



# Contractual Risk Transfer

## Table of Contents

### Contractual Risk Transfer

- III: General Information
  - Contractual Risk Transfer as a Risk Management Technique
    - Factors Affecting Contractual Risk Transfer
      - Control of the Risk
      - Knowledge of Risk
      - Statutory or Common Law Limitations on Risk Transfer
      - Custom and Practice
      - Bargaining Position
    - Risk Transfer in Risk Management Theory
    - Key Contract Provisions
    - The Process
    - Measures of Successful Performance
    - Financial Performance Measures
    - Skills Required
    - Summary
  - Basics of Contract Law
    - Elements of a Contract
      - The Offer
      - Acceptance of the Offer
      - Offer and Acceptance Under the UCC
      - Consideration
    - Types of Contracts
    - Validity and Enforceability of Contracts
    - Interpretation of Contracts
      - The Parol Evidence Rule
      - Basic Rules of Contract Interpretation
      - Interpretation of Insurance Policies
    - Breach of Contract
    - Common Commercial Contract Provisions
      - Choice-of-Law Provisions
      - Forum Selection Provisions
      - Jury Waiver Provisions

- Alternative Dispute Resolution Provisions
  - Summary
- Independent Contractor Exposure
  - Development of the Independent Contractor Rule
  - Control by Employer
  - Peculiar Risk and Inherent Danger Doctrines
  - Statutory Liability
  - Negligent Hiring
  - Borrowed Servant Doctrine
  - Summary
- Employee Leasing Exposure
  - Development of Employee Leasing Issues
  - The Employment Relationship
  - State Approaches to Determination of Employer
  - State-Specific Status of Employer Determination and Exclusive Remedy
  - Third-Party Issues
    - Commercial General Liability Insurance
  - Summary
- Electronic Contracts
  - Legislation Pertaining to E-Commerce and E-Contracts
    - Electronic Signatures in Global and National Commerce Act
    - Uniform Electronic Transactions Act
    - State-Specific Laws Pertaining to Electronic Insurance Transactions
    - Uniform Computer Information Transactions Act
  - Commonly Encountered E-Contracts
    - Shrink-Wrap Agreements
    - Click-Wrap Agreements
    - Click-Wrap Agreements: Practical Considerations
    - Browse-Wrap Agreements
    - Browse-Wrap Agreements: Practical Considerations
    - Click-Wrap and Browse-Wrap Agreements: Post-Transaction Terms
    - E-mail Contracts
    - Existing Written Contracts Can Be Modified by E-mail
    - Formation of Contract by Instant Message
    - E-mail Contracts: Practical Considerations
  - Conclusion
- Overview of Contractual Risk Transfer Strategies
  - Strategies for Transferring Risk to Others
    - Observe Statutory and Common Law Limitations
    - Back Up Indemnity Provisions with Insurance Requirements

- Problems with Additional Insured Status
    - The OCP Alternative
    - Verify Compliance with Insurance Requirements
    - Certificate Management
  - Strategies for Accepting Risk from Others
    - Negotiate Contract Risk and Insurance Provisions
    - Read the Entire Contract
    - Try To Cap Liability and Indemnity
    - Coordinate Additional Insured Status with Indemnity Agreement
    - Resist Use of Manuscript Forms
    - Educate Indemnitees on Coverage Issues
    - Consider Using Blanket AI Endorsements
    - Additional Insureds and Workers Compensation Insurance
    - Additional Insureds and Completed Operations
    - Consider Contractual Obligations in Selecting Limits
- Alternative Dispute Resolution
  - Negotiation
    - Gathering and Organizing Information
    - Setting Positions
    - BATNA and WATNA
    - Creating Options
    - Stages of Negotiation
    - Negotiation Provisions in Contracts
  - Mediation
    - The Benefits of Mediation
    - Do I Have To Mediate?
    - Selecting a Mediator
    - Confidentiality of Mediation Communications
    - Preparing for the Mediation
    - The Mediator's Role
    - The Mediation Format
    - Good Faith Participation
    - The Uniform Mediation Act
  - Arbitration
    - Enforceability of Arbitration Provisions
    - Authority of the Arbitrator
    - The Arbitration Process
    - Arbitration Provisions in Contracts
  - Pros and Cons of Alternative Dispute Resolution

- Insurance Forms
  - Developers of Standardized Forms
  - ISO Form Numbering and Edition Dates
- IV: Indemnity Provisions
  - Indemnity Provisions
  - Implied Indemnity and Contribution
  - Express Indemnity Agreements
    - Broad Form Indemnity Agreements
    - Intermediate Form Indemnity Agreements
    - Limited Form Indemnity Agreements
    - Hybrid Indemnity Agreements
    - Cross-Indemnity Agreements
  - Court Treatment of Indemnification Agreements
    - "Public Policy" Rationale
    - Enforceability of Indemnity Agreements
    - Relationship of Injury or Damage to Risk Indemnified Against
      - Subject Matter of Indemnity Clause
      - Duration of Indemnity Obligation
      - Related Issues
    - The "Clear and Unequivocal" Approach
      - Construction Contracts
      - Leases
      - Insurance Requirements
    - The Strict "Express Negligence" Approach
      - Express Negligence Doctrine
      - Conspicuousness Requirement
      - Other Recent Express Negligence Cases
    - Other Rules of Construction Applied to Indemnity Agreements
      - Ambiguity Construed Against the Drafter
      - Burden of Proof
      - Contract to Be Read as a Whole
      - Importance of Insurance Requirements
      - Indemnity Obligation as Limitation on Additional Insured Coverage
      - Third-Party Beneficiaries
      - Incorporation by Reference
      - Writing Requirement
    - Summary
  - Standards of Interpretation for Indemnitee's Own Negligence
  - Putting It All Together: Drafting Indemnity Clauses
    - Simplicity vs Complexity

- Consistent Terminology
      - Parties to the Contract
      - Subject Matter of the Contract
      - The Contract or Agreement Itself
    - Duration of Indemnity Obligation
    - Scope and Enforceability of Indemnity
    - Attorneys Fees
    - Defense and Settlement on Indemnitee's Behalf
      - Allocation, Reimbursement, and Durational Issues
      - Selection of Counsel Issues
      - Consent To Settle
    - Summary
  - Construction Anti-Indemnity Statutes
    - Insurance Provisions and Anti-Indemnity Statutes
  - State Construction Anti-Indemnity Statutes
  - Motor Carrier Transportation Anti-Indemnity Statutes
    - Court Interpretation of Anti-Indemnity Statutes
    - State Motor Carrier Transportation Anti-Indemnity Statutes
  - Maritime Contract Indemnity Provisions
    - Contractual Indemnity under Federal Maritime Law
    - Maritime Indemnity under the OCSLA
      - When Will a Contract Be Governed by OCSLA?
      - Effect of State Anti-Indemnity Statutes on Indemnity Provisions
    - Maritime Indemnity under the LHWCA
      - When Will the Employer's Tort Immunity under the LHWCA Apply?
      - Effect of the LHWCA on Indemnity Provisions
    - Maritime Indemnity Provisions in Towage Contracts
  - Oil Field Anti-Indemnity Statutes
    - History and Purpose of the Anti-Indemnity Acts
      - Developments through the Late 1960s
      - Industry Response
      - Subsequent Industry Developments
    - Key Anti-Indemnity Statute Issues
      - Choice of Law
      - Contracts Subject to the Act
      - Effect on Indemnification for Damages
      - Effect on Indemnification for Defense Fees
      - Effect on Insurance Arrangements
    - Overview of State Oilfield Anti-Indemnity Acts
      - The Wyoming Oilfield Anti-Indemnity Act

- The New Mexico Oilfield Anti-Indemnity Act
    - The Louisiana Oilfield Anti-Indemnity Act
    - The Texas Oilfield Anti-Indemnity Act
  - Environmental Indemnity Provisions
    - Indemnity Agreements
    - Legal Interpretation of Environmental Indemnity Provisions
    - Summary
- V: Waivers of Subrogation
  - Subrogation Basics
    - Legal vs Conventional Subrogation
    - Allocation of Subrogation Recoveries
    - Obligation to Preserve Subrogation Interest
      - Voluntary Payments
    - Workers Compensation Subrogation
    - Summary
  - General Principles of Waivers of Subrogation
    - Scope of the Waiver
    - Workers Compensation Waivers of Subrogation
      - Subrogation Theory and Its Breakdown
      - Mechanics of Workers Compensation Subrogation
      - Waivers of Subrogation under State Law
      - The Problem of Double Recovery
      - State Law Measures Addressing Double Recovery
      - Contractual Measures Addressing Double Recovery
      - Pros and Cons of Waivers of Subrogation
      - Recommendations
    - Summary
  - Insurance Policy Subrogation Provisions
    - The Common Provision and Its Inference
    - Workers Compensation Policies
    - Commercial General Liability Policy
    - Commercial Automobile Insurance Policies
    - Commercial Property and Inland Marine Insurance Policies
    - Summary
  - Prohibition of Subrogation Against Insureds
    - Subrogation in Real Property Leases
    - Subrogation Against Additional Insureds
    - Antisubrogation Rule--Two Separate Policies
    - Summary

- VI: Liability Limitation Clauses
  - Limitation of Liability Clauses
    - Typical Limitation of Liability Clauses
    - Requirements for Valid Limitation of Liability Clauses
      - Opportunity to Negotiate and Sophistication of Parties
      - Limits of the Limitation
      - Description of Risks Covered
      - Designation of Persons Covered
    - Statutory Restrictions
    - Treatment by the Courts
      - Survey of Cases
      - Court Interpretation of Limitation of Liability Clauses
    - Summary
  - Exculpatory Clauses
    - Key Differences from Limitation of Liability and Indemnity Clauses
    - Exculpatory Clauses in Sports and Recreational Activities Contracts
    - Exculpatory Clauses in Other Contracts and Agreements
    - Factors Affecting Validity
      - Exculpatory Clauses Are Strictly Construed
      - Clear and Unambiguous Language
      - Conspicuousness of Clause
      - State Statutes May Prohibit or Affect Clause's Validity
      - Gross Negligence or Willful and Wanton Conduct
      - Public Policy Restrictions
      - Exculpatory Clauses: Practical Considerations
      - Survey of Cases
    - Summary
- X: Contractual Liability Insurance
  - The CGL Policy's Contractual Liability Coverage
    - The Insuring Agreement and the Exclusion
    - Definition of "Insured Contract"
      - Lease of Premises
      - Sidetrack Agreement
      - Easement License Agreement
      - Indemnification of Municipality
      - Elevator Maintenance Agreement
      - Other Business Contracts
      - Contractual Liability and Construction Defects
    - What Is Not an "Insured Contract"
    - Application to Surety Indemnity Agreements

- Defense of Indemnitees
  - Application of Policy Exclusions
  - Personal and Advertising Liability Coverage
  - Contractual Liability Endorsements
    - Questions about Limited Contractual Liability Coverage
    - Broad Form Indemnity as an "Insured Contract"
  - Summary
- Contractual Liability Coverage in Standard Automobile Policies
  - The Business Auto Policy
    - BAP Insuring Agreement
    - Contractual Liability Exclusion
    - Relationship to Other BAP Exclusions
  - The Auto Dealers Policy
  - The Truckers Policy
  - The Motor Carrier Coverage Form
- Contractual Liability Coverage in Umbrella and Excess Policies
  - The Umbrella Insuring Agreement
  - Policy Exclusions
    - War
    - Workers Compensation and Similar Laws
    - Aircraft-Watercraft
    - Property Damage
- Contractual Liability Coverage in Professional Liability Policies
  - Design Professionals
  - Accountants
  - Lawyers
  - Physicians
  - Hospitals
  - Insurance Agents
  - Media Professional Liability
  - Other Professional Liability Coverages
- Contractual Liability Coverage in Aircraft Policies
- Insuring Indemnity Obligations in Maritime Contracts
  - Coverage under CGL and Marine General Liability Policies
    - Background and Structure of CGL and MGL Policies
    - The CGL and MGL's Contractual Liability Exclusion
    - Practical Considerations for Ensuring Coverage
  - Coverage under Protection and Indemnity Policies
    - Coverages and Exclusions of P&I Policies
    - Options To Increase Likelihood of Coverage under P&I Policies



- Contractual Liability Coverage for Environmental Claims
  - Total Pollution Exclusion
  - Contractual Liability Coverage in the CPL Policy
- CGL Contractual Liability Limitations
  - The Standard CGL Coverage Form
    - The Contractual Liability Limitation Endorsement
    - Amendment of Insured Contract Definition
  - Nonstandard Forms
    - Written vs Unwritten Contracts
    - Aircraft, Autos, Watercraft
    - Broad Form Indemnification
  - Summary
- XI: Additional Insured Status
  - Additional Insured Status
    - Reasons for Requiring Additional Insured Status
      - Problems with Hold Harmless Enforcement
      - Direct Right to a Defense
      - Subrogation
      - Personal Injury Coverage
      - Obtaining Coverage Not Otherwise Available to Indemnitee
    - Summary
  - Additional Insured Status under the CGL Policy
    - Categories of Insured
      - Named Insured
      - Automatic Insureds
      - Additional Insureds
    - Unambiguous Contractual Insurance Requirements
      - Differentiating Indemnity and Insurance Requirements
      - "Implied" Insured Status
    - Additional Insureds and Notification Requirements
    - Defense of Indemnitees vs Defense of Additional Insureds
    - Unenforceable Indemnity Agreement
      - Anti Indemnity Statutes and Insurance Requirements
    - Additional Insured Status without Indemnity Agreement
    - The Additional Insured's "Other Insurance"
      - The Umbrella as "Other Insurance"
      - "Other Insurance" and Indemnity Agreements
      - Allocation Among Insurers
      - Method of Tendering Defense
    - Additional Insureds and Completed Operations

- Separation of Insureds
  - Additional Insureds and the CGL Pollution Exclusion
  - Partnerships, Joint Ventures, LLCs as Additional Insureds
  - Standard CGL Additional Insured Endorsements
  - Cancellation Notice and State Law
- Manuscript Endorsements
- Nonstandard Additional Insured Endorsements
- Additional Insured Status under Commercial Property Insurance
  - Additional Insured Endorsements
    - Loss Payment
    - Notice of Cancellation
    - No Protection from Insured's Acts
    - Subrogation
  - Mortgagees and Loss Payees
    - Mortgage Clauses
    - Loss Payee Clauses
  - Builders Risk Insureds
    - Builders Risk Policy Subrogation Provision
    - Including Contractors as Insureds
    - Waiver of Subrogation Endorsement
- Additional Insureds under Workers Compensation Insurance
  - Borrowed Servant Situations
  - Dual Employment and Joint Employment
  - Employee Leasing
- Additional Insured Status under Umbrella and Excess Policies
  - Umbrella Additional Insureds
  - Additional Insureds as in Underlying
  - Contractually Required Additional Insured Coverage
  - "Other Insurance" Problems
  - Issues Specific to Excess Policies
- Additional Insured Status under Standard Automobile Policies
  - Vicarious Auto Liability
  - Insured Status for Owner of Leased or Rented Vehicle
  - Owners of Hired or Borrowed Equipment
- Insured Status under Contractors Pollution Liability Insurance
- Maritime Contracts and Additional Insured Status
  - Requiring Additional Insured Status in Maritime Contracts
    - Benefits of Additional Insured Status
    - Effect of "Other Insurance" Clauses on Additional Insured Status
    - Effect of State Oil Field Anti-Indemnity Statutes

- Court Treatment of Additional Insured Status
      - Rule of Law Established by the Ogea Case
      - The Tullier Court Follows the Same Path as Ogea
      - A Slightly Different Result Is Reached in the Becker Case
      - Brusco Tug & Barge Court, Rejects "Default" Rule of Law
  - Court Interpretations of Pre-2004 Additional Insured Endorsements
    - "Arising Out Of"
      - Required Causal Connection
      - "Work" or "Operations"
  - The Third-Party-Over Action
    - The Problem
      - Contribution and Implied Indemnity
      - Express or Contractual Indemnity
      - Injured Employee's Causes of Action Against Third Parties
      - Apportionment of Fault between Third Party and Employer
      - Express Indemnity Agreements
      - Effect of Anti-Indemnity Statutes
    - Mechanics of the Third-Party-Over Action
    - Third-Party-Over Actions in the Construction Industry
    - Third-Party-Over Actions--No Additional Insured
    - Third-Party-Over Actions--No Indemnity Agreement
    - Summary
- XII: Protective Liability Insurance
  - Owners and Contractors Protective Liability Insurance
    - The Loss Exposure
    - The OCP Liability Coverage Form
      - Insuring Agreement
      - Exclusions
      - Supplementary Payments
      - Who Is an Insured
      - Limits of Insurance
      - Conditions
      - Definitions
    - Endorsements
    - OCP Policy versus Additional Insured Status
      - Breadth of Coverage
      - The Anti-Indemnity Issue
      - Is an OCP Policy the Better Choice?
      - Separate Set of Limits
      - Access to Named Insured's Umbrella

- Effect on Loss Experience
    - Cost
    - Other Insurance Problems
    - Cancellation Notice
  - Conclusion
- Railroad Protective Liability Insurance
  - Bodily Injury and Property Damage Liability
    - Coverage a Exclusions
  - Physical Damage to Property
  - Policy Conditions
    - Cancellation
    - Other Insurance
    - Premium and Premium Audit
    - RRP Coverage, Indemnity Agreements, and Subrogation
  - Limits of Insurance
  - Rating
    - Location
    - Type of Project
    - Project Owner
    - Hazardous Nature of the Work
- XIV: Insurance Requirements
  - Strategies for Contract Insurance Requirements
    - Overall Considerations for Contract Insurance Requirements
    - Consequences of Failing To Comply Insurance Requirements
      - Caselaw Highlights Perils Caused by Non-Compliance
      - Additional Considerations
    - Insurance Requirement Costs
    - Considerations for General Insurance Provisions
      - Evidence of Insurance
      - Notice of Cancellation
      - Deductibles and Retentions
      - Self-Insurance
      - Cross-Liability
      - Acceptability of Insurers
    - Limits of Liability
    - Considerations for Specific Coverage Requirements
    - Sample Contract Requirements for General Insurance Provisions
  - Strategies for General Liability Insurance Requirements
    - Miscellaneous General Liability Coverages
      - Protective Liability Insurance

- Liquor Liability Insurance
    - Products-Completed Operations Insurance
    - Electronic Data Liability
  - Possible Contract Requirements
    - Standard Policy Form
    - Occurrence Coverage
    - Claims-Made Coverage Features
    - Long-Term Completed Operations Coverage
    - Per-Project General Aggregate Limit
    - Per-Location General Aggregate Limit
    - Each-Occurrence Limit
    - Additional Insured Status
    - Waiver of Subrogation
  - Common Errors and Problems
    - For More General Liability Insurance Information ...
  - Sample CGL and Umbrella Liability Insurance Contract Requirements
- Strategies for Automobile Insurance Requirements
  - Possible Contract Requirements
    - Standard Policy Form
    - Liability Coverage
    - Additional Insured Status for Independent Contractor Exposure
    - Lessor or Renter as Additional Insured
    - Waiver of Subrogation
    - Physical Damage Coverage
    - Loss Payable Clause
    - Pollution Liability Coverage
    - Special Auto Liability Exposures
    - Trailer Interchange Coverage
  - Common Errors and Problems
    - For More Auto Insurance Information
  - Sample Commercial Auto and Umbrella Liability Insurance Contract Requirements
- Strategies for Workers Compensation Insurance Requirements
  - Coverage Summary
  - Possible Contract Requirements
    - Alternate Employer Endorsement
    - Waiver of Subrogation
    - Longshore and Harbor Workers Act Coverage
    - Outer Continental Shelf Lands Act Coverage
    - Maritime Coverage
    - Defense Base Act Coverage

- Federal Employers Liability Act Coverage
      - Migrant and Seasonal Agricultural Worker Protection Act Coverage
      - Federal Coal Mine Health and Safety Act Coverage
    - Common Errors and Problems
      - For More Workers Compensation Insurance Information
    - Sample Contract Requirements for Workers Compensation Insurance
  - Strategies for Commercial Property Insurance Requirements
    - Possible Contract Requirements
      - Insured Perils
      - Flood and Earthquake
      - Coastal Windstorm
      - Terrorism
      - Valuation and Limit
      - Covering Additional Interests
      - Waiver of Subrogation
      - Equipment Breakdown Coverage
      - Income and Expense Coverage
      - Inland Marine Coverage Approaches
    - Common Errors and Problems
      - For More Property Insurance Information
    - Sample Contract Requirements for Commercial Property Insurance
  - Strategies for Cyber Insurance Requirements
    - Evolution of Cyber and Privacy-Related Coverages
    - Cyber Exposures Arising from Contractual Relationships
    - Possible Contract Requirements
    - Common Issues and Problems
  - Environmental Impairment Liability Insurance Requirement Strategies
    - Common Errors and Problems
    - Sample Contract Requirements: Pollution Legal Liability Insurance
    - Sample Requirements: Environmental Professional Liability Insurance
- XV: Insurance Certificates
  - Insurance Certificates
  - Options for Verifying Insurance
    - Standard Certificates
      - Benefits of Standard Certificates
      - Problems with Standard Certificates
    - Modified Certificates
      - Benefits of Modifying Standard Certificates
      - Problems with Modifying Standard Certificates
      - How To Modify an ACORD Certificate

- Proprietary Certificates
  - Benefits of Proprietary Certificates
  - Problems with Proprietary Certificates
  - How To Develop a Proprietary Certificate
- Alternatives to Certificates
  - Memorandum of Insurance
  - OCP Policy
  - Surety Bond
- Certificate of Liability Insurance (ACORD 25) Exhibit
- Certificate of Property Insurance (ACORD 28) Exhibit
- Certificate of Commercial Liability Insurance Exhibit
- Sample Manuscript Certificate of Insurance Exhibit
- Legal Analysis of Certificates
  - No Disclaimers Present
    - Historic Development
    - Contract Law
    - Equitable Estoppel
  - Effect of Disclaimers
    - No Policy Changes
    - No Equitable Estoppel
  - Overcoming Disclaimers
    - Totality of Circumstances Test
    - Reasonable Belief in Coverage
    - UCC Transactions
  - State Certificate Regulations
    - Other Pertinent Statutes
- Disputes Over Certificate Requirements
  - Failure To Furnish Certificate
    - Termination of Lease
    - Termination of Construction Contract
    - Liability for Cost of Substitute Coverage
    - Unreasonable Certificate Requests
  - Excuses for Failing To Furnish Certificate
    - Impossibility of Performance
    - Breach of Reciprocal Duty
  - Waiver of Certificate/Insurance Requirements
    - Allowing Tenant To Possess Leasehold
    - Allowing Contractor To Begin Work
    - Entering New Phases of Construction
    - Completing the Contract

- Making Final Payment
    - Conduct over Multiple Transactions
  - Protecting Against Waiver
    - Rigorous Enforcement
    - Contract Remedy Clauses
    - Nonwaiver Clauses
- XVI: Administration
  - Administration by Risk Transferors
    - Developing a Corporate Risk Transfer Philosophy
    - Establishing Standards
    - Applying the Standards
    - Monitoring Compliance
    - Compliance Monitoring Systems
    - Handling Noncompliance
    - Responding to Cancellation Notice
    - Compliance Management Approach
  - Administration by Transferees
    - Establishing Corporate Risk Transfer Standards
      - Contract Review Guidelines
      - Learn the Risk Transfer Specifics Early
      - Develop Alternatives to Unacceptable Requirements
      - Avoid Committing to Problematic Insurance Requirements
    - Efficient System for Responding to Insurance Requirements
    - Applying the Standards
    - Managing for Results
  - Certificate Tracking Systems
    - Types of Systems
    - System Capabilities
      - Viewing and Sorting Data
      - Compliance Verification
      - Report Generation
      - Letter Generation
      - Customization
      - Hardware/Software Requirements
    - Nontechnical Considerations
      - Experience
      - Customer Service
      - Cost
      - Professional Responsibility
    - System Evaluation and Comparison



- CertainCert
      - Certifitrac+
      - EBIX BPO
      - Insurance Tracking Services
    - Conclusion
  - Contract Review Manual
    - Guidelines for Inserting Insurance Clauses in Contracts
      - Exhibit - Executed Certificate of Insurance Form
    - Insurance Requirements for Contractors
  - Contract Review Checklist
- XVII: Construction Contracts
  - Contracting Approaches within the Construction Industry
    - Basic Project Delivery Methods
      - General Contractor with Subcontractors
      - Multiple Prime Contracts
      - Construction Management Contracts
      - Design-Build Contracts
    - Risk Allocation and Insurance Responsibilities
      - Architect/Owner Relation
      - General Contractor/Owner Relation
      - General Contractor/Subcontractor Relation
      - Construction Manager/Owner/General Contractor Relations
      - Design-Build Contractor/Owner Relation
      - Consolidated Insurance Programs
  - Standard Form Construction Contracts
    - AIA Contract Documents
    - AGC Contract Documents
    - ConsensusDOCS Contract Documents
    - EJCDC Contract Documents
  - Standard Construction Indemnity Agreements
    - AIA Document A201
      - Paragraph 4.18 (1976), Paragraph 3.18 (1987), and Paragraph 3.18 (1997)
      - Paragraph 3.18 (1987)
      - Paragraph 3.18 (1997)
      - Paragraph 3.18 (2007)
      - Comparison of AIA A201 Indemnity Paragraphs
      - Relevant Court Decisions
    - Other A201 Indemnity Clauses
    - ConsensusDOCS 300 Indemnity Clause
    - ConsensusDOCS 200 Indemnity Clause

- ConsensusDOCS Hazardous Materials Provisions
  - EJCDC Document C-700 (2007)
  - Standard Form Subcontract Indemnity Clauses
    - Incorporation by Reference
  - Duty To Defend Clarified
- Contractual Liability Coverage in Contractors' Umbrella Policies
  - Contractual Liability Exclusions
  - Explosion, Collapse, Underground Property Damage Exclusion
  - Aircraft/Watercraft Liability Exclusion
  - War-Related Liabilities Exclusion
  - Employers Liability Exclusion
  - Other Exclusions
- Construction Contract Insurance Requirements
  - Contractor's Liability Insurance
    - Workers Compensation and Employers Liability Insurance
    - General Liability Insurance
    - Automobile Liability Insurance
    - Additional Insured Status
    - Other Liability Coverages
    - Limits of Insurance
    - Evidence of Insurance
  - Owner's Liability Insurance
  - Property Coverages
    - Scope of Coverage
    - Deductibles
    - Other Required Property Coverages
  - Waivers of Subrogation
  - Sample Requirements for General Insurance Provisions
  - Sample Requirements for CGL and Umbrella Liability Insurance
  - Sample Requirements for Commercial Auto and Umbrella Liability
  - Sample Requirements for Workers Compensation Insurance
  - Sample Requirements for Contractors Pollution Liability Insurance
- Builders Risk Insurance and Contract Waivers of Subrogation
  - A201 Waiver of Subrogation Provision
  - Parties Protected by Waiver
    - Protection for Performance Bond Surety
    - Liability Ins. as "Other Property Insurance"
  - Time Period of Waiver
  - Property Subject to Waiver
    - Caselaw Broadly Applying Waiver

- No Conflict between Waiver of Subrogation and Indemnity Obligation
- Limitation of Liability and Exculpatory Clauses
  - In Professional Services Contracts
  - In Construction Contracts
- Strategies for Builders Risk Insurance Requirements
  - Possible Contract Requirements
    - Who Buys the Policy?
    - Who Is an Insured
    - Waiver of Subrogation
    - Covered Causes of Loss
    - Covered Property
    - Deductibles
    - Occupancy before Completion
    - Coverage Termination
  - Common Errors and Problems
    - For More Builders Risk Information ...
  - Sample Contract Requirements for Builders Risk Insurance
    - Owner Required to Maintain Insurance
    - Contractor Required to Maintain Insurance
- Surety Bond Requirements in Construction Contracts
  - Surety Bonds in Construction Contracting
    - Subcontract Bonds
    - Bond Forms
    - Bonds Required for Public Projects
  - Options for Private Projects
    - Advantages and Disadvantages of Surety Bonds
    - Other Types of Completion/Payment Guarantees
  - Contract Surety Bond Requirement Provisions
  - Summary
- Risk Allocation in the AIA General Conditions (A201)
  - Indemnity Provisions
  - Insurance Requirements
    - General Liability Insurance
    - Additional Insured Status
    - Builders Risk Insurance
  - Waivers of Subrogation
  - Waivers of Consequential Damages
  - Design Responsibilities
  - Differing Site Conditions
  - Site Safety

- Hazardous Materials
  - Mediation and Arbitration
    - Mediation
    - Arbitration
  - Conclusion
- Contract Provisions and Environmental Liability
  - Scope of Work
    - Construction Contract--No Environmental Responsibility
    - Remediation Contract
    - Phases of Services
  - Changes
  - Differing Site Conditions
  - Standard of Care
    - Ordinary Negligence Standard
    - Higher Standards of Care
  - Warranties
    - Cost Estimates
  - Responsibilities of Parties
    - Compliance with Laws
    - Requirements Applicable to Subcontractors
  - Permits and Licenses
  - Health and Safety
    - Training
  - Disposal of Materials
  - Indemnification
    - Client Indemnifies Consultant
    - Consultant Indemnifies Client
    - Environmental Liability
    - Mutual Indemnification
  - Limitation of Liability
  - Confidentiality
  - Dispute Resolution
    - Recovery of Dispute Resolution Costs
    - Time Limit for Legal Action
  - Third-Party Rights
    - Warnings Regarding Use of Consultant's Report
  - Severability
  - Survival
- Special Contracting Risks
  - Professional Services

- Construction Management
    - Design-Build
  - Completed Operations and Construction Defects
    - Defective Work
    - Subcontractor's Insurance
- Design-Build Construction Contracts
  - Methods of Project Delivery
    - Traditional Project Delivery
    - Construction Management Project Delivery
    - Design-Build Project Delivery
  - Selection of Design-Builders
  - Pros and Cons of Design-Build
    - Single Point Accountability
    - Accelerated Delivery
    - Quality of the Work
    - Transfer of Design Liability
    - Loss of Checks and Balances
    - New Set of Adversarial Relationships
    - Assumption of Design Liabilities by the Contractor
    - Bidding Issues
    - Design-Build Laws
  - When Is Design-Build Appropriate?
  - Potential Liabilities of Design-Build Participants
    - Traditional Liabilities of the Contractor
    - Traditional Liabilities of Design Professionals
    - Liabilities of the Design-Builder
  - Ins. Coverage for Design Liab. in Traditional Policies
    - Builders Risk Coverage
    - General Liability Coverage
    - Contractors Professional Liability Exclusion Endorsements
    - CG 22 79
    - Design Build Exposures
    - Umbrella Coverage
    - Coordinating Coverages
  - Design-Build Professional Liability Insurance
    - Coverage Trigger
    - Discovery Provisions
    - Extended Reporting Period
    - Project-Specific Alternative
    - Covered Persons

- Covered Damages
      - Covered Acts
      - Exclusions
      - Claims Settlement Procedures
      - Deductibles
      - Other Provisions
      - Alternative Coverage Options
    - Surety Issues
    - Design-Build Risk Management
  - Analyzing and Avoiding Risks in Construction Contracts
    - Claims Submission
      - Managing Contract Claims
    - No Damages for Delay
      - Strategies for Recovering "Delay" Claims
    - Dispute Resolution
      - Strategies for Successful Dispute Resolution
    - Waivers and Releases
      - Strategies for Limiting/Avoiding Waivers
  - Construction Contract Review Checklist
- XVIII: Real Estate Contracts
  - Real Estate Leases
    - Written vs Oral Leases
    - Commercial vs Residential Leases
    - Ground Leases
    - Assignments and Subleases
    - Real Estate Lease Forms
    - Basic Lease Terminology
    - Importance of Risk Transfer in Leasing
    - Key Leasing Issues to Address with Risk Transfer Provisions
      - Effects of Inflation on Value of Rental Income Stream
      - Changes in Leasing Market Conditions
      - Changes in Laws Affecting Use of the Premises
      - Increases in Operating Expenses
      - Risk of Catastrophic Losses
      - Risks of Bodily Injury and Property Damage
      - Environmental Risks
    - Liability Exposures Associated with Leasing
      - Bodily Injury Loss Exposures
      - Property Damage Loss Exposures
      - Economic Loss Exposures

- Overview of Risk Transfer Provisions in Leases
      - Insurance Requirements Provisions
      - Indemnity Provisions
      - Exculpatory Provisions
      - Damage and Destruction Provisions
      - Compliance with Laws Provisions
      - Disclosure Provisions
      - Representations and Warranties
      - Guaranties
      - Remedies and ADR Provisions
    - Conclusion
  - Indemnity and Waiver of Subrogation Clauses in Commercial Leases
    - Indemnification Clauses
      - Types of Indemnification Provisions
      - Permissible Scope of Indemnification
      - Role of Insurance Requirements
    - Suggestions for Negotiating and Drafting Indemnity Clauses
      - Understand State Law Requirements
      - Consider a Savings Clause
      - Define the Scope of the Term "Claims"
      - Define the Indemnitees
      - Define the Subject Matter of the Indemnity Clause
      - Handling the "Clear and Unequivocal" Issue
      - Preserve Equitable Indemnity Rights
      - Indemnity Not Limited by Workers Compensation Benefits
      - Relationship of the Indemnity to Other Lease Provisions
      - Separate Attorneys' Fees Clause
      - Survival of the Indemnity Obligation
      - Duty To Defend
      - Landlord Indemnification of Tenant
    - Waivers of Subrogation
      - Additional Questions
    - Conclusion
  - Exculpatory and Limitation of Liability Clauses in Commercial Leases
    - Enforceability of Exculpatory Clauses in Leases
      - Public Policy Restrictions
      - Degree of Negligence
      - Liability for Breach of a Statutory Duty
      - Liability for Fraud and Other Intentional Torts
      - Unequal Bargaining Power and Unconscionable Contracts

- Defective Design or Construction of the Premises
    - Statutory Restrictions
  - Exculpatory Clause Drafting Suggestions
    - Understand State Law Requirements
    - Consider a Savings Clause
    - Reflect that the Lease Consideration Has Been Adjusted
    - Scope of the Exculpatory Clause
    - Geographical Reach of the Clause
    - Use Insurance and Indemnity Provisions to Reinforce Intent
  - Limitation of Liability Provisions in Leases
  - Conclusion
- Casualty Damage Provisions under Commercial Leases
  - Common Law and Statutory Law
  - Status of Lease
  - Rent
  - Insurance of Improvements
- Ins. Requirements for Real Estate Leases
  - Liab. Insurance Requirements
    - Commercial General Liability Insurance
    - Environmental Impairment Liability Insurance
    - Auto Liability Insurance
    - Workers Compensation Insurance
  - Property Ins. Requirements
    - Buildings
    - Improvements and Betterments
    - Personal Property
    - Time Element Coverage
    - Property Insurance Limits
    - Coverage Forms and Insured Perils
    - Boilers and Machinery
  - General Insurance Provisions
    - Evidence of Insurance
    - Notice of Cancellation, Nonrenewal, or Material Change
    - Acceptability of Insurers
    - Insurance Deductibles
  - Summary
  - Sample Insurance Requirements for Real Estate Leases
    - General Insurance Provisions
    - CGL and Umbrella Liability Insurance
    - Pollution Legal Liability Insurance



- Commercial Automobile and Umbrella Liability Insurance
  - Workers Compensation and Employers Liability Insurance
  - Commercial Property Insurance
- Real Estate Lease Review Checklist
- Commercial Real Estate Purchase and Sale Agreements
  - Recitals
  - Buyer Inspections and Approvals (Due Diligence)
  - Conditions to Closing
    - Buyer's Conditions
    - Seller's Conditions
  - "As Is" Provisions
  - Casualty or Condemnation
  - Indemnity Provisions
  - Insurance Requirements
  - Limitation of Liability and Exculpatory Provisions
  - Representations and Warranties
  - Liquidated Damages and Remedies
  - Dispute Resolution
  - Conclusion
- Commercial Real Estate Mortgages
  - Single Purpose Entity Structure
  - Prepayment Restrictions
  - Representations and Warranties
  - Insurance
  - Condemnation
  - Indemnity Provisions
    - Environmental Indemnity Agreement
  - Events of Default
  - Limited Recourse
  - Changes in Law Regarding Taxation
  - Conclusion
- Commercial Property Management Agreements
  - Recitals
  - Management Fee
  - Limitation of Liability
  - Budgets
    - Capital Budget
    - Operating Expense Budget
  - Insurance Requirements
    - Liability Insurance Requirements

- Property Insurance for the Managed Property
    - Insurance Administration
  - Indemnity Provisions
  - Approval of Contracts
  - Termination
    - Property Manager's Obligations After Termination
  - Leasing Indemnity of Property Manager
  - No Agency
  - Conclusion
- XIX: Personal Property Contracts
  - Equipment Leases
    - Ordinary Equipment Leases
      - Lease Description
      - Lease Term
      - Identification/Location/Use of Equipment
      - Maintenance/Repair of the Equipment
      - Taxes and Fees
      - Warranties
      - Events of Default
      - Risk of Loss
      - Trademark/Service mark
      - Indemnity and Insurance
      - Remedies
    - Lease or Security Interest?
    - Finance Leases
      - Commencement of Insured's Insurable Interest and Risk of Loss
      - Risk of Loss
      - Commercial Auto/Truck Insurance Coverage
      - Commercial Property Insurance
      - Loss Payee Designation
      - Additional Insured Endorsement
      - Procurement of CGL Insurance Pursuant to the Lease
      - Insurance vs Indemnity
      - Insurance Coverage for Indemnity Obligations
      - Binders
      - Workers Compensation Insurance
      - Other Insurance Issues
      - Bankruptcy Considerations
  - Purchase Orders
    - Applicability of the UCC: Sale of Goods or Services

- Purchase Order: Offer or Acceptance?
    - Key Question
  - Price: Open or Closed
  - Quantities of Goods
  - Time for Performance or Payment
    - Letters of Credit
  - Description and Inspection of Goods
  - Execution Requirements
    - Confirmation Letter Exception
  - Delivery Terms
  - Warranties
    - Express vs Implied Warranties
  - Indemnity, Limitation of Liability, and Disclaimer Provisions
  - Insurable Interests
  - Insurance Implications Arising From Use of Purchase Orders
  - Conclusion
- XX: Energy Industry Contracts
  - An Energy Exploration and Production Overview
    - The Major Players
    - The Role of the Oil Operator
    - The Role of the Drilling Contractor
    - The Role of the Well Service Contractors
    - Major Types of Contracts
      - Mineral Lease
      - Farmout Agreement
      - Joint Operating Agreement
      - Drilling Contract
      - Master Service Agreement
      - Master Charter Agreement
    - Conclusion
  - Insurance and Indemnity Provisions in the Mineral Lease
    - Insurance Requirements
    - Surface Damage Agreement
  - Mineral Lease and Farmout Agreement Sample Insurance Requirements
  - Risk Allocation Provisions in the Farmout Agreement
    - Insurance Requirements
    - Definition of "Payout"
    - Other Nonstandard Provisions
    - Conclusion
  - Risk and Claims Management for Onshore Joint Operating Agreements

- The Players and Their Roles
  - Professional Organizations
  - The Operator
  - Non-Operators
  - Government Agencies
- Modification of Contract Forms
- Insurance
  - The Importance of Insurance
  - Operator's Insurance Coverage
  - General Insurance Concepts in the Context of the JOA
- Risk Allocation
  - JOA Basic Commercial Risks: Consenting and Nonparticipating Parties
  - Non-Joint Losses, Costs, and Expenses
  - Importance of the Exculpatory Clause
  - Removing the Operator
  - The Operator as "Independent Contractor"
- Claims Management
  - Decide the Method of Communication with the Joint Account Attorney
  - Create a Protocol for Dealing with Subpoenas and Document Requests
  - Be Careful with Statements Made to Media and in Court Documents
  - Postpone the Gross Negligence Determination
  - Plan for Private Arbitration
  - Confirm the Rules on JIB Payments
  - Provide Reasonable Control and Settlement Authority Up Front
- Conclusion
- Risk Allocation in Onshore Drilling Contracts
  - The Role of Custom in Drilling Contracts
  - The Significant Impact of the IADC
  - Basic Principles of Risk Allocation
    - Uncertainty of the "At Law" Framework
    - The Industry's Desire for Certainty
    - "Knock-for-Knock" Indemnity
    - Use "Magic Language" in Indemnity Provisions
    - Anti-Indemnity Acts
    - Applicable Law
    - Particular Provisions
    - Consequential Damages Waiver
  - Insurance
    - The "Big Three" Insurance Protections
    - Contractual Liability Coverage

- Insurance Issues Particular to Drilling Operations
  - Loss of the Drilling Unit
  - Debris and Wreck Removal
  - Loss of the Hole
  - Lost Business Income
- Insurance Certificates
- Conclusion
- Risk Allocation Provisions in Master Service Agreements
  - Basic Functions of an MSA
  - Risk Allocation in the Oil Field
  - Setting the Basic Indemnity Framework
    - Foreman v. Exxon: Need for a Unified Risk Allocation Structure
    - Pass-Through Indemnity: Solution to the Foreman Problem
    - Drillers, Fracking Companies, and Large Service Contractors
  - Carve-Outs: Exceptions to the Overarching Indemnity Framework
    - Carve-Outs for Contractors' Down-Hole Equipment
    - Special Events Clauses: The Ultimate Carve-Out
  - Allocating Losses by Persons Outside of the "Groups"
    - Allocating Pollution Risks
  - Drafting Indemnity Provisions
    - Include "Magic Language" in the Indemnity Provision
    - The Difference between "Indemnify" and "Release"
    - Murky Waters: Indemnity for Gross Negligence and Punitive Damages
    - Battle of the "Notwithstandings"
    - Effect of Anti-Indemnity Acts on Right To Seek Indemnity
  - Insurance Coverage
    - The "Big Three" Insurance Protections
    - Insuring Contractual Liability
    - The Proper Use of Insurance Certificates
  - Call Your Insurance Agent or Broker
  - Particular Provisions Bearing on Risk Allocation
  - Avoid Conflicts between Warranty and Indemnity Provisions
    - Independent Contractor Provisions
    - Louisiana Statutory Employer
    - Choice of Law Provision
    - Savings Clauses
    - Primacy Clauses: The Battle of the Forms
    - Consequential Damages Waiver
  - Conclusion