

Contractors Insurance Survival Guide – Issue One

Patrick O'Toole, AU

Insurance for contractors is getting harder to place, and the restrictions that go along with offering coverage are getting tighter at the same time. What do the contractors themselves perceive? That insurance costs them more, and the companies are offering less. I've watched this process from the inside, as a company underwriter, and I offer the following information in the hopes of bringing standard market insurers, and their high-quality contractor insured's, back onto the same page.

The idea here is that, if we listen to what the insurers are *really* telling us, we might see that they are trying, in their own way, to help you help them, and thus reduce their cost, *and* yours.

Here's the first big issue that every standard insurer is clamoring for from contractors, and when they don't get it, a non-renewal notice is likely to follow.

The Hold Harmless/Indemnification Clause

This is a clause in the contract between a general contractor and his subcontractor. In essence, it formally states that the subcontractor is responsible for the work he performs, *and for any damage or injury that arises out of that work*. This changes, by contract, the usual state of affairs when a general contractor goes to work for a building owner/developer, and assumes responsibility for completing that work.

The traditional view – and it still usually holds sway – is that the general contractor is responsible for damage or injury arising out of both his own, *and* his subcontractors', operations. What the indemnification agreement does is give the general contractor a right to recover those damages from his subcontractor, if the subcontractor's negligence was what caused the damage.

Why are They Hassling Me?

Why is this important to the insurance company? For a number of reasons.

First, the indemnification agreement gives rights to the general contractor. And in turn, when the insurance company assumes the obligations of that GC after a loss, the company also obtains all the rights of that GC – so they get to enforce the indemnification agreement against the sub. If there's nothing but a handshake between them, the GC – who may have an ongoing relationship with the sub on this or other jobs – may not be a willing helper in trying to get the money back from the subcontractor who caused the damage. But if there is a pre-arranged, formal contract, everything is a lot clearer when the lawyers come in, and that's good for the insurance company.

Second, the indemnification agreement does not contain the exclusions that a standard general liability insurance policy contains. Here it helps the GC assert claims against a sub that might not be covered by the GC's own insurance.

Why does the *insurer* care about this if they exclude coverage anyway? Usually, insurers are obligated to *defend* claims against their insureds, even if they don't think the claims are covered, and even if they ultimately don't have to pay the claim. Defending a construction case can eat up \$25,000 without even trying. And when you're defending, you want as many defenses as you can get. I've been through a lot of litigated cases between contracting layers, and the clearer the contracts, the cleaner, quicker, and cheaper the case.

And third, an indemnification agreement makes it very difficult for a subcontractor – or his insurer – to sue the GC directly for claims that the sub had to pay initially.

But wait – didn't we already say that it's the GC, not the sub, who has to pay the initial claims? And isn't it usually third party claimants – be they building owners, occupants or visitors – who sue general contractors for damages? You can see why a sub might sue a general over payment terms, but damage claims?

All in the Family

Actually, the claims experience among construction insurers over the last couple of decades has seen a strong trend toward suits filed by subs against either the GC, other subs, or both. And these suits originate from worksite injuries.

Subcontractor employees who get hurt on a jobsite, and are lucky enough to work for a sub that actually maintains workers compensation insurance, might be entitled to large sums under the workers comp laws of the state. Workers comp is the “sole remedy” of that employee against his employer, so end of story, right? Well, no. Not if there's another sub or a GC at the same jobsite, against whom either the employee, or the sub's worker's comp insurer, can file a liability claim (either valid or the other kind). Once the workers comp carrier sues the GC to recover the comp benefits paid out, the injured employee almost always piles on to get something else too – after all, the comp carrier's attorney is already working to prove a negligence case against the GC, so why not?

And what about the employee of a subcontractor who *doesn't* have workers comp insurance? A lot of subs are pretending that their workers are “independent contractors”, responsible for maintaining their own insurance, and exempt from the requirements of workers comp coverage. For such workers, there is no real recourse against their direct employer that won't bankrupt that employer and make a compensation award meaningless. So for them, the GC at the site becomes the payor of first resort.

Trust, But Sign a Contract

A well crafted indemnification agreement makes it harder for such claims to pass through to the beneficiary of the clause.

I have seen (and as an insurer, been the victim of) indemnification agreements that went *too* far – that actually shifted responsibility away from general contractors *even if they were negligent*. But in general, what these clauses seek to do is force everyone in the construction transaction to be responsible for their own bad acts, and *not* assume responsibility for the bad acts of others.

Want your insurance company (or, perhaps, your *next* insurance company) to love you – and to show that love by giving you a break on premiums? Incorporate a good hold harmless/indemnification clause into your subcontractor agreements, and require the agreement on every job, from every sub. I could show you sample clauses that will pass muster for most insurers, and which you can run by your attorney and ask your subs to sign.

If you don't feel you can ask your subs to indemnify you, then you should realize that your premiums reflect that refusal. Insurers want everything on the table – they are part of the deal you make with your subs, and agree to back up your end of that deal. Handshakes may be good enough for you – but remember that your insurer has found out how much a handshake is worth when hundreds of thousands in damages are at stake. In basic terms, if you want to grow into a leader in the construction market, get on board with your insurers. They can get you there, and sub agreements are just one of the ways.