Fundamentals of Contractual Risk Transfer

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Contract Risk Transfer Goals

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- Create an Enforceable Indemnity Agreement
- Ensure Downstream Parties Maintain Adequate Insurance for the Risk
- Acquire Insured Status on Downstream Policies
- Communicate with Downstream Policies to Optimize Your Coverage
- Establish Parameters for Scope of Coverage

Standard Model for Downstream Risk Transfer

Contractual Indemnity Claim

Downstream Party

Upstream Party

Additional Insured Coverage

Downstream Party's Insurance

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The Contract as the Starting Point of Risk Transfer

Establishes Sub's Indemnity Obligation

Establishes Sub's Insurance Obligation

Triggers Sub's Policy

Contractual Indemnity

- Indemnity = risks transferred to Contractor based on contract, not common law
  - Varying degrees of overlap

- 3 Moving Parts:
  - How much indemnity will the law allow me to get?
  - Do I want to get less than the law allows?
  - Does the Contractor want to get less than the law allows?

Construction Anti-Indemnity Statutes

All Liability

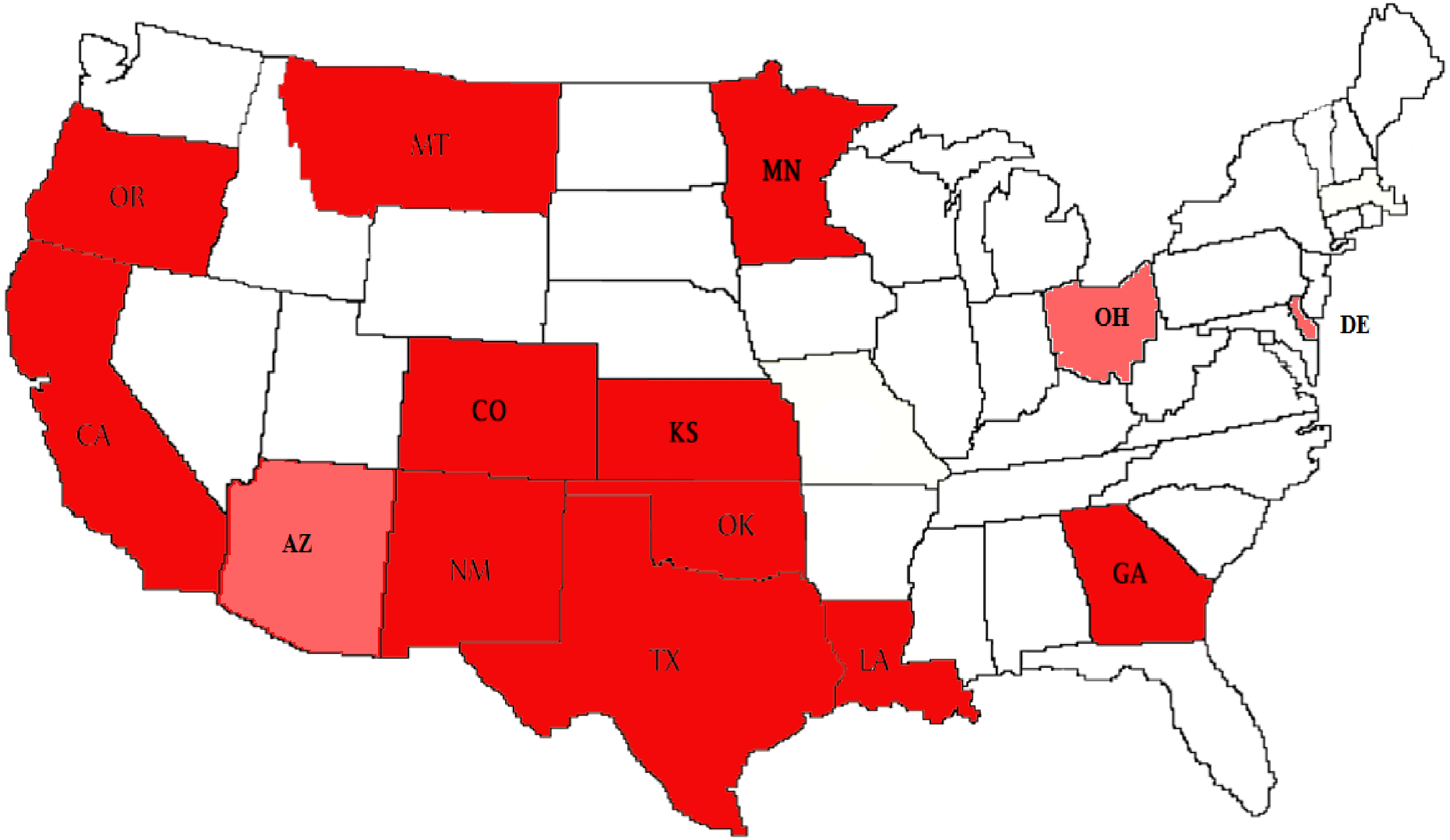
All But Sole Negligence

Only What's Not Your Fault

Only What's Their Fault

Dependent on State Law

Anti-Indemnity Applied to Insurance



A growing number of states extend their anti-indemnity laws to apply in some way to AI coverage, or more generally, insurance:

California, Colorado, Georgia, Kansas, Louisiana, Minnesota, Montana, New Mexico, Oklahoma, Oregon, and Texas

A few states have given some (but not a clear) indication that the anti-indemnity prohibition extends to insurance: Arizona (public projects), Delaware, and Ohio

Contract Indemnity – What Do Subs Try to Change?

- Limit indemnity to their acts
- Limit indemnity to their negligence
- Limit indemnity to bodily injury and property damage
- Cap indemnity at their contract price
- Eliminate consequential damages
- Limit to during construction

Insuring the Indemnity Obligation

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Covered	***Not Covered***
• Bodily injury • Property damage • Defense costs? • Professional liability? • Pollution liability? • Cyber liability?	• Fines/penalties • Public authority (stop orders) • Breach of contract • Intellectual property • Strikes

Liability

Contractual Insurance Requirements

- Lines of Coverage
- Limits Structure
- Duration
- Additional Insured
- Priority
- Notice of Cancellation
- Subrogation Waiver
- COI
- Specifics
  - Coverage Elements
  - Prohibited Exclusions

Specific Lines – Workers Comp

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Employee Leasing Companies	• Get the Contract • "If Any"
Professional Employer Organizations ("PEOs")	• Get the Contract • Review the PEO's Policy

Specific Lines – General Liability

Scope of Coverage Dictated by ISO CG 00 01 Requirement	• NOT by specific requirements
Risk Transfer Dictated by Your Parameters	• Additional Insured • Primary and Non-Contributory • Waiver of Subrogation • Notice of Cancellation

Specific Lines – Excess/Umbrella

Follows	Additional Insured General Scope of Coverage*
Doesn't Follow	All non-Additional Insured Risk Transfer Often contains additional exclusions limiting scope*

Specific Lines – Property/Tools & Equipment

OVERLAP WITH BUILDER'S RISK

WAIVER OF CLAIM

CRANES

Other Coverage Lines

- Auto Liability
- Professional Liability
- Pollution Clean-Up and Liability
- Cyber Liability
- Watercraft and Aircraft Liability
- Marine Cargo & Goods In-Transit

CAUTION! Certificates of Insurance

AGENCY CUSTOMER ID: ____________________

ACORD

NEW YORK CONSTRUCTION
CERTIFICATE OF LIABILITY INSURANCE ADDENDUM

DATE (MM/DD/YYYY)

THIS ADDENDUM SUMMARIZES SOME OF THE POLICY PROVISIONS IN THE REFERENCED INSURANCE POLICIES AND IS ISSUED AS A MATTER OF INFORMATION ONLY; IT CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. ALL TERMS, EXCLUSIONS AND CONDITIONS IN THE ACTUAL POLICY SHOULD BE CONSULTED FOR A MORE DETAILED ANALYSIS OF COVERAGE, AS THIS ADDENDUM DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES.

AGENCY	NAMED INSURED(S)

A Typical COI Is Not:

- Part of the sub's policy
- A document that controls the sub's coverage
- An enforceable contract between you and the sub's insurer
- An enforceable contract between you and the sub's broker

Where to Expect Pushback

- **Scope of Indemnity**
  - Limit it to my negligence
  - Limit it to what my insurance covers
- **Liability Waivers/Caps**
  - Consequential damages
  - Limit to contract value
- **Insurance**
  - More restrictive additional insured (or different form)
  - Lower limits
  - No professional
  - Status/Rights on builder's risk
  - Notice of cancellation

Questions?

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