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Insurance Considerations When Contracting: Practical Advice and Pitfalls to Avoid

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OVERVIEW

- Introduction of Speakers
- Insurance Provisions in Contracts
 - Key terms and what they mean
 - Examples
- Additional Insured Status
 - How you become an AI, scope, rights afforded, and other insurance
 - Examples
- Interaction of Insurance and Indemnity
- Key Takeaways

Presenter: Selena Linde



Selena Linde is a Partner in Perkins Coie's Insurance Recovery Practice and is a primary author and editor of the first edition Association of Corporate Counsel's Policyholders Primer on Insurance. Ms. Linde has been honored as one of twenty-five worldwide recipients of *Business Insurance's* Women to Watch, one of eleven National Insurance Stars and one of the top 250 Women Litigators by *Benchmark Litigation*. She is also listed in *Best Lawyers In America: Insurance Law, Legal 500* and *Washington, D.C. Super Lawyers*.

Ms. Linde has recovered more than a billion dollars for her clients and has an active trial practice representing policyholders in complex insurance coverage cases throughout the country and an equally active arbitration, mediation, and counseling practice. Approximately a quarter of her time is spent advising clients on insurance renewals and insurance contract requirements. Current selected representations include:

- Lead Coverage Counsel for Hospitality Company in Puerto Rico (Property and Business Interruption Claims stemming from Hurricane Maria)
- Lead Coverage Counsel for International Retailer (Cyber Breach Claims)
- Lead Coverage Counsel for Fortune 100 Company (General Liability and D&O Claims)
- Lead Coverage Counsel for Residential Capital (E&O and D&O Claims related to packaging of mortgage backed securities)
- Lead Coverage Counsel for Zillow (EPL and D&O Claims)

Join Ms. Linde's LinkedIn network for updates and articles on insurance coverage topics. She can be reached directly at (202) 654-6221 or SLinde@perkinscoie.com.

Presenter: Michael Sharkey



Michael Sharkey is a partner in the Insurance Recovery group at Perkins Coie LLP. He concentrates his practice on representing policyholders in insurance coverage disputes nationwide. He has represented clients on a wide variety of insurance matters and policies, obtaining numerous significant and precedent-setting rulings in litigation on key insurance coverage issues. Mr. Sharkey is listed in *Best Lawyers In America: Insurance Law*, and *Washington, D.C. Super Lawyers*.

Mr. Sharkey also regularly advises clients on the drafting and interplay of insurance and indemnification provisions in contracts, including construction contracts, supplier and service agreements, and corporate transactions, with the goal of aligning the provisions with the parties' intent during the drafting process – before a dispute arises. Selected representations include:

- Lead Insurance Counsel for Electronics Manufacturer: Advised on drafting of insurance requirements in supplier contracts and on the effect of corporate transactions on rights to insurance proceeds, as well as advice on insurance coverage for claims alleging mass torts, data breaches, and trademark infringement.
- Lead Insurance Counsel for Mining Company: Assisted in insurance recovery for several major insurance claims, including losses from fire, flood, structural collapse, and alleged environmental harms.
- Lead Insurance Counsel for Financial Services Company: Assisted in insurance recovery for the costs of responding to government investigations of its business practices.

Mr. Sharkey can be reached directly at (202) 654-6223 or MSharkey@perkinscoie.com.

Presenter: Doug Cox



Doug Cox is Assistant General Counsel for General Dynamics Mission Systems (“GDMS”) where he is responsible for full-spectrum legal support for the C4ISR line of business, including General Dynamics Global Imaging Technologies and General Dynamics SATCOM Technologies, Inc. (with operations in the U.S., Estonia, Germany, and India).

Types of Insurance Requirements in Contracts

- Requirement to procure or maintain certain insurance
- Requirement to add other party as an “additional insured” on your own policies
- Analysis required of the insurance requirements both for your company and the other party

Requirement to Procure or Maintain Certain Insurance

- Ensures source of recovery for claims against other party
- Some assurance of financial stability of the other party
- Often used in conjunction with an indemnity requirement
 - Contractual liability coverage
 - Insurance increases likelihood there will be something to recover under the indemnity

Maintenance of Insurance Provisions

- Minimum “A.M. Best” Ratings
- Who Pays?
- Types of Insurance Required
- Priority: Primary and Non-contributory, Excess Only
- Waiver of Subrogation
- Notice of Changes/Cancellation; Who is responsible
- ~~Certificates of Insurance Endorsements~~
- Claims under the insurance/deductibles
- Coverage required does not limit liability or indemnification requirements
- Additional Insured Status
- So does indemnification go first?

A.M. Best Ratings/Who Pays

“During the term of this Agreement, **Vendor** shall obtain and maintain, at its expense, the following insurance coverage purchased from an insurer(s) rated A+(VIII) or better by A.M.Best”

- Who is A.M. Best?
- What does A+ (VIII) mean?
- What is a good enough rating?
- Who pays?

What Types of Insurance May Be Required

- Certain common types of insurance that contracts may require to be maintained, or provide additional insured status:
 - CGL, Umbrella, Auto Liability, Professional Liability, Privacy/Data Breach, Workers Comp, Fidelity
- Particular contracts may require other types
 - Examples: Property insurance (leases), D&O tail insurance (corporate transactions), Workplace Violence/Crisis policies
- Some exposures not covered by standard insurance, e.g., patent infringement
 - Focus on other methods of risk transfer

What Types of Insurance May Be Required

- **BE SPECIFIC**
 - A.M. Best Rating
 - Who Pays?
 - Types of Insurance
 - Coverage lines, limits, occurrence/claims made, additional coverages, form numbers, etc.
 - How long can you report?
 - No vague language/options not to purchase

Insurance Required

- **Simply naming types of insurance coverage may not be sufficient**
 - Policy may have exclusions that affect the particular exposures you wish to guard against
- **Different endorsements require different causal relationships between the work under the contract and the alleged harm**
 - There may be exclusions applicable only to additional insureds
- **Amount of coverage**
 - Consider how impacted by other claims party may face
 - What happens if party buys less (or more) coverage than required by the contract?

What is wrong/missing with this example?

Vendor will maintain in full force and effect during the term of this Agreement:

- A. Commercial general liability insurance (including contractual liability coverage) on an occurrence basis for bodily injury, death, “broad form” property damage, and personal injury, with coverage limits of not less than \$1,000,000 per occurrence;
- B. Auto liability insurance coverage with coverage limits of not less than \$1,000,000 per occurrence for bodily injury and property damage;
- C. Workers compensation insurance as required by law in the state where the services will be provided with coverage limits of not less than \$1,000,000 per accident and employee;
- D. Umbrella (excess) liability insurance on an occurrence form, for limits of not less than \$1,000,000 per occurrence; (need for less depends on scope of work)

Maintenance of Insurance Provisions

1) **Required Coverages.** During the term of this Agreement, **Vendor** shall obtain and maintain, at its expense, the following insurance coverage purchased from an insurer(s) rated A+(VIII) or better by A.M.Best:

- a) Commercial General Liability (including products and completed operations, personal and advertising injury, and contractual liability coverage), written on an occurrence form with minimum limits of \$1,000,000 each occurrence, and \$2,000,00 in the aggregate.
- b) If **Vendor's** employees enter **Client** premises, Workers' Compensation Insurance with statutory limits and Employers' Liability (Stop-Gap Liability) insurance with minimum limits of \$1,000,000; Automobile Liability Insurance with \$1,000,000 coverage limits for each accident, including owned, non-owned and hired vehicles, and \$2,000,000 in the aggregate (only needed if driving is part of scope of work; limits can be modified for individuals/small companies).
- c) Professional Liability Insurance covering acts, errors and omissions in the performance of this Agreement with minimum limits of \$2,000,000 each claim. Such insurance shall include coverage for claims of infringement of copyrights, trademarks, trade dress and misappropriation of trade secrets. Such insurance shall be maintained to allow reporting of claims for at least 3 years after this Agreement terminates.
- d) Network Security & Privacy Liability Insurance with minimum limits of \$2,000,000 each claim. Such insurance shall cover liability or governmental investigations resulting from (i) the loss, theft, or disclosure of Confidential Information or personal non-public information of any User, (ii) the unauthorized access to, use of, or tampering with **Vendor's** computer systems, including denial of service attacks or inability of an authorized third party to gain access to services, and (iii) the introduction of a computer virus or malicious code into, or otherwise causing damage to, a computer, computer system, network, or similar computer related property and the data, software, and programs thereon. Such insurance shall be maintained to allow reporting of claims for at least 3 years after this Agreement terminates.

Priority of Insurance

“**Client** and its affiliates shall be named additional insureds on a primary and non-contributory basis, and the policy shall include a waiver of subrogation against **Client**, its affiliates, and their respective employees, directors and representatives.”

- Primary and non-contributory
- Excess only
- Priority between different lines of insurance is addressed by “other insurance” clauses and state law addressing conflicts between them”

Waiver of Subrogation

- Prohibits an insurance company from recovering the money they paid from a negligent third party
- Insurance company would otherwise “step in the shoes” of the policyholder
- Two types: Scheduled/Blanket
- Ensure it extends to affiliates, employees, directors, representatives, etc.
- Increase in premium possible

Notice of Changes/Cancellation

“Policy limits may not be reduced, terms changed, or policy canceled with less than thirty (30) days' prior written notice to **Client**. **Vendor** shall ensure that any of its agents, representatives, subcontractors, and independent contractors comply with the above insurance requirements.”

- Certificate of Insurance
- Endorsements

Proof of Insurance: Certificates of Insurance/ Endorsements/ Full Policy

“Proof of Insurance. Prior to the commencement of any work under this Agreement, and promptly upon renewal of any required insurance policies during the term of this Agreement, **Vendor** will provide a Certificate of Insurance and copies of any applicable endorsements evidencing the foregoing coverage. If requested by Client, Vendor will provide full copies of insurance policies within 15 days of Client’s request.”

What is wrong/missing with this example?

Insurance

Vendor shall maintain adequate and sufficient insurance to cover all potential losses to the Client under this Agreement. The Client shall be named as an additional insured under such policies, with evidence of such insurance provided to the Client within 30 days of the signing of this Agreement. All policies must contain a waiver of subrogation. Vendor's insurance carrier shall agree in writing to provide the Client with thirty (30) days' notice of cancellation or material change to coverage.

How are Insurance Claims Handled?

- **Deductibles:**

“Should an insurance claim become necessary under this contract, **Vendor** shall have sole responsibility for the payment of any deductible.”

- **Defense?**

- **Claims against the carrier?**

Limitations on Liability or Indemnification?

- Explicitly state that the coverage you require does not limit the other party's liability.

“**Vendor**'s maintenance of such insurance shall in no way limit its liability under this Subcontract, including, but not limited to, any indemnification obligations under [Insert Sections]. **Vendor**'s breach of this Section shall result in damages of the limits of such insurance coverage that should have been provided or maintained.”

Additional Insured Coverage

What is an Additional Insured?

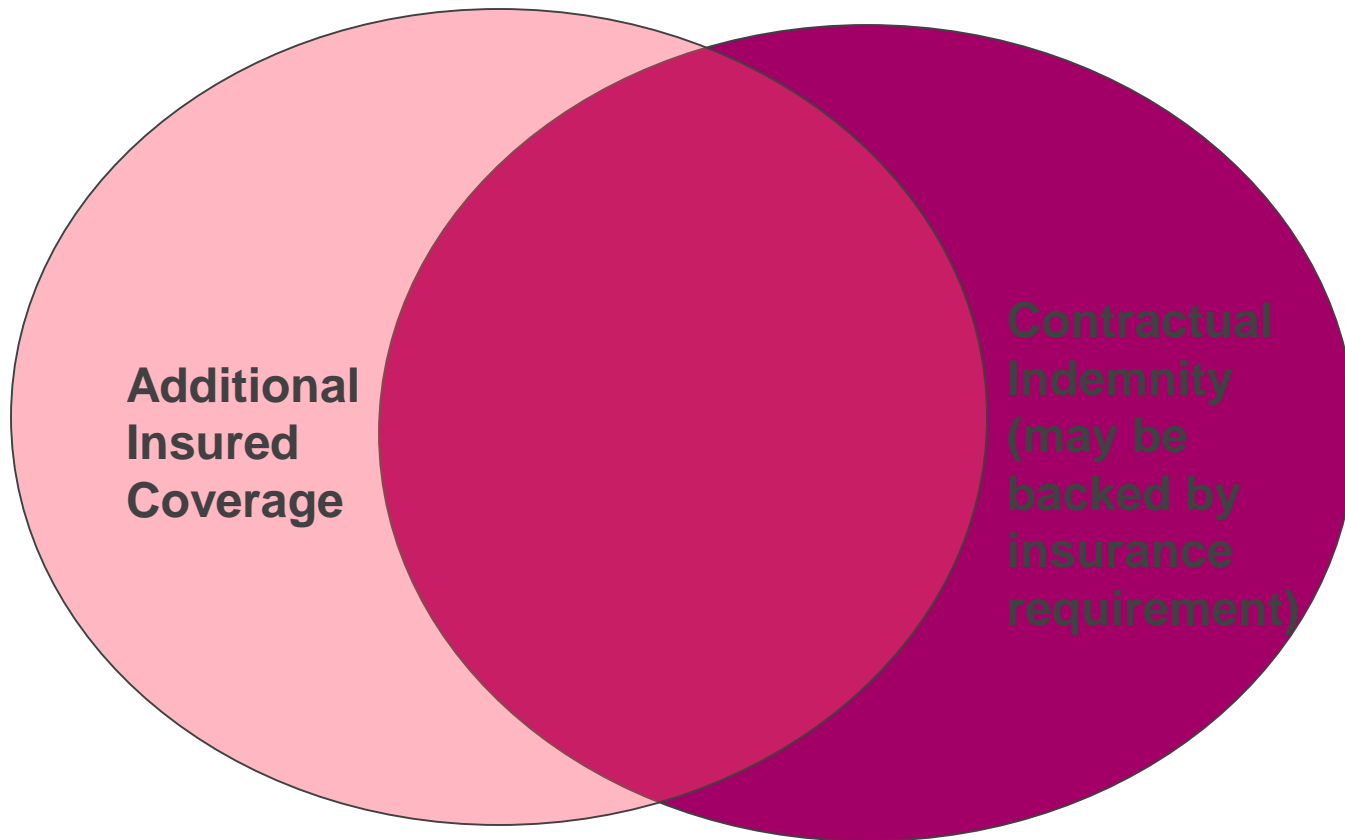


Additional Insured Status

- Other party is granted direct rights as an “additional insured” under the other party’s insurance
- The additional insured can notify the insurance company and access the coverage directly, without the need to make a claim against the other party
- A key benefit is access to the duty to defend under the insurance coverage

Additional Insured Coverage and Indemnity Agreements

What's the difference?



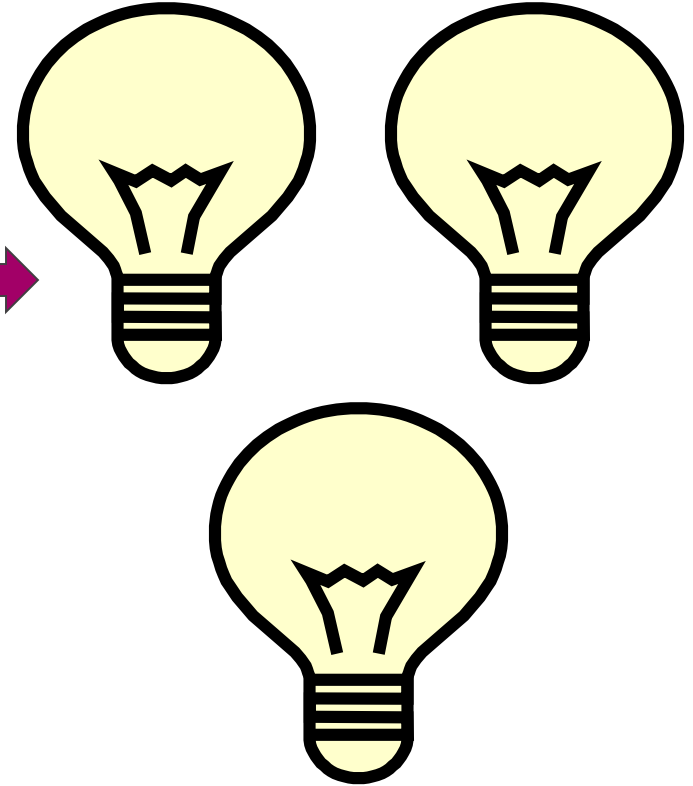
Additional Insured Coverage: Who Becomes An Additional Insured?



**Utility
Company**

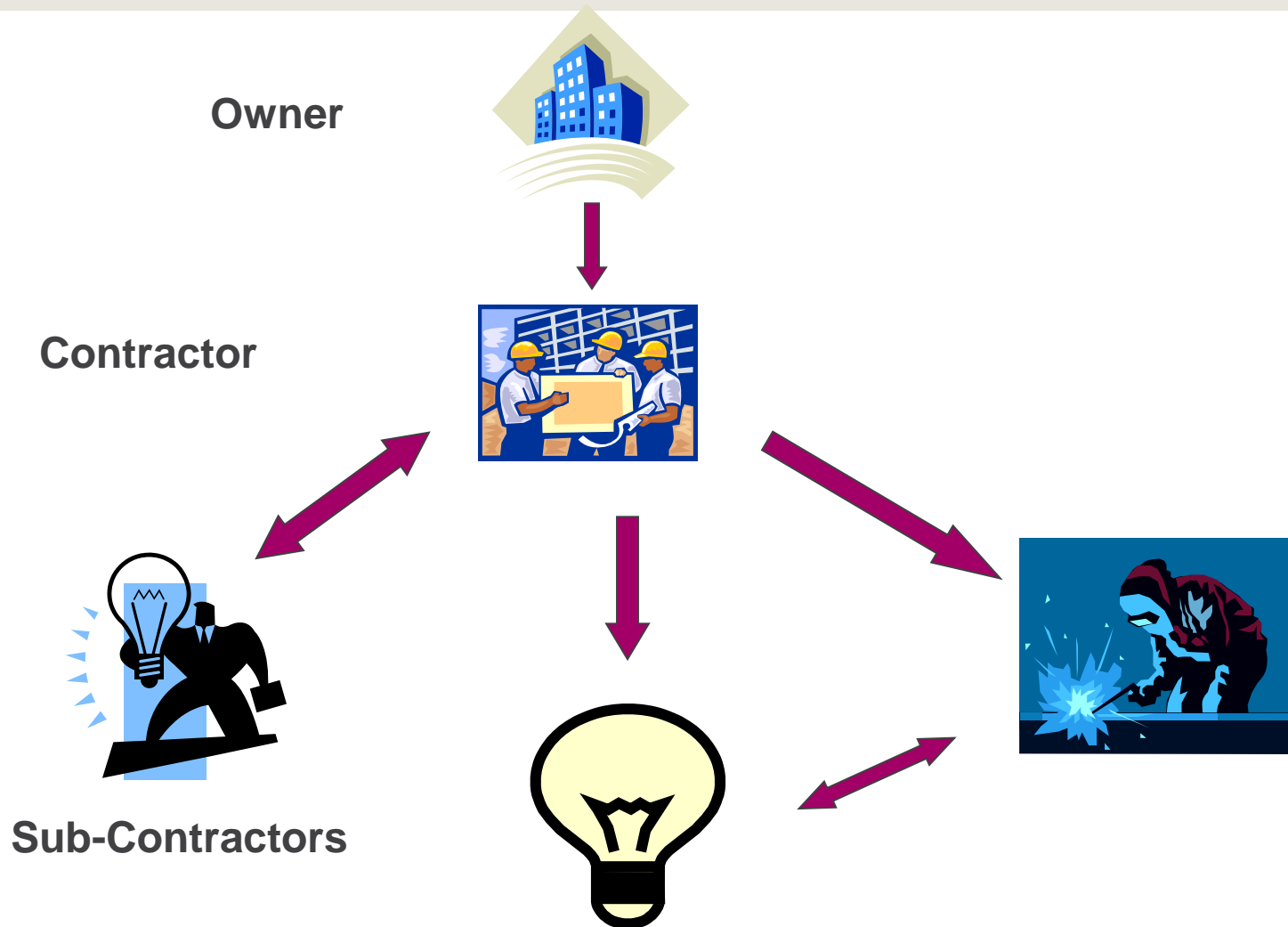


ACME Electric Line Work



**Utility
Customers**

Additional Insured Coverage: Who Becomes An Additional Insured?



Additional Insured Coverage: How Does Your Company Become An Additional Insured?



ACORD **CERTIFICATE OF LIABILITY INSURANCE** DATE (MM/DD/YYYY)

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

PRODUCER	NAME (AC, EL, Ed):	TYPE (AC, No):
	ADDRESS:	
	PRODUCER:	
	CUSTOMER ID #:	
	INSURER (S) AFFORDING COVERAGE	NAIC #:
INSURED	INSURER A:	
	INSURER B:	
	INSURER C:	
	INSURER D:	
	INSURER E:	

COVERAGES **CERTIFICATE NUMBER:** **REVISION NUMBER:**

THIS IS TO CERTIFY THAT 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 OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

TYPE	TYPE OF INSURANCE	INS. DIV.	POLICY NUMBER	POLICY EFF. (MM/DD/YYYY)	POLICY EXP. (MM/DD/YYYY)	LIMITS
GENERAL LIABILITY	COMMERCIAL GENERAL LIABILITY					EACH OCCURRENCE \$
	<input type="checkbox"/> CLAIMS-MADE <input type="checkbox"/> OCCUR					PER POLICY (Ex. acc. limits) \$
						PERSONAL & ADV INJURY \$
						GENERAL AGGREGATE \$
GEN'L AGGREGATE LIMIT APPLIES PER: <input type="checkbox"/> POLICY <input type="checkbox"/> PER <input type="checkbox"/> LOC						PRODUCTS - COMM'CP AGG. \$
AUTOMOBILE LIABILITY	ANY AUTO					COMBINED SINGLE LIM. (Ex. accident) \$
	ALL OWNED AUTOS					BODILY INJURY (Per person) \$
	SCHEDULED AUTOS					BODILY INJURY (Per accident) \$
	HIRE AUTOS					PROPERTY DAMAGE (Per accident) \$
	NON-OWNED AUTOS					\$
						\$
UMBRELLA / L&B	EXCESS L&B	<input type="checkbox"/> OCCUR <input type="checkbox"/> CLAIMS-MADE				EACH OCCURRENCE \$
	DEDUCTIBLE					AGGREGATE \$
	RETENTION	\$				\$
WORKERS COMPENSATION AND EMPLOYER'S LIABILITY	ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/DIR. EXCLUDED (mandatory in NH)	<input type="checkbox"/> Y/N				LEG. STAT. / OTH. LIMIT AMOUNTS / E.L.
	DESCRIPTION OF OPERATIONS below:					E.L. EACH ACCIDENT \$
						E.L. DISEASE - EA EMPLOYEE \$
						E.L. DISEASE - POLICY LIMIT \$

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (Attach ACORD 101, Additional Remarks Schedule, if more space is required)

CERTIFICATE HOLDER	CANCELLATION
	SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.

AUTHORIZED REPRESENTATIVE

ACORD 25 (2009/09)

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Creating Additional Insured Status

- Requirements set out in contract
- But the insurance policy must also support the additional insured status, often by endorsement
 - Specific endorsement
 - Blanket endorsement

Additional Insured Coverage

ACORD **CERTIFICATE OF LIABILITY INSURANCE**

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement or statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

PRODUCER: _____ CONTACT NAME: _____ PHONE: _____ FAX: _____

INSURED: _____ INSURER A: _____ INSURER B: _____ INSURER C: _____ INSURER D: _____ INSURER E: _____ INSURER F: _____

COVERAGES **CERTIFICATE NUMBER:** _____ **REVISION NUMBER:** _____

TYPE OF INSURANCE	ACORD CODE	POLICY NUMBER	POLICY EFF. DATE (MM/DD/YYYY)	POLICY EXP. DATE (MM/DD/YYYY)	LIMITS
GENERAL LIABILITY <input type="checkbox"/> COMMERCIAL GENERAL LIABILITY <input type="checkbox"/> CLAIMS-MADE <input type="checkbox"/> OCCUR GEN'L AGGREGATE LIMIT APPLIES PER: <input type="checkbox"/> POLICY <input type="checkbox"/> PRODUCE <input type="checkbox"/> LOC					EACH OCCURRENCE \$ DAMAGE TO RENTED EQUIPMENT \$ MED EXP. (Per one person) \$ PERSONAL & ADV INJURY \$ GENERAL AGGREGATE \$ PRODUCTS - COMPROP AGG \$ \$
AUTOMOBILE LIABILITY <input type="checkbox"/> ANY AUTO <input type="checkbox"/> ALL OWNED AUTOS <input type="checkbox"/> SCHEDULED AUTOS <input type="checkbox"/> HIRED AUTOS <input type="checkbox"/> NON-OWNED AUTOS					COMBINED SINGLE LIMIT (Per accident) \$ BODILY INJURY (Per person) \$ BODILY INJURY (Per accident) \$ PROPERTY DAMAGE (Per accident) \$ \$
UMBRELLA LIAB <input type="checkbox"/> OCCUR <input type="checkbox"/> CLAIMS-MADE <input type="checkbox"/> EXCESS LIAB <input type="checkbox"/> DEDUCTIBLE \$ <input type="checkbox"/> RETENTION \$					EACH OCCURRENCE \$ AGGREGATE \$ \$
WORKERS COMPENSATION AND EMPLOYERS' LIABILITY <input type="checkbox"/> ANY PROCEEDINGS AGAINST THE EXECUTIVE OFFICER(S) UNDER EXCLUDED (Mandatory in NH) If yes, describe under DESCRIPTION OF OPERATIONS below	Y/N/A				WC STATE - <input type="checkbox"/> OTHER STATES - <input type="checkbox"/> E.L. EACH ACCIDENT \$ E.L. DISEASE - EA EMPLOYEE \$ E.L. DISEASE - POLICY LIMIT \$

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (Attach ACORD 101, Additional Remarks Schedule, if more space is required)

CERTIFICATE HOLDER: _____ CANCELLATION: _____

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.

AUTHORIZED REPRESENTATIVE: _____

Insurance Company

Named Insured

Policies and Coverage

Specific Limitations

Certificate Holder

Scope of Coverage: What Is The Scope Of Additional Insured Coverage?

Willis		CERTIFICATE OF LIABILITY INSURANCE		Page 2 of 3	DATE 04/12/2007
PRODUCER	877-945-7378	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.			
Willis North America, Inc. 26 Century Blvd. P. O. Box 305191 Nashville, TN 37205191		INSURERS AFFORDING COVERAGE		NAIC#	
INSURED		INSURER A: ACE INA Insurance	22667-008		
		INSURER B: ACE American Insurance Company	22667-001		
		INSURER C: ACE Insurance Company	22667-009		
		INSURER D: ACE American Insurance Company	22667-003		
		INSURER E:			
DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLES/EXCLUSIONS ADDED BY ENDORSEMENT/SPECIAL PROVISIONS					
Metro Elevator Co. is included as Additional Insured as respects endorsement #CC1E15-10 with regard to Erection, rental & dismantle of Champion Hoist lease #20252 as respects Montour Power Station, Washingtonville, PA.					

Notes specific endorsement

Scope of Coverage: What Is The Scope Of Additional Insured Coverage?

ADDITIONAL INSURED – LESSOR OF LEASED EQUIPMENT			
Name Insured		Endorsement Number	
[REDACTED]		10	
Policy Symbol	Policy Number	Policy Period	Effective Date of Endorsement
HDO	[REDACTED]	06/30/2006 to 06/30/2007	06/30/2006
Issued By (Name of Insurance Company) Ace American Insurance Company			
<small>Insert the policy number. The remainder of the information is to be completed only when this endorsement is issued subsequent to the preparation of the policy.</small>			
THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.			
This endorsement modifies insurance provided under the f			
COMMERCIAL GENERAL LIABILITY COVERAGE FORM			
SCHEDULE			
Name of Person or Organization		[REDACTED]	
It is agreed that the "Persons or Entities" provision is amended to include any person (s) or organization (s) shown in the schedule, but only with respect to their liability arising out of the maintenance, operation or use by you of equipment leased to you by such person(s) or organization(s), subject to the following additional exclusions:			
This insurance does not apply:			
1. To any "occurrence" which takes place after the equipment lease expires;			
2. To "bodily injury" or "property damage" arising out of the sole negligence of the person or organization shown in the Schedule.			

Limitation as to background of claim

Common Missteps in Creating Additional Insured Status

- **Misidentifying the party to be included as additional insured**
 - Misnaming in specific endorsement
 - Failing to meet requirement of blanket endorsement (e.g., work started before there is a “written contract”)
- **Incorrect description in the contract itself**
 - Wrong entity identified as the party to be named (e.g., contracting with parent but subsidiary performing the work)
 - Wrong insurance listed as required
- **Sometimes courts will reform obvious mutual mistakes, but better to list correctly**

Additional Insured Coverage: Who Controls the Rights of the Additional Insured?



7. Separation Of Insureds

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:

- a. As if each Named Insured were the only Named Insured; and
- b. Separately to each insured against whom claim is made or "suit" is brought.

Scope of Coverage: Examples

CG 20 10 07 04

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – SCHEDULED PERSON OR ORGANIZATION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Limitations to Coverage

A. Section II – Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

1. Your acts or omissions; or
2. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

Additional Exclusions

B. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This insurance does not apply to "bodily injury" or "property damage" occurring after:

1. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or
2. That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

Scope of Coverage: Examples

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – DESIGNATED PERSON OR ORGANIZATION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Section II – Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by your acts or omissions or the acts or omissions of those acting on your behalf:

- A.** In the performance of your ongoing operations; or
- B.** In connection with your premises owned by or rented to you.

Scope of Coverage: Current ISO Forms

- **ISO: Insurance Services Office**
 - Revised standard CGL policy forms as of April 1, 2013
 - Additional Insured Endorsements
 - Insured Contract Definition Endorsement
 - Primary and Noncontributory Other Insurance Endorsement

Scope of Coverage: Current ISO Forms (Cont'd)

- **Owners, Lessees, or Contractors**
 - *“To the extent permitted by law”*
 - No broader than contract requires
 - Insurance limits are capped at contract requirements
- **Blanket Additional Insureds**
 - Coverage for upstream suppliers/
contractors

Scope of Coverage: ISO Forms (Cont'd)

- **Insured Contract Definition Endorsement**
 - Limits “Insured Contracts” to extent the named insured’s assumption of tort liability is permitted by law
 - Restricts ability of indemnitee to access insurance coverage
 - Request copies of insured contract endorsements

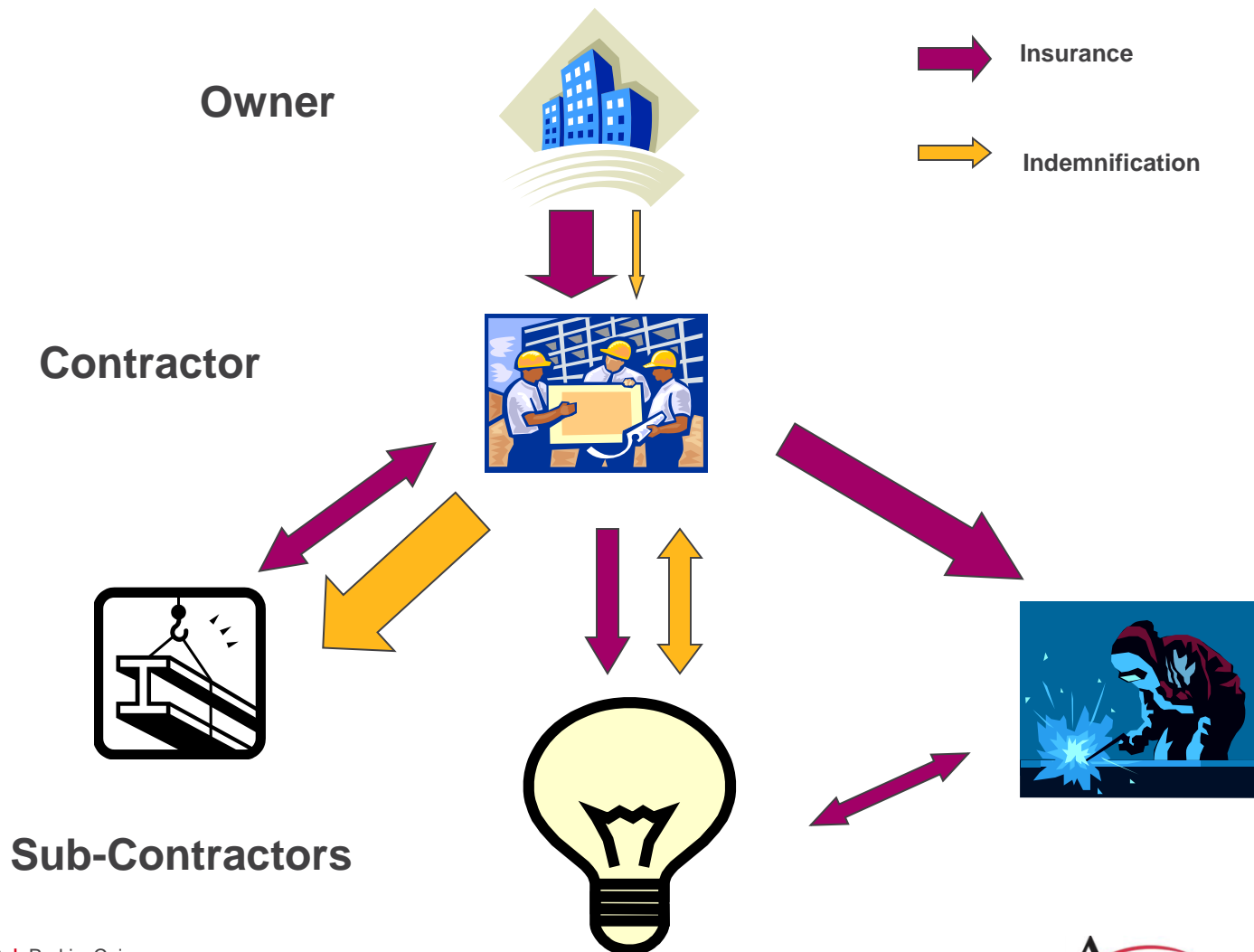
Avoiding Pitfalls

- **List details of coverage required**
 - Minimum limits
 - Specific type of coverage, or even particular policy form
 - Presence of desired coverage, or absence of certain exclusions
- **Get copies of the policies, or at least endorsement – certificates of insurance are not enough!**
 - Updates at renewals
- **Actual insurance rights vs. mere claim for breach of contract for failing to obtain proper insurance**

Who Goes First

- With multiple lines of insurance, and indemnification, there may be disputes as to which goes first
- Disputes may arise as between relative priority of insurance and indemnify, or different lines of insurance

Additional Insured Coverage and Indemnity Agreements



Maintenance of Insurance/Indemnification Clauses – Sample Vendor Contracts

Indemnification

Vendor agrees to indemnify, defend and hold harmless Client, its officers, directors, volunteers, employees, contractors and agents, from any and all claims, losses, damages, liabilities, judgments, or settlements, including reasonable attorneys' fees, costs and other expenses, incurred by the Client on account of any act, omission or breach of this Agreement or arising in any way from services performed by Vendor pursuant to this Agreement. Vendor remains liable for all damage or injury due to Vendor's negligence, or the negligence of Vendor's employees, contractors or agents.

Sponsorship Agreement

Indemnification and Insurance

Company and the Association agree to indemnify, defend and hold harmless each other, their officers, directors, employees, volunteers, subcontractors and agents, from any and all claims, losses, damages, liabilities, judgments, or settlements, including reasonable attorneys' fees, costs, and other expenses incurred on account of the indemnifying party's negligent acts or omissions in connection with the Sponsorship. In addition, Company shall maintain insurance of not less than \$1,000,000 for comprehensive general liability, with evidence of such insurance provided to the Association within 30 days of the signing of this Agreement.

Interaction of Insurance and Indemnity

- If insurance and indemnification respond to the same loss, which goes first?
 - Is indemnification net of insurance, or is insurance company subrogated to indemnification rights?
- If agreements are silent, courts may apply default rules
- Specific language in agreements can avoid disputes and uncertainty
- Waiver of subrogation

Scope of Coverage

Who pays the deductible or retention?



Scope of Coverage

Other Insurance



Other Insurance

- **Company's own insurance policies**
 - CGL (property damage, bodily injury, advertising injury)
 - D&O (company wrongful acts)
- **Overlapping coverage leads to coverage disputes**
 - Which is primary
 - What if a conflict
 - What if limits of AI too low

Multiple Lines of Insurance

- Priority between different lines of insurance is addressed by “other insurance” clauses and state law addressing conflicts between them
- “Primary and non-contributory”

Anti-Indemnity Statutes and Additional Insured Requirement

- State anti-indemnity statutes restrict the ability of certain types of contracts (e.g., construction) to grant indemnity for a parties' own negligence
- Do these statutes restrict the ability of a party to require it be named as an additional insured
 - Some states' statutes address this one way or the other, but most do not
 - Courts in different jurisdictions have reached different results
 - Be aware of your jurisdiction's rules

Key Takeaways: Insurance (and Indemnification) Matters!

- **What does the agreement require?**
 - Insurance, indemnity, or both?
 - How do such agreements interact?
- **Get copies of:**
 - Relevant endorsement
 - Full policy
- **Understand the scope of coverage**
- **Specific language in agreements can avoid disputes and uncertainty (otherwise default rules)**

Questions???

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