

# Welcome

The “Transferring Risk in Premises Liability” Webinar will begin shortly...

In order to prevent static and interruptions to the presentation, webinar participants will be muted upon entry. If you have questions at any time during the webinar, please use the chat function and submit them to Derek Hoeft. Questions will be responded to at the end of the presentation. Thank you.

# Transferring Risk in Premises Liability Webinar

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# TRANSFERRING RISK IN PREMISES LIABILITY

Indemnity  
Language

# INDEMNITY LANGUAGE: INTRODUCTION

- Common Law Indemnification
- Contractual indemnification
  - Contracts between i.e., landlords/tenants, general contractors/subcontractors
  - Indemnification language: “indemnify, save, protect, save/hold harmless”
    - “A agrees to defend, indemnify and hold harmless B, from any and all damages, liability, and claims arising from A’s conduct”

# INDEMNIFICATION LANGUAGE: ENFORCEABILITY ISSUES

- Does the indemnification language contravene public policy?
- Did the parties to the indemnification agreement have equal bargaining power?
- Does the indemnification language clearly state the beneficiary being relieved of liability?
- Does the indemnification language relate only to the contracting parties?

# INDEMNIFICATION LANGUAGE: CONSPICUOUS/CLEAR LANGUAGE

- **Conspicuousness**
  - Indemnity language must appear on the face of the contract to attract attention of reasonable person
    - **Conspicuous:** Larger type, contrasting colors, boldface paragraph, written entirely in caps
    - **Not conspicuous:** midst of other topics, small print, back side of 2 page agreement, heading “Customer Agrees”

# INDEMNIFICATION LANGUAGE: CONSPICUOUS/CLEAR LANGUAGE

- Clear Language:

- “During the term hereof Lessee shall, at Lessee’s own cost and expense, promptly observe and comply with all present or future laws, rules, requirements, orders...whether the same are in force at the commencement of the term hereof or at any time in the future may be passed, enacted or directed; and Lessee shall pay all costs, expenses, claims...that in any manner arise out of or be imposed because of the failure of Lessee to comply with these covenants”

# INDEMNIFICATION LANGUAGE: QUESTIONS TO CONSIDER

- **What am I indemnified from?**
- **Who is indemnified?**
- **What losses or expenses are covered in the indemnity agreement?**

# INDEMNIFICATION LANGUAGE: WHAT AM I INDEMNIFIED FROM?

- Indemnity against Liability: Duty to Defend
  - Language that triggers duty to defend
    - “hold harmless from and against any liabilities/claims”
  - Language that fails to trigger duty to defend
    - “shall indemnify and save harmless”
  - Arises as soon as liability is incurred
  - May be a duty to defend without a duty to indemnify
  - Triggered merely by claims of injury that fall within the scope of the indemnity clause; true facts irrelevant

# INDEMNIFICATION LANGUAGE: WHAT AM I INDEMNIFIED FROM?

- Indemnity against Loss: Duty to Indemnify
  - Not triggered until the indemnitee is liable for damages
- “Arising out of” issues
  - “Arising out of...the performance of this contract”
    - An employee’s claims “arise out” an indemnitor’s performance if the injury occurs when an employee is on the job that is the subject of the indemnification agreement
      - Hoffman Const. Co. of Alaska & U.S. Fabrication & Erection, Inc., 32 P.3d 346, 353 (Alaska 2001)

# INDEMNIFICATION LANGUAGE: WHAT AM I INDEMNIFIED FROM?

- Indemnitor's own negligence
  - Some states allow/some void as against public language
  - Most states have some requirement that there is clear and unequivocal language that the other contracting party is providing indemnification for other's own negligence
    - Ex. Texas
    - Ex. North Carolina
    - Ex. New Jersey

# INDEMNIFICATION LANGUAGE: WHAT AM I INDEMNIFIED FROM?

- Joint negligence
  - “Each and every claim...on account of personal injury...arising out of...performance of the services hereunder, except such as...resulted from A’s negligence”
- Intentional/Malicious conduct
  - Indemnification generally not available
    - i.e., OH, MA, CA

# INDEMNIFICATION LANGUAGE: WHO IS INDEMNIFIED?

- The term “officers, directors, employees and joint owners” has been held by at least one court to be sufficiently precise, but not to include a consultant to the party to the indemnification agreement.
  - *Melvin Green, Inc. v. Questor Drilling Corp.*, 946 S.W.2d 907, 911 (Tex. App. 1997)

# INDEMNIFICATION LANGUAGE: WHAT LOSSES OR EXPENSES ARE COVERED?

- Attorney's fees
  - If there is no obligation to defend the indemnitee
    - If the indemnification clause at issue does not specifically say that it includes attorney's fees they are excluded
  - If there is an obligation to defend: "hold harmless"
    - Entitled to costs and attorney's fees incurred to enforce the contractual indemnity provision
    - In the absence of an express contractual term to the contrary, a claim for attorney's fees and costs under an indemnification agreement is limited to expenses incurred in the defense of the claim indemnified against

# OTHER REMEDIES

- Implied contractual indemnity/Equitable Indemnity
- Common law indemnification (i.e., CT)
  - Party against whom the indemnification is sought was negligent
  - That party's active negligence, rather than defendant's own negligence, was the direct, immediate cause of the resulting injuries
  - Other party was in control of the situation to the exclusion of the party seeking reimbursement
  - Defendant did not know of the other party's negligence, had no reason to anticipate it, and reasonably could rely on the other party not to be negligent

Robert E. Cooper

# Insuring Arrangement, Additional Insured, and Certificates of Insurance

Christian & Small

ATTORNEYS AND COUNSELORS

# Creating the Requirement in the Relationship

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- Contract Requirements
- Purpose is to shift legal responsibility from one party to another and provide a contractual remedy for monetary damages in the event of:
  - Breach of Contract
  - Breach of Representation or Warranty
  - Claims by Third Party
- Most often the goal is to guard against lawsuits with the attendant costs of defense and settlement.
- Should consider other conduct such as improper use or tortious interference with existing or potential business relationships

# Contract Language

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- Eliminate ambiguity about survival/breach of representations
- Make clear that all breaches are covered ....even those unintended
- Establish procedure for handling claims of third parties
- Specifically include expenses - attorneys' fees and costs
- Set parameters of liability – caps or agreed limits

# Scope of Coverage to be Provided – Additional Insureds

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- Do you know what coverage you actually have?
  - Request certificate
  - Check the additional insured endorsement
  - Consider whether you need to ask for the policy itself
  - If certificate came from agent or broker, make sure it was also transmitted to the insurer

# Scope of Coverage to be Provided – Additional Insureds

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- Why try to have additional insured status?
  - To fund obligations required by indemnity agreements
  - To prohibit subrogation by the named insured's insurer against the additional insured for the additional insured's own negligence
  - Shift defense costs directly of the additional insured
  - Minimize the claim history for the additional insured

# Scope of Coverage to be Provided – Additional Insureds

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- Who is an additional insured?
  - Person or entity doing business with named insured
  - Relationship requires that the other person or entity be added as an additional insured to the policy by amendment to the policy or an endorsement
- What does it mean to be an additional insured?
- What limits apply to an additional insured?

# Scope of Coverage to be Provided – Additional Insureds

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- Is there a downside to being an additional insured?
  - Possible dilution of policy limits
  - Possible defense conflicts
  - Named insured may be accepting a greater transfer of risk than anticipated
  - Possible loss of control of the defense
  - Potential coverage disputes
- How do you obtain this coverage?

# Certificates of Insurance

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- Function of a certificate of insurance is to provide information to the party to whom it is issued concerning the insuring arrangement of another entity.
  - What is it?
    - Document issued by an insurance company/broker used to verify existence of insurance coverage under specific conditions granted to listed individuals.
    - Specifically, the document lists:
      - Effective date of the policy
      - The type of insurance coverage purchased
      - The types and dollar amount of applicable liability

# Certificates of Insurance

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- How does it function?
  - The certificate does not create coverage
  - Cannot be used to alter coverage
  - Typically contain a disclaimer to the effect that certificate holders granted any rights under the policy
  - Many provide that the company has no duty to notify the holder of cancellation
  - Typical coverages and endorsements
    - General Liability
    - Auto Liability
    - Workers Compensation
    - Umbrella/Excess Liability
    - Property (equipment, real property, personal property)
    - Professional Liability
    - Host Liquor
  - Third Party Requests

# The Duty to Defend

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- Selection of Counsel
- Joint Counsel?
- Separate Counsel?

# CONFLICTS OF INTEREST CONSIDERATIONS

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## ➤ **I. Know The Rules**

- ABA Rule 1.7 – Conflict of Interest: Current Clients
- ABA Rule 1.8 – Conflict of Interest: Current Clients-Specific Rules
- ABA Rule 1.9 – Duties to Former Clients
- ABA Rule 1.10 – Imputation of Conflicts of Interest

## ➤ **Make Use of Resources**

➤ Attorney Registration & Discipline websites

➤ State bar ethics opinions

➤ Case law

## ➤ **Take Time to Think About**

# **A. SPECIFIC ALLEGATIONS**

## ➤ **1. Complaint Alleges Both Negligence & Intentional Acts**

- Plaintiff is involved in an altercation with an armed security guard
- Plaintiff is shot
- Plaintiff alleges that the guard was negligent; also alleges an intentional act
- If there is a potential to indemnify covered claims, a duty to defend all claims arises
- *Maryland Casualty Co. v. Peppers*, 64 Ill.2d 187, 355 N.E.2d 24 (1976)
- *San Diego Navy Fed. Credit Union v. Cumis Ins. Society, Inc.*, 162 Cal.App.3d 358 (Cal. Ct. App. 1984).

## ➤ **2. Complaint Alleges Negligent Acts Occurring Both During & Outside the Policy Period**

- Plaintiff is involved in 2 slip and fall incidents at the same store
- 1st occurred when the store was insured; second occurred when the policy has lapsed
- Conflict arises because the insurer may be inclined to push the case toward the uncovered event.
- *Illinois Masonic Med. Ctr. v. Turegum Ins.*, 168 Ill.App.3d 158, 522 N.E.2d 611 (1<sup>st</sup> Dist. 1988).

### ➤ **3. Complaint Seeks Both Compensatory & Punitive Damages**

- Plaintiff is detained in a store for shoplifting
- Plaintiff alleges false imprisonment; claims severe emotional distress
- Complaint seeks \$10,000 in compensatory damages and \$1,000,000 in punitive damages
- There is no insurance for the punitive damages
- Because the insured rather than the insurer is at risk for punitive damages, the two have “differing levels of motivation in defending a suit that requests large punitive damages.” *Utica Mutual Ins. Co. v. David Agency Ins., Inc.*, 327 F.Supp.2d 922, 929 (N.D. Ill. 2004).

### ➤ **3. Complaint Seeks Both Compensatory & Punitive Damages (cont'd)**

➤ Courts differ on whether a conflict exists where punitive damages have been claimed

- ❖ *Illinois Municipal League Risk Mgmt. Assoc. v. Seibert*, 223 Ill.App.3d 864 (1992)(where a claim of punitive damages exists in underlying complaint, a conflict of interest arises between the insurer and the insured).
- ❖ *Parker v. Agricultural Ins. Co.*, 109 Misc.2d 678 (N.Y. Sup. Ct. 1981)(conflict exists and retention of independent counsel is necessary where a reservation of rights is filed based on a punitive damages exclusion and the presence of actual evidence or a severe financial exposure to the insured creates a real disparity of interest).

## ➤ 4. Amount Sought Exceeds the Amount of Coverage

- Complaint is filed and ad damnum clause seeks \$5,000,000 judgment
- Insured has coverage of \$2,000,000
- Many states indicate that, “[n]o conflict of interest shall be deemed to exist...solely because an insured is sued for an amount in excess of the insurance policy limits.” *Golden Eagle Ins. Co. v. Foremost Ins. Co.*, 20 Cal.App.4<sup>th</sup> 1372, 25 Cal.Rptr.2d 242, 257 (2<sup>nd</sup> Dist. 1993); *Littlefield v. McGuffey*, 979 F.2d 101, 108 (7<sup>th</sup> Cir. 1992) (“The possibility of liability exceeding coverage” does not “trigger a conflict of interest....(T)he one is not the conceptual equivalent of the other.”)

## ➤ **4. Amount Sought Exceeds the Amount of Coverage (cont'd)**

- *R.C. Wegman Construction Co. v. Admiral Ins. Co.*, 629 F.3d 724 (7<sup>th</sup> Cir. 2011). Some have argued that *Wegman* holds that an insured is entitled to independent counsel to be paid by the insurer when there is a “non-trivial probability” of an excess verdict. Dicta—not the law in Illinois.

## ➤ **5. Consent After Full Disclosure**

- The insurance company retained defense attorney may represent an insured even if the presence of a conflict that normally would require independent counsel if the insured consents after “full disclosure.”

## ➤ **5. Consent After Full Disclosure (cont'd)**

- Full disclosure should include an explanation of:
  - ❖ The attorney's relationship to the insurer
  - ❖ The attorney's own interests
  - ❖ The nature of the conflict between the insurer and the insured and how the defenses may impact the coverage
  - ❖ Limitation of the scope of representation to defending the third-party claim only, thus limiting the ability to maximize coverage
  - ❖ The insured's option to retain separate counsel to advise about coverage issues and
  - ❖ The insured's right to independent counsel to defend, whose fees will be reimbursed by the insurance company.

# **B. CLIENT CONSIDERATIONS**

## ➤ 1. Antagonistic Insureds

- Plaintiff is injured when store manager runs into her in the parking lot
- Sues manager and store for injuries; seeks to hold store liable under a theory of *respondeat superior*
- Manager is no longer employed at the time the suit is filed
- Store argues that the former manager was acting outside the scope of his employment at the time of the accident
- In that situation a conflict exists and independent counsel must be retained for one of the defendants. *Williams v. American Country Ins. Co.*, 359 Ill.App.3d 128, 833 N.E.2d 971 (1<sup>st</sup> Dist. 2005).

## ➤ **2. Representation of Opposing Parties**

- Particularly troublesome in firm with a large number of lawyers
- Attorney Smith represents plaintiff in premises case against Acme Grocery Store
- Partner Attorney Jones is contacted by insurer to represent Acme in the suit
- Can't do it—there is a conflict there

## ➤ **2. Representation of Opposing Parties (cont'd)**

### ➤ Change the facts a little:

- ❖ Jones represents a number of insureds for Acme's insurer
- ❖ Jones has not been retained to represent Acme in this case
- ❖ Can Smith take the plaintiff's case?
- ❖ Yes—no conflict (make sure Jones does not work on the case and no information is shared)
- ❖ Ask another question—would it be wise for Smith to take the case? (Ill will from the insurer)

## ➤ **3. Reservation of Rights Letters**

- Insurer sends insured concert venue a Reservation of Rights letter
- Claims it is reserving its rights to defend and indemnify because the insured failed to satisfy a condition precedent to coverage (notice)
- Create a conflict entitling the insured to counsel of its own choosing?
- It depends!

### ➤ **3. Reservation of Rights Letters (cont'd)**

- Some states have adopted a fact-dependent test to determine whether independent counsel is necessary when a reservation of rights letter is issued:
  - ❖ Illinois
  - ❖ New York
  - ❖ Ohio
  - ❖ Oklahoma
  - ❖ Pennsylvania
- A conflict exists if the facts that will be adjudicated in the lawsuit against the insured are the same facts upon which the existence of coverage depends

### ➤ **3. Reservation of Rights Letters (cont'd)**

➤ Other states have appeared to adopt a *per se* rule that the policyholder is entitled to independent counsel whenever an insurer issues a Reservation of Rights letter:

- ❖ Alabama
- ❖ Arizona
- ❖ Florida
- ❖ Kentucky
- ❖ Massachusetts
- ❖ Missouri
- ❖ Texas
- ❖ Washington

## ➤ **C. Settlement**

### ➤ **1. Plaintiff's Demand Exceeds Policy Limits**

- Conflicts can arise, especially when there is a solid defense to liability but defense counsel knows the case can be settled within policy limits
- Where insurer has retained counsel to defend the claim, the insurer or its attorney (other than retained defense counsel) should timely inform the insured of the danger of exposure
  - ❖ Where there is a probability that damage award will exceed limits
  - ❖ Where prayer for damages in complaint exceeds limits
  - ❖ Where there is an unlimited prayer and probability exists that verdict may exceed limits
- Insured should be encouraged to retain additional counsel at his expense to advise with respect to exposure

## ➤ **2. Plaintiff Offers to Settle Within Policy Limits & Insurer Does Not Want to Settle**

- Insurer is required to give “equal consideration” to the interests of the insured when evaluating settlements
- If not, insurer may be guilty of bad faith

# Questions?



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