

What's Next for Risk Management? Three Trends to Watch in 2015

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Trend: Anti-Indemnity Statutes' Impact on Indemnity Provisions



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What does an indemnity clause do?

- In a contract containing an indemnity clause, one party agrees to hold harmless, or reimburse, another party for losses that arise under the contract
- Allows the parties to a contract to allocate risks between themselves

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Definitions

- **Indemnify**: to hold a party harmless, or to compensate or reimburse that party for losses that occur under a contract
 - Includes attorney's fees and any damages awarded in a potential lawsuit
- **Indemnitor**: the party that agrees to indemnify, or hold harmless, another party for losses that occur under a contract
- **Indemnitee**: the party to a contract that receives indemnity from the indemnitor

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Example

- A property owner wants to construct a building
- The property owner hires a general contractor
- The general contractor agrees to indemnify the owner for any losses that may occur while constructing the building



Indemnitor	Indemnitee
General contractor	Property owner



What are some examples of indemnity clauses?

- “Contractor agrees to defend, indemnify, and hold harmless Owner from any and all damages, liability, and claims arising from Contractor’s conduct.” – more common
- “Contractor agrees to defend, indemnify, and hold harmless Owner, from any and all damages, liability, and claims arising from this contract, including claims alleging damages caused by the Owner’s sole negligence.” – less common

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Types of Indemnity Clauses

- Limited indemnity clauses
- Intermediate indemnity clauses
 - Full indemnification
 - Partial indemnification
- Broad indemnity clauses

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Limited Indemnity Clauses

- Provide the least protection for indemnitees
- The indemnitor only agrees to bear the cost of defending any lawsuit and paying any judgment against the indemnitee arising out of the indemnitor's own negligent acts or omissions, if any
- Allowed by all fifty states

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Intermediate Indemnity Clauses

- Cover scenarios where both the indemnitor and the indemnitee bear some responsibility for a loss under a contract; also known as ‘concurrent negligence’
- The indemnitor takes responsibility not only for the indemnitor’s own negligence, but also for damages arising from the concurrent negligence of both the indemnitor and the indemnitee
- Some anti-indemnity legislation targets intermediate indemnity clauses

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Full Indemnification

- A type of intermediate indemnification
- Requires the indemnitor to take full responsibility for any harm caused by the concurrent negligence of both the indemnitor and the indemnitee, as well as harm caused by the indemnitor's sole negligence
- Even if the indemnitor is only 1% at fault, and the indemnitee is 99% at fault, the indemnitor must pay for 100% of the damage

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Partial Indemnification

- Another type of intermediate indemnification
- In situations involving the concurrent negligence of both the indemnitor and the indemnitee, the indemnitor only promises to indemnify the indemnitee for the relative percentage of the indemnitor's own negligence
- The indemnitor's liability is capped at the level, or percentage, of the indemnitor's own fault
- Ex. If an indemnitor was 49% negligent and the indemnitee was 51% negligent, the indemnitor only has to pay 49% of the legal fees and any damages award

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Broad Indemnity Clauses

- Provide the most protection for indemnitees
- The indemnitor assumes full responsibility for the indemnitee's sole negligence (even if the indemnitee was entirely at fault)
- Anti-indemnity legislation targets broad indemnity clauses more than any other kind

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Types of Indemnity Clauses - Summary

	Limited	Intermediate – Full	Intermediate - Partial	Broad
What does the indemnitor have to indemnify the indemnitee for?	Only the indemnitor's negligence	The indemnitor's negligence and all concurrent negligence by both the indemnitor and the indemnitee	The indemnitor's negligence and the indemnitor's proportional share of any concurrent negligence	The indemnitor's negligence, the indemnitee's negligence, and their concurrent negligence
Does anti-indemnity legislation prohibit?	No – all 50 states allow.	Some states prohibit	Some states prohibit	Some states prohibit – most targeted type of indemnity clause

“Additional Insured” Clauses

- Separate and distinct from indemnity clauses
- Require the indemnitor to name the indemnitee as an “additional insured” under the indemnitor’s insurance policy
- Extends the benefits of the indemnitor’s insurance policy to the indemnitee
- Intertwined with indemnity clauses – most contracts will have both



Contractual Insurance Requirements

An ideal contractual insurance provision will specify:

- Type of required insurance (ex. general liability)
- Limits of coverage
- Client's insured status (ex. loss payee, additional insured)
- Identity of the entities to be covered
- Policy may not be cancelled without prior notice to Client
- Insurer must be licensed in relevant states and possess at least an "A-" A.M. Best rating
- Certificate, endorsement and policy must be delivered to Client within x days
- Client's insurance shall be excess
- Waiver of subrogation

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Insurance Certificates:

What Are They Good For?:



CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY)

11/2/2011

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.

- “[T]hose who take such certificates at face value do so at their own risk.”
 - *Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 314 (Tex. 2006).
- Insurance certificates provide initial confirmation of coverage, but are insufficient to protect Client interests.

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Contractual Insurance Requirements

- Must Review the Actual Policy and AI Endorsement
- Endorsement: Review the AI endorsement for:
 1. Schedule of insureds
 - Client may be identified by name
 - Client may fall under “blanket” provision, which adds as additional insureds those parties the named insured has agreed by contract to add
 2. The scope of coverage granted by the endorsement

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Indemnity Agreements In The Construction Industry

- Parties typically use indemnity agreements in two situations:
 - Owners and general contractors
 - General contractors and subcontractors
- Owners hire general contractors, then seek to insulate themselves from risk by having the general contractors indemnify them
- General contractors, in turn, hire subcontractors and seek to insulate themselves from risk by having the subcontractors indemnify them

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Legal Requirements For Indemnity Clauses

- Every state has different legal requirements
- Generally, must clearly identify intent and scope of the indemnification
- Judges will strictly interpret indemnity clauses
- For example, Texas requires clear and unequivocal language and requires indemnity clauses to provide ‘fair notice’ in order to be valid and enforceable

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What does anti-indemnity legislation do?

- Public policy favors freedom of contract: parties are free to include whatever terms they want in their contracts
- Anti-indemnity legislation singles out certain kinds of indemnity clauses and renders them void and unenforceable as against public policy

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Why do lawmakers enact anti-indemnity legislation?

- State legislatures pass anti-indemnity legislation in order to correct what they perceive as an imbalance in bargaining power
- Before these statutes, contractors would have no choice but to accept indemnity clauses in their contracts, because if they refused, the owner could simply award the bid to another contractor

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What practical effect does anti-indemnity legislation have?

- In states with anti-indemnity legislation, you can include indemnity clauses within your contracts, but if they violate an anti-indemnity statute, they will be held to be void and unenforceable and have no legal effect
- The party that the indemnity clause names as the indemnitor will not have to indemnify the indemnitee

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Which states have enacted anti-indemnity legislation?

- A majority of states have enacted anti-indemnity legislation of some kind
- Some states prohibit broad indemnity clauses only
- Other states prohibit both broad indemnity clauses and intermediate indemnity clauses
- All states allow limited indemnity clauses



Which states prohibit broad indemnity clauses?

Alaska

Arizona

Arkansas

Georgia

Hawaii

Idaho

Indiana

Maryland

Massachusetts

Michigan

New Jersey

South Carolina

South Dakota

Tennessee

Virginia

West Virginia

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Which states prohibit intermediate indemnity clauses?

California

Louisiana

North Carolina

Colorado

Minnesota

Ohio

Connecticut

Mississippi

Oklahoma

Delaware

Missouri

Oregon

Florida

Montana

Rhode Island

Illinois

Nebraska

Texas

Iowa

New Hampshire

Utah

Kansas

New Mexico

Washington

Kentucky

New York

Wisconsin

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Which states have passed laws that address the “additional insured” loophole?

Arizona

California

Colorado

Kansas

Louisiana

Montana

New Mexico

Oklahoma

Oregon

Texas

Utah

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Which states do not have any anti-indemnity legislation?

Alabama

District of Columbia

Maine

Nevada

North Dakota

Pennsylvania

Vermont

Wyoming

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Can contracting parties waive anti-indemnity legislation?

- Many states, including Texas, do not allow contracting parties to waive anti-indemnity legislation, because to do so would defeat the public policy purpose behind the laws
- Source: Tex. Ins. Code § 151.151

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Takeaways

1. Learn the legal requirements in your state.

2. Review and revise your standard-form contracts.

Anti-indemnity legislation in your state may prevent you from including certain kinds of indemnity clauses in your contracts. You may need to use new indemnity clauses.

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Trends: Video Surveillance on Multi-Family Properties

Panacea or Placebo?

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Proliferation

- ❖ Today's technology provides substantial video surveillance systems at affordable prices. Previously, the cost of such systems was a major deterrent.
- ❖ Recording media has evolved to a point where weeks of data can be stored at little or no cost without the need of recycling.
- ❖ Measure du jour of most property owners in response to criminal activity.

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Video Surveillance Systems

Conventional



Construction



DECISIONS, DECISIONS

The decision to implement a video surveillance system should be carefully weighed against all alternative measures. There are several, less complex options that may address exposures more adequately, without the possibility of expanding the applicable duty of care. To elaborate:

- Video surveillance may be problematic in a private environment involving contracts of confidentiality and privacy.
- Recordings become controversial when law enforcement or others demand access.
- Prompt maintenance of a video surveillance system is critical, especially if monitored.
- Reducing or eliminating a video surveillance system may create a negative perception or liability.



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EFFECTIVENESS

Visible video surveillance has been proven, statistically, as an effective crime deterrent. For this reason, many have implemented “dummy” cameras to give the illusion of a video surveillance. While this may seem a good, economic alternative, the false sense of security it represents can be very detrimental in the event of a loss.

With video surveillance becoming more of the standard than the exception, common perpetrators are employing various evasive tactics to include concealing clothing, disabling cameras, or simply stealing the recording equipment.

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ALTERNATIVES

- Controlled pedestrian access.
- Enhanced lighting.
- Trimming of landscaping to reduce concealment opportunities.
- Parking of police vehicle on premises.
- Increasing frequency of police or courtesy officer patrols.

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IF VIDEO SURVEILLANCE IS THE CHOICE

- Locate cameras wisely, considering visibility, area being surveilled, maintenance, privacy, and damageability.
- Place appropriate signage advising of the use of video cameras and the areas being surveilled.
- Implement use and waiver language in the Apartment Lease Agreement regarding the use of video cameras.
- Maintain the video system with extraordinary care.
- Establish protocols regarding recorded media, its use, and distribution.



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