

STRUCTURAL BUILDING COMPONENTS MAGAZINE (FORMERLY WOODWORDS)

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"Are You the Deep Pocket" by Bob Bush

As a manufacturer, you are exposed to litigation from a number of people, not only from the product manufactured, but the risk is increased because you depend on others to erect and construct the product you sell. You are asked to sign agreements, contracts, and invoices that contain confusing wording. By signing these documents you and your company could be exposed to liability, often not covered by insurance agreements.

Analyzing the contracts and insurance agreements can be a complex and difficult task. The wording is sometimes arranged in seemingly random fashion and it is often highly technical. The interpretation of the language may require references outside the contract to court decisions, statutes, and negotiations with the insurance company.

Outlined below is a 'glossary of terms' seen in indemnity agreements, contracts, and certificates of insurance. Knowledge of these terms could help avoid litigation.

GLOSSARY OF TERMS

Additional Insureds: Those individuals or entities who are not automatically included as insureds under the Commercial General Liability coverage of the named insured, but for whom the named insured may add coverage by endorsement to its liability policy. Usually, additional insureds are added by endorsement. These endorsements do not increase the policy limits. Every time you add an additional insured, there's a chance that limits could be used up paying for claims made against one of those insureds. This means, of course, you could be left without enough limits to pay claims. An additional insured does not have the same rights or responsibilities under the policy as named insureds. There may be an additional premium charged by the company to endorse the policy with an additional insured.

Blanket Additional Insured Endorsement: This endorsement provides additional insured coverage under the named insured's Commercial General Liability coverage to an entity if the named insured is required by contract to do so. There may be an additional premium charge by the company to add blanket additional insureds to the policy. The same is true as above regarding limits. You should discuss with your agent if this endorsement should be added to your

policy.

Certificate of Insurance: A document which provides evidence to the party to whom it is issued that coverages and limits are being provided to the insured by the insurance company. You will give certificates and receive certificates. When you get a certificate you should:

1. Delete words "Endeavor to" notify if coverage is canceled. You want to know if an insurance company cancels on a company that provides you a certificate of insurance.
2. Increase notice of cancellation to 90 days. Most certificates only allow 10. You should require a certificate of insurance from all parties related to your business. Companies that come on your premises to provide services, contractors, repair companies, delivery services, etc. You should also require certificates of insurance from contractors who purchase your products. If the contractor has no coverage or inadequate cover-age, you could become the 'deep pocket' should a loss occur.

Hold Harmless: A provision in a contract that requires one contracting party to respond to the legal liabilities of the other party to the public. For example, construction contracts usually require the contractor to indemnify the owner with respect to the owners' liability to members of the public who are injured or whose property is damaged during the course of the contracting operations. There are a number of types of hold harmless agreements which are differentiated by the extent of liabilities they transfer. Be very hesitant to sign any agreement that has a hold harmless provision. Discuss this with your insurance agent.

Products-Completed Operations Hazard Insurance: Provides coverage for an insured against claims arising out of products sold, manufactured, handled, or distributed or operations which are complete. Claims are covered only after the product has been sold or operations have been completed or abandoned by the named insured.

Waiver of Subrogation: Businesses are occasionally required, as a condition to being awarded a job contract, to waive all rights of recovery against the party awarding the contract for liability arising out of that party's negligence. Governmental agencies and large self-insured corporations are the usual requesters of such waivers. Waivers must be executed prior to a loss to be accepted by the insurance carrier. Workers' compensation, auto, and general liability policies must be endorsed. There may be an additional premium charged by the company to endorse the policy with waiver of subrogation. Be aware of contracts containing waiver of subrogation terms. This should be discussed with your agent.

INDEMNITY AGREEMENT

When you agree to 'indemnify' an owner or contractor on a construction project, you literally agree to 'stand in the shoes' of them and to assume liability or responsibility that would otherwise be theirs. Within the scope of that indemnity agreement, you become an insurer of losses. The contractual portion of the liability insurance policy may or may not respond to the liability assumed. Contracts signed should be reviewed to identify problem wording in indemnity agreements.

Obviously, the success of any indemnification negotiation depends upon the actual and perceived attitude of the parties involved. The owner's attitude can be perceived from an "Anything is negotiable" standpoint to a "Take it or leave it, there are plenty of manufacturers who will accept this!" Your attitude can range from "There's not enough profit in this job to self-insure the liability of others" to "We take risks like this all day, just get the paper-work done so I can start work!"

You should always talk to your agent. Ask the agent to read the contracts you sign. Ask your attorney to establish procedures in your company as to what wording and responsibilities you should be willing or unwilling to assume.

SAMPLE WORDING FOUND IN CONTRACTS

There are certain words or phrases that should raise red flags. Be careful to sign any contract or written agreement that contains the following wording.

...and defend...": If you agree to "defend," you will find long before any legal liability is established, you will have an obligation to retain an attorney and mount a defense. It is very unlikely the insurer will have any interest in providing defense coverage until such time that the insurer can determine if the indemnity agreement is legal and enforce-able and the obligation assumed are covered by the contractual liability insurance.

It is unlikely these facts will become evident early in the claim's investigation period and may likely not be determined until final judgment or settlement. You could be responsible for this obligation out of your own pocket. Defense wording should be deleted from the indemnification agreement.

" ...Engineer...": You should realize that you cannot indemnify the engineer for his professional negligence. This should not be a negotiable point. The engineer should be deleted from the indemnity agreement or, a more likely approach, exclude his professional negligence by indicating that the obligations under this indemnity agreement shall not extend to the liability of the engineer, his agents, or employees, arising out of (1) the preparation or approval of drawings, opinions, reports, surveys, change orders, designs or specifications, or (2) the giving or failure to give direction or instructions by the engineers, his agents or employees providing such giving or failure to give is the primary cause of the injury or damage.

" ...Representative, invitees, designees, agents...": Will there be anyone else left on earth after including all of these people? Why should you have to put the total corporate assets at risk, as well as all of the insurance coverage to provide primary insurance coverage to protect the legal liability of people who he doesn't even know or for people who are no way related to the project? Why do these people deserve to be protected against loss of injury for which they are legally liable? These entities should be deleted from the indemnity agreement. You are entitled to know the names of those you are providing insurance for and would like to reserve the right to discuss the appropriateness of the indemnity to each party.

"...any and all claims, actions, cause of actions, obligations, demands, suits...": Most of these wordings don't match up with the insurance provided under contractual liability coverage. The policy agrees to "pay those sums the insured becomes legally obligated to pay as damages because of 'bodily injury' and 'property damage,'" Any and all claims, actions, causes of actions, obligations, demands, and suits are not considered to be damages. Their occurrence, or their alleged occurrence, may not trigger coverage by the contractor's insurer. Out of the entire laundry list of items contained in the indemnity agreement, only liabilities, loss, damage and expenses are considered "damages" under the insurance policy. Those other items arise in connection with damages, but are not the subject of indemnification from an insurer and should be struck.

"...The willful misconduct of any of them...": Quite obviously, the liability assumed by this provision is not insurable.

"...Violation of any state, federal, local law, code, ordinance, or regulation, including but not limited to the Americans with Disabilities Act of 1990...": It is impossible to know all the state, federal, local laws, codes, ordinances, or regulations which may somehow have a bearing. There's not an attorney in this country who is capable of knowing all of those laws! This provision needs to be deleted from the indemnity agreement. The new American with Disabilities Act with all of its yet-to-be tested regulations might have you indemnifying people for years to come.

Fines, penalties, obligations to modify work to comply with laws are generally not going to be covered by insurance.

Insurance and insurance-related issues can be confusing. Be careful in signing agreements and assuming liability without a good knowledge that your insurance coverages are properly structured to cover the exposure. Careful analysis of contracts, invoices, and work orders should be clearly reviewed. Be aware that others are attempting to make you liable for their negligence. Always review with your insurance agent and attorney written agreements you plan on signing.

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