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## THE INSURANCE NEWSLETTER

Summer 2015

### Anti Indemnity Statutes and Contractors

It's almost impossible these days to find a construction contract that doesn't include "hold harmless", "indemnification", "additional insured", and/or "waiver of subrogation" provisions somewhere. These are clauses that attempt to hold the subcontractor legally accountable for jobsite accidents and injuries.

No one would argue that a subcontractor should not be responsible for injuries it causes. The problem arises when these clauses attempt to shift liability for accidents that are not the fault of the subcontractor. Owners and general contractors have long sought to do just that by use of indemnity clauses which shift the responsibility to pay damages (often including attorney's fees and litigation costs) to subcontractors without regard to who actually caused the loss. There are a lot of reasons why this is not a good idea for anyone other than the owner or general contractor, but given uneven negotiating power typical in these relationships, these clauses keep popping up, always to the subcontractor's detriment.

States have an interest in seeing that the financial consequences for injury or loss fall on the responsible party, but since subcontractors typically are not in a position to insist on that, many states have enacted legislation to level the playing field and mitigate some of the more egregious abuses by upper tier owners and contractors. Currently forty five states have some kind of anti indemnity (as they are called) statutes on the books. These are specifically intended to prevent the party with superior bargaining power (owner/general contractor) from taking advantage of the party with inferior power (the subcontractor).

These statutes deal with the three types of indemnity agreements:

Limited Indemnity, where the subcontractor assumes liability only for its own negligence; the owner/GC has no protection if it is even partially at fault.

Intermediate Indemnity, where the subcontractor has responsibility for its own sole or partial negligence. These may be full indemnity agreements, where the subcontractor is responsible for all damages even if only partially at fault, or partial indemnity, where liability is apportioned based on percentage of fault.

Finally, Broad Indemnity is where the subcontractor is responsible regardless of who is at fault. Even if the owner or GC is solely at fault, the subcontractor pays.

Broad indemnity clauses are clearly unfair, and are the target of most states anti indemnity legislation. Limited indemnity provisions are almost equally one sided since the subcontractor must be 100% liable for them to attach, and the world doesn't really work that way in most cases. All states allow limited indemnity provisions, but they are almost never seen in real world use.

Full or partial intermediate indemnity is where most states have some say. Seventeen states prohibit broad indemnity clauses outright. Twenty four more ban broad indemnity clauses and intermediate indemnity agreements, too; owners or GC's can't transfer liability for their own actions to others. Conversely, six states allow broad indemnity agreements.

Of course the question of who is indemnified, and how, can't be separated from the question of how insurance applies, since in most cases subcontractors will look to their liability policies to protect them when a claim occurs. There are two parts to the liability policy that pertain here.

The first is the contractual liability section, which protects for the liability assumed by contract, as with these indemnity agreements; the second is additional insured provisions, usually applicable since the superior party to these contracts will not only require indemnification, they'll also want to be named on the policy.

Anti-indemnity questions are complex, governed as they are by applicable statutes in the state concerned, terms of the contract between the parties, the indemnitor's insurance policy and the specifics of each individual claim. In cases where liability may be determined by degree of fault, conclusion must also wait for a jury to allocate fault.

All that said, we can only touch lightly on the topic in the space available here. Nevertheless, it's not a topic to overlook if you have an exposure. We'll be happy to sit down with you and go over your own specific situation.

### Spring Weather

Spring is the season of unsettled weather, as anyone who follows the news knows. Tornadoes, thunderstorms and hail are the main culprits, although flooding has been an issue (again) the past couple of months. Storms in the middle of the country hit cars and homes with golf ball-sized hail, but even hail the size of a pea can pack quite a punch and cause substantial damage.

Damage to buildings and structures from hail is covered by most property policies; damage to vehicles from hail is covered by the comprehensive physical damage section of auto policies. Comprehensive covers a range of perils, including fire, theft, vandalism, broken glass and such. Interestingly, insurance industry sources report that hail accounted for 42% of all comprehensive auto claims during the second quarter.

As you would expect geography impacts where hail damage is found most often, with the Midwest being the region experiencing the most claims. Nevertheless, increases in hail related claims were widely reported, from Vermont and Delaware to New Mexico and South Dakota and many states in between.

For individuals or businesses insuring just one or a few vehicles hail claims can be an annoyance, but for organizations operating larger fleets in areas prone to hail damage, a hailstorm can leave a large number of vehicles with heavy damage from an event that can last only minutes (the average hailstorm lasts just six minutes). And the out of pocket cost can be heavy if each vehicle is subject to a separate

comprehensive deductible for the damage it sustains.

If you think you might be exposed to this type of loss it's worth exploring a catastrophe cap on the comprehensive deductibles in your fleet policy. For instance, if you have a \$1,000 comprehensive deductible per vehicle, many underwriters will offer a cap of three to five times that for comprehensive claims arising from the same event. With such an endorsement your out of pocket costs would be capped even if dozens of vehicles were damaged from the same hailstorm.

Other comprehensive losses are also covered by this; think of vandals attacking a fleet of parked autos, or a fire in an indoor garage. Anyone parking a large number of vehicles in a yard or garage should consider this type of endorsement. It's cost is typically negligible; give us a call if we can help you with this.

### Changes in the NFIP

The NFIP (National Flood Insurance Program) is undergoing some significant changes as a result of passage of the Biggert-Waters Flood Insurance Act of 2012 (BW-12) and the Homeowner Flood Insurance Affordability Act (HFI-AA) of 2014.

Standard insurance companies (i.e., for profit companies) had long refused to write flood insurance policies on structures built in areas known to be exposed to flooding. There is a technical insurance industry term used to describe this type of underwriting position; it's called "common sense". In stepped the government in 1968, offering to provide subsidized insurance on flood prone properties. The results were predictable; the NFIP was severely underfunded and has run significant deficits, especially recently following Katrina, Sandy and other recent flood events. The program has been hemorrhaging money and requiring bailouts and last minute congressional deals to keep the program authorized and funded, usually year to year.

Biggert-Waters was intended to strengthen the NFIP. It extends the program for five years while also requiring significant changes to all major aspects of the program including updating flood maps, revising the rules of the insurance program and increasing premiums to actuarially sound levels. In effect, the government is getting out of the business of subsidizing many folks who choose to build in areas that are predictably occasionally underwater.

All changes were effective with policies effective on or after April 1, 2015, so if you have a flood policy renewing after that date you'll see them then. While some of the changes had to do with flood policies on residential properties, most of our readers will be chiefly concerned with changes affecting businesses, so we'll look mainly at those. Businesses, secondary residences and severe repetitive loss properties don't get a grace period and will see immediate changes in their formerly subsidized flood policies. Changes include:

- Flood zone maps are changing. That means buildings might now be in a flood zone that weren't before, or they may now be in a higher-risk zone than before. The Federal Emergency Management Agency (FEMA) is updating maps throughout the country to reflect current flood risk.
- Grandfather status is being eliminated. Many buildings were formerly allowed to keep their original flood-risk rating even if the zone designation was changed on a later flood zone map. Now, all buildings will be rated using the most current maps.
- Flood insurance premiums are expected to increase. Current premiums are discounted and subsidized by the government, but government support for flood insurance policies is being phased out except for those covering primary residences. There will no longer be any support for commercial buildings, second homes and repetitive loss properties. Premiums could potentially increase by 25 percent per year for the next four years until the full-risk rates are reached. For the mathematically inclined that could mean an increase of almost 150%.
- Certain events will now cause an immediate increase in flood insurance premiums. The loss of subsidies and grandfathered status will be phased in over a four or five-year period. However, rates will immediately increase to full-risk rates if you allow a flood insurance policy to lapse, buy a flood policy for the first time, or buy a property in a flood zone.

In point of fact, in the past 5 years, all 50 states have experienced floods or flash floods. Over 20% of NFIP claims (and over 40% of total annual flood damage) come from areas outside recognized flood zones. Anywhere it rains, it can flood, and just a few inches of water from a flood can cause tens of thousands of dollars in damage.

If you are not in a flood zone insurance will still be inexpensive and available. If you are, expect to see your costs increase to a level that reflects your true exposure.

## Fiduciary Liability Risks Growing

Under the provisions of the Employee Retirement Income Security Act (ERISA) trustees of retirement plans face a potential for personal liability arising from acts or omissions in their role as fiduciaries for those plans. Many of our readers are in this role, so a recent Supreme Court ruling could personally affect you.

Succinctly, the case had to do with allegations of excessive fees in investment funds selected for participants in a retirement plan, and whether the six year statute of limitations for such actions started when the employer initially selected those funds, or later. The employer argued that the initial selection, which was more than six years ago, precluded liability.

The Court said no, that the employers and fiduciaries have "...a continuing duty to monitor investments and remove imprudent ones." Since they determined that the duty was a continuing one, the statute of limitations did not apply.

This decision slipped by without much notice, but you can bet the plaintiff's bar noticed. If you are a fiduciary and you haven't taken a look at the plans you are responsible for in a while, now is the time to do that. You should also review your fiduciary liability policy; we can help you with that.

## Symbolic Business Auto Coverage

The standard ISO (Insurance Services Office) business auto insurance policy, widely used to afford coverage for commercial motor vehicles, uses an interesting way to determine what types of vehicles are actually covered by the policy...symbols.

Right on the first page of the Business Auto Coverage Form, under Section 1, Covered Autos, is a table entitled Description of Covered Auto Designation Symbols. There are nine numbered symbols, from 1, Any Auto, the broadest, to eight other ever more narrow definitions. You should know about these, since these symbols, and their definitions, define what vehicles are covered by the policy.

A quick listing of symbols, and what they define as a covered vehicle (*italics added*):

Symbol:

1. *Any* "Auto"
2. Owned "Autos" *Only*
3. Owned Private Passenger "Autos" *Only*
4. Owned Other than Private Passenger "Autos" *Only*

5. Owned "Autos" Subject to No Fault
6. Owned "Autos" Subject to a Compulsory Uninsured Motorist Law
7. Specifically Described "Autos"
8. Hired "Autos" *Only*
9. Non-owned "Autos" *Only*

Note that "Auto" is a defined term, it means, in abbreviated form, any land motor vehicle, trailer or semitrailer designed for travel on public roads.

Also worth noting is that these symbols are never the same for all coverages found in the policy. Liability, uninsured motorist, collision, comprehensive, all will have differ-

ent symbols describing what vehicles are covered by the policy.

So why is this important? Quite simply, if you don't get the symbols right you could find yourself in an uninsured vehicle. Say your policy is written with symbol 2 for liability coverage, then you lease a car. Is a leased car an Owned "Auto"? No, its not, and its not covered. Perhaps you have symbol 7 on your policy, then trade in a vehicle for another. Did you tell the insurance company? The new one is not Specifically Described, so its not covered.

Ideally, you'll always want your liability coverage to be written with symbol 1. You'll be covered for liability



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claims arising from legal use of any auto, including hired and non-owned.

Underwriters usually won't give you symbol 1 for collision and comprehensive coverage, but the next best thing is symbol 2, plus 8 and, if you want to, 9. That gives you automatic coverage for owned, hired and non-owned autos, which covers most all bases. Yes, you can have more than one symbol per coverage.

If you are in a state with no-fault coverage laws, you'll need symbol 5 for that. For all states you'll want symbol 6 for uninsured motorist coverage. That brings up a prob-

lem, though. Some states have expanded the requirement for UM coverage to hired and non-owned autos, too. By definition, symbol 6 covered only *Owned* "Autos" subject to a compulsory UM law; there is a gap here. You can fill it by adding symbol 8 and 9 to this coverage, too.

Business auto policies have been around seemingly forever, and auto insurance in general is an area where things are pretty much standardized. You'd still be surprised how often we find pretty basic mistakes in these policies, and coverage symbols are the first place we start any policy review.