

# Bunker Hill Underwriters

## Engineered Risk Division

# Killer Contract Clauses

## Claim & Litigation Impact of Construction Contract Clauses

Presented by: Tim Conlon, Senior Vice President

# Goal: Cut through the confusion

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- Contract review to spot traps
- Proving 'sole negligence'



# Two Keys to Contracts

- Contract Review
- Accident Investigation



# Contracts Favor Owners & GC's

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*In the past, contracts always favored the Owners & GC's.*

- Indemnity Language
- Additional Insured Requirements

# Level the Playing Field

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*Thanks to changes in case-law and policy endorsements things have changed – but only for “sole negligence”*

- By using some contract review techniques you can avoid paying for future claims where you had nothing to do with the accident.

# Early History of Contractual Risk Transfer

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- 1700's- English Courts determine “Master Builder” is legally responsible for injuries to others.
- 1800's – English Courts expand legal responsibility to include workers under select circumstances thereby creating ‘subcontract agreements’
- 1900's – US Courts adopt similar concept however allow the use of ‘hold harmless’ agreements which enable Owner/GC to transfer legal responsibility to subcontractors

# Modern History of Contractual Risk Transfer

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- 1950's – GC's begin widespread use of 'hold harmless' agreements in order to shift liability to Subcontractors
- 1970's/1980's – US Courts strike down validity of 'hold harmless' as being against public's interest – (in some states)
- 1990's to present – GC's begin to use 'Additional Insured' requirement as a way around 'hold harmless'

# Two Battleground Areas

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1. Indemnification Language – this is really ‘hold harmless’ that is interpreted on a state-specific basis.
2. Insurance Procurement Language – this is where the Additional Insured Requirements language seeks to create coverage

# Indemnification Language

- Not an issue in Illinois because it is barred under Illinois Statute for both “sole” & “concurrent” liability
- Indiana & Michigan it is partially banned only for “sole” not “concurrent”
- Wisconsin allows Indemnification for both “sole” & “concurrent”



# Sample Indemnification Language

- Replace any references to “arising out of” your work with the phrase “caused by” your work.

MODIFIED SUBCONTRACT AGREEMENT <i>EXAMPLE ONE</i>	
LANGUAGE TO AVOID	ACCEPTED CHANGES
<p>To the fullest extent permitted by law, Subcontractor shall indemnify, defend and hold harmless the Contractor, Owner, Architect/Engineer, their parents, members, subsidiaries, related corporations and any other entity as provided in the Contract Documents (hereinafter “Indemnified Parties”) and agents and employees of any of them from and against any and all claims, damages, losses and expenses, including but not limited to attorney’s fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the work itself) including the loss of use resulting there from, but only to the extent caused or alleged to be caused in whole or in any part by the negligent acts or omissions of the Subcontractor, anyone directly or indirectly employed by the subcontractor or anyone for whose acts the Subcontractor may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party identified hereunder.</p>	<p>To the fullest extent permitted by law, Subcontractor shall indemnify, defend and hold harmless the Contractor, Owner, Architect/Engineer, their parents, members, subsidiaries, related corporations and any other entity as provided in the Contract Documents (hereinafter “Indemnified Parties”) and agents and employees of any of them from and against any and all claims, damages, losses and expenses, including but not limited to attorney’s fees, <del>arising out of or resulting from performance of the</del> <b>caused by negligence in subcontractor’s Work</b>, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the work itself) including the loss of use resulting there from, but only to the extent caused or alleged to be caused in whole or in any part by the negligent acts or omissions of the Subcontractor. <del>anyone directly or indirectly employed by the subcontractor or anyone for whose acts the Subcontractor may be liable, regardless of whether or not such claim, damage, loss or expense is</del> <b>caused in part by a party identified hereunder.</b></p>

# Additional Insured Requirements

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- AI requirements are the “Contractual Risk Transfer” choice of 1<sup>st</sup> Resort for GC’s & High Tier Subcontractors
- The AI Endorsement is what gives coverage not the Certificate of Insurance
- AI language is not an issue until there is a major loss
- Most AI language excludes coverage for “sole negligence”

# Insurance Companies & Courts Pushed Back

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- Since 2004 ISO (Insurance Service Office) has issued new AI Endorsements limiting AI coverage to claims where the Named Insured has some contributory negligence
- Courts has ruled generally supporting this basic concept that is:

***For AI status to be triggered the Named Insured has to be partially at fault***

# Sole Negligence is Key

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- ◉ Whether the contract is triggered by Indemnity (Hold Harmless) or Insurance Procurement (Additional Insured) the one common denominator needed to trigger coverage is the determination of “sole negligence”
- ◉ If the “sole negligence” of the Additional Insured (AI) can be established – then there is no AI coverage

# Sole Negligence Dilemma

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*But exactly how do you “establish” Sole Negligence?*

- While the courts and the insurance companies have finally determined that you can't transfer risk for an accident in which you're considered to “solely negligent” there is no clear way of determining “who” will make the decision.

# Three Choices – None Good

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*There must be a “finding”*

- Coverage Litigation
- Verdict with allocation of fault by jury
- Clear investigative findings proving ‘sole negligence’

# Coverage Litigation

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- Many insurance companies spend a great deal of money litigating whether they have an Additional Insured obligation – usually to a GC or High Tiered Sub.

# Jury Verdict with Allocation of Fault

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- Less than 10% of all personal injury cases go all the way to a Jury Verdict
- Litigating to Verdict to sort out “sole negligence” is a set-up for a “Pyrrhic Victory” where you win but in reality nobody wins.

# Investigation “Proving” Sole Negligence

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- Clear & convincing evidence that is supported by Expert – Causation Analysis is the best way to determine “sole negligence at its root.

# Causation Clearly Determined to be Sole Negligence

## DETAILS OF UNKNOWN VAULT/TUNNEL:



Outrigger Mat

Hidden Steel Plate

# Causation Determined But Not Sole Negligence

- Even though GC was primarily at fault it was not due to their “sole negligence”
- AI coverage from the Sub was triggered and their carrier paid the claim



Thank you