids insurer-imposed restrictions

Transferor Tactic #7

- Deal properly with the other insurance problem.

Owner's CGL

*This Insurance
is Primary*

Contractor's CGL

*This Insurance
is Primary*

Transferor Tactic #7 (cont.)

- One attempted solution to the problem.

Owner's CGL

*This Insurance
is Primary*

Contractor's CGL

*This Insurance
is Primary*

*This Insurance
is Primary*

Transferor Tactic #7 (cont.)

- A better solution!

Owner's CGL

*This Insurance
is Excess When
You Are An
Additional Insured*

Contractor's CGL

*This Insurance
is Primary*

Transferor Tactic #7 (cont.)

- Don't require the other party to endorse its policy to be primary and noncontributory.
- Do deal proactively with the other insurance problem.
 - Reflect intent that it be primary in contract
 - Make sure your policy is excess when you are an AI (Exhibit D)
 - Develop a strategy to tender coverage

Transferor Tactic #8

- Don't require a cross liability endorsement on liability policies.
 - Suit by one insured against another insured
 - Coverage or Exclusion?
 - No standard endorsement
- Do affirmatively state that liability policies should provide cross liability coverage.
 - Include statement in contract to avoid exclusion
 - Don't require unneeded endorsement

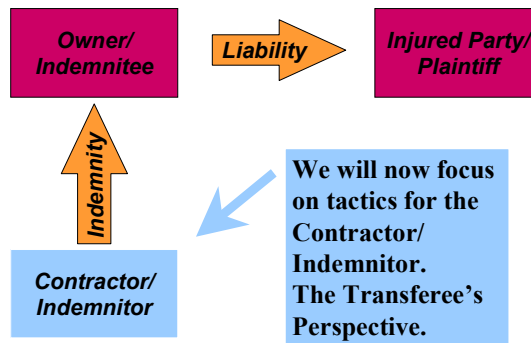
Transferor Tactic #9

- Don't put too much faith in certificates.
 - Standard Acord form has little legal validity
 - Disclaimers (Exhibit E)
 - Are manuscript certificates worth the effort?
- Do check certificates against insurance requirements.
 - Reissued Acord form was enforced by one court
 - Failure to review may waive rights later

Transferor Tactic #10

- Don't require copies of insurance policies.
 - Probably haven't been issued yet.
 - If you get them, you must review them.
- Do contractually reserve the right to obtain copies of policies.
 - Need them after a loss

Contractual Risk Transfer



Transferee Tactic #2

- Don't negotiate a less onerous indemnity clause and negate it with AI Status.
- Do refuse to provide AI status or limit its application when you've negotiated a limited indemnity clause.

Transferee Tactic #3

- Don't forget to comply with Requirements for AI Status
 - Certificate alone doesn't effect AI status
 - Breach of contract
 - Not covered by contractual liability insurance
- Do use a blanket AI endorsement to reduce the chance of a breach.
 - Automatically add AIs when required by contract.

Transferee Tactic #4

- Don't get blindsided with a completed operations AI requirement
 - 1985 endorsement covered completed operations (Exhibit A)
 - 1997 endorsement excludes completed operations (Exhibit B)
- Plan a response.
 - Negotiate different requirement
 - Ask insurer to cover with 1985 endorsement or CG 20 06
 - Or new 2001 endorsement CG 20 37 (Exhibit C)

Transferee Tactic #5

- Don't forget your limits are diluted every time you agree to indemnify another party or add them as an AI
- Do consider your contractual obligations when determining the limits you need to purchase.
 - Per project general aggregate
 - Per location general aggregate

Transferee Tactic #6

- Don't cap the limit available to an AI unless you also cap the indemnity.
 - Common practice
 - However, there is danger in capping one and not the other
- Do try to cap both.

INSURANCE REQUIREMENT CASE STUDY

You have been asked to review and update the insurance requirements used by a general contractor in its standard subcontract agreement. What changes you would you make in these provisions?

To download a Word file with an example insurance clause that rectifies many of the problems you'll find in the following insurance provision, go to this URL: <http://www.IRMI.com/tactics>

Old Clause	Notes and Suggestions
<p>A. Subcontractor shall provide and maintain in full force and effect during the term of the Contract, all warranty periods and other periods as specified herein, insurance policies providing coverages as specified below, with limits of liability not less than those shown herein:</p> <ol style="list-style-type: none"> 1. Workmen's Compensation and Occupational Disease including All States Endorsement, USL&H and, if applicable Jones Act, Admiralty or Maritime Law.....Statutory Limits Employers Liability\$1,000,000 2. Comprehensive General Liability Insurance.....CSL \$1,000,000 per occurrence for bodily injury including death and property damage 3. Comprehensive or Commercial Automobile Liability including contractual liability on all owned, non-owned, hired and leased automobiles....CSL\$1,000,000 per occurrence for bodily injury including death and property damage 4. Excess Umbrella Liability ...\$4,000,000 	<p>Visit http://www.IRMI.com/tactics for an alternative provision.</p>

<p>B. The policies in Items A.2 and A.4 above shall include coverage for:</p> <ol style="list-style-type: none"> 1. Broad Form Property Damage 2. Product Liability 3. Explosion, Collapse, and Underground damage 4. Contractor's Protective Liability, covering all Subcontractor's vendors and Subcontractors liability assumed in the subcontract. 5. Blanket Contractual Liability including subcontractor's liability assumed in this subcontract. 6. Completed Operations liability including broad form property damage coverage, which shall be maintained for five (5) years after final acceptance of subcontractor's work. 7. Personal Injury 8. Employees as Additional Insureds 	<p>Visit http://www.IRMI.com/tactics for an alternative provision.</p>
<p>C. All Subcontractor's insurance policies shall be endorsed to include Owner, Engineer, and Contractor as additional insureds who are not subject to the "other insurance" clause of Subcontractor's policies. Such policies shall contain additional insured endorsements at least as broad as the ISO CG 20 10 11 85 endorsement, which shall remain in effect for at least five (5) years after final acceptance. All policies shall contain a cross liability endorsement.</p>	
<p>D. If Subcontractor will be performing any operations which require additional insurance coverages, including but not limited to marine, environmental, aircraft, and/or asbestos, Subcontractor will be required to maintain such insurance with limits and coverages satisfactory to Contractor.</p>	
<p>E. Subcontractor will be responsible for and hereby releases Owner, contractor, Engineer and their respective affiliates, directors, officers, and employees and agents from all liability for loss or damage to all tools, equipment, structures, property of employees and other property, the capital cost of which is not included in the cost of the work. Each Subcontractor will maintain all risk physical damage insurance on such property in an amount equal to the full replacement value.</p>	

<p>F. Each policy shall be endorsed to provide a waiver of any and all of each insurer's rights of subrogation against the Owner, Contractor, Engineer, and their respective affiliates and associated companies, directors, officers, employees, and agents.</p>	<p>Visit http://www.IRMI.com/tactics for an alternative provision.</p>
<p>G. In the event of cancellation, alteration, or material change in any of the foregoing policies, thirty (30) days advance written notice shall be mailed to Contractor.</p>	
<p>H. All insurance policies required shall be issued by licensed and reputable insurance companies with a Best Rating of A+ or higher and be acceptable to Contractor. Unless authorized in writing by Contractor, all required insurance shall be written on an "occurrence" basis.</p>	
<p>I. Prior to the start of work and expiration date of insurance coverages, properly qualified and authorized representatives of the Subcontractor's insurer shall fully execute and furnish to Contractor a certificate of insurance on Contractor's form evidencing the insurance requirements in this subcontract agreement. Failure of Subcontractor to file such certificate of insurance or failure by Contractor to receive or demand such certificate shall not be construed as a waiver of Subcontractor's obligations to maintain and carry such insurance. The contractor shall have the right, but not the obligation, to prohibit any such person from entering the project site until such certificates have been filed and approved by Contractor. Failure to obtain and maintain the required insurance may result in termination of the Subcontract. Contractor may also at any time call for and Subcontractor shall promptly furnish true and exact copies of all policies of insurance affording the coverage required herein, together with any endorsements of changes thereto.</p>	

Contractual Risk Transfer Exhibits

EXHIBIT A

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. [Emphasis Added]

CG 20 10 11 85

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EXHIBIT B

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 C

2001 Edition CG 20 37—Completed Operations Additional Insured Status

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

Section II—Who Is An Insured 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” at the location designated and described in the schedule of this endorsement performed for that insured and *included in the “products-completed operations hazard”* [Emphasis Added]

CG 20 37 10 01

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EXHIBIT D
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 E

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.

Copyright ACORD Corporation 1988

EXHIBIT F
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

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