Professional Liability News

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Hold Harmless and Contractual Liability

New client—new contract but what about the hold harmless clause transferring liabilities? The most commonly used are "limited," broad," and "intermediate." **Broad** (unenforceable in some states) is where A holds B harmless for virtually everything, whether A is negligent, A & B are jointly negligent or B is solely negligent. **Intermediate** is where A holds B harmless where A is negligent or where A & B are jointly negligent. **Limited** is where A holds B harmless based on A's sole negligence. B then has protection when B is held vicariously responsible for the actions of A. But what is insurable? Virtually all insurance policies exclude liability assumed by contract (contractual liability) unless such liability would have attached even in the absence of such contract,

"Policies exclude assumed liabilities unless liability would have attached in the absence of the contract."

SAMPLE MUTUAL HOLD HARMLESS

The Consultant agrees, to the fullest extent permitted by law, to indemnify and hold harmless the Client, its officers, directors and employees (collectively, Client) against all damages, liabilities or costs, including reasonable attorneys' fees and defense costs, to the extent caused by the Consultants negligent performance of professional services under this Agreement and that of its subconsultants or anyone for whom the Consultant is legally liable. The Client agrees, to the fullest extent permitted by law, to indemnity and hold harmless the Consultant, its officers, directors, employees and subconsultants (collectively, Consultant) against all damages, liabilities or costs, including reasonable attorneys' fees and defense costs, to the extent caused by the Client's negligent acts in connection with the Project and the acts of its contractors, subcontractors or consultants or anyone for whom the Client is legally liable. Neither the Client nor the Consultant shall be obligated to indemnify the other party in any manner whatsoever for the other party's negligence.

Where an agreement is allowed, basic court requirements for enforcement include (1) liability must arise from subject matter of the clause, i.e. work or operations, (2) language should be sufficiently clear and definite, (3) agreement cannot be contrary to the public interest and (4) agreement must not be prohibited by statute.

Insurance by nature involves the transfer of risks. Contractual risk transfers, such as transferring risk to an insurance company or to another party through contractual provisions, are generally used together. The process operates smoothly where both parties are knowledgeable as to the business transaction, which the contract memorializes, and there is an appropriate level of skill to protect the interests of each party. An experienced attorney, risk management professional, outside consultant or an agent/broker can be equally essential to the process.

Keep in mind that your industry may have tried and true standard agreements such as those available through the American Institute of Architects.

Any contract has important legal consequences. Consultation with an attorney is encouraged.

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