Don’t Pay Twice!

David Parker, ARM-P, CPM®, IPMA-SCP
Central Arizona Project
Enterprise Risk Management

Key Takeaways

How and why of insurance and indemnification

Appropriate language For Various Contract Types

Indemnification agreements

Additional insured coverage

Favorable and detrimental contract terms

Waivers of subrogation

Limitations of liability

Certificates of insurance

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Common Types of Contracts

- Design
- Construction
- Products and Services
- Professional Services
- Leases
- Licenses
- IT/Security
- Intergovernmental/Interlocal
- Mutual Aid
- Services we provide
- Space we lease

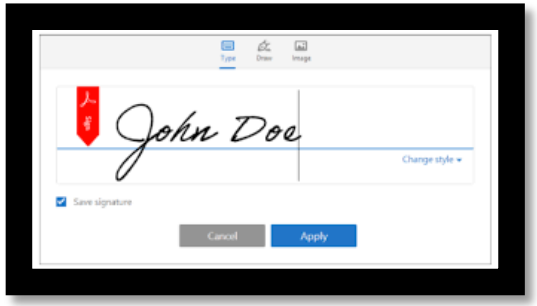


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Common Indemnification Principles

Common Law

- Verbal or written contract
- Where contract is silent on indemnity
  - No contractual remedy
- Active negligence only
  - Contributory negligence voids



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Common Indemnification Principles

Contract Law

- As insurable as possible
- States parties' intentions
- Clear and unambiguous
- Doctrine of Adhesion
- Public policy concerns
- Limiting, broadening, savings language
- Contractual remedy



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Common Indemnification Principles

Public Policy Issues

- Courts don't like them
- Non-negotiable impact
- Not limited to insurance coverage
- Anti-indemnification statutes
- "Insurance Cramdown"



Photo credit: my cousin vinny

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Common Indemnification Terms

Contractual Duties

- **Indemnify**
- Defend
- Hold (Save) Harmless

indemnify

v. to guarantee against any loss which another might suffer. Example: two parties settle a dispute over a contract, and one of them may agree to pay any claims which may arise from the contract, holding the other harmless.

http://dictionary.law.com/Default.aspx?typed=indemnify&type=1

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Common Indemnification Terms

Contractual Duties

- Indemnify
- **Defend**
- Hold (Save) Harmless

{insurer} had both "the right and the duty to defend any suit against the insured seeking damages on account of bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent." Under such a provision, an insurer's obligation to defend is broader than its obligation to pay, and arises whenever the complaint alleges facts and circumstances, some of which would, if proved, fall within the risk covered by the policy.

Lerner v. General Ins. Co of America
245 S.E.2nd 249 (1978)

https://www.leagle.com/decision/1978494245se2d2491488

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Common Indemnification Terms

Contractual Duties

- Indemnify
- Defend
- **Hold (Save) Harmless**

hold harmless

n. a promise to pay any costs or claims which may result from an agreement. Quite often this is part of a settlement agreement, in which one party is concerned that there might be unknown lawsuits or claims stemming from the situation, so the other party agrees to cover them

http://dictionary.law.com/Default.aspx?typed=hold%20harmless&type=1

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Forms of Indemnity

Three or Four Types

(Breadth of Responsibility)

- **Broad Form**
- Intermediate Form
- Limited Form
- Comparative Form (Vicarious Liability)

To the fullest extent permitted by law, Contractor agrees to indemnify, defend, and hold harmless Owner and [. . .] from any and all claims [. . .] including claims alleged to have arisen from the sole negligence of Owner or its officers, employees, agents, or any other for which Owner may be liable.

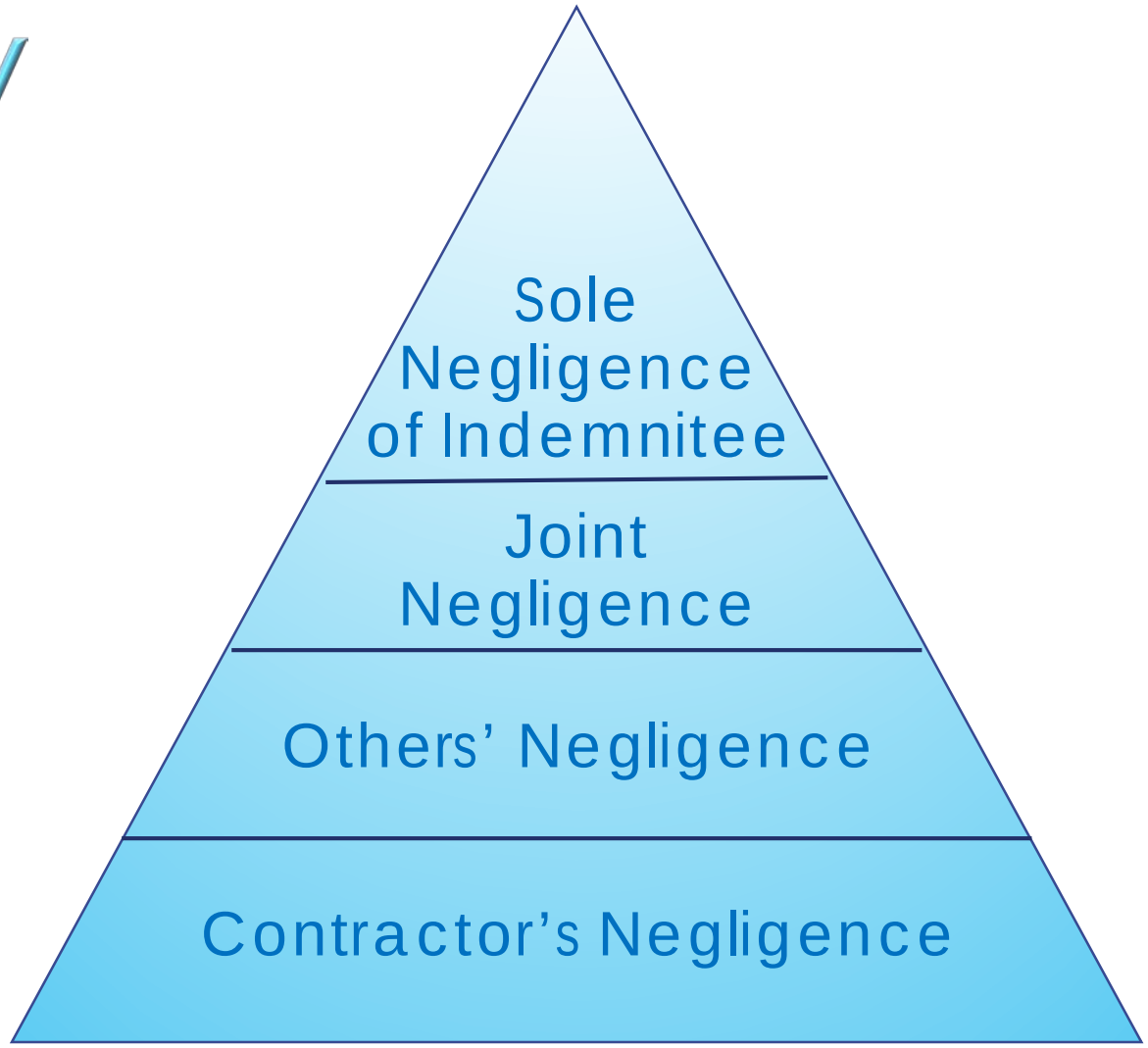
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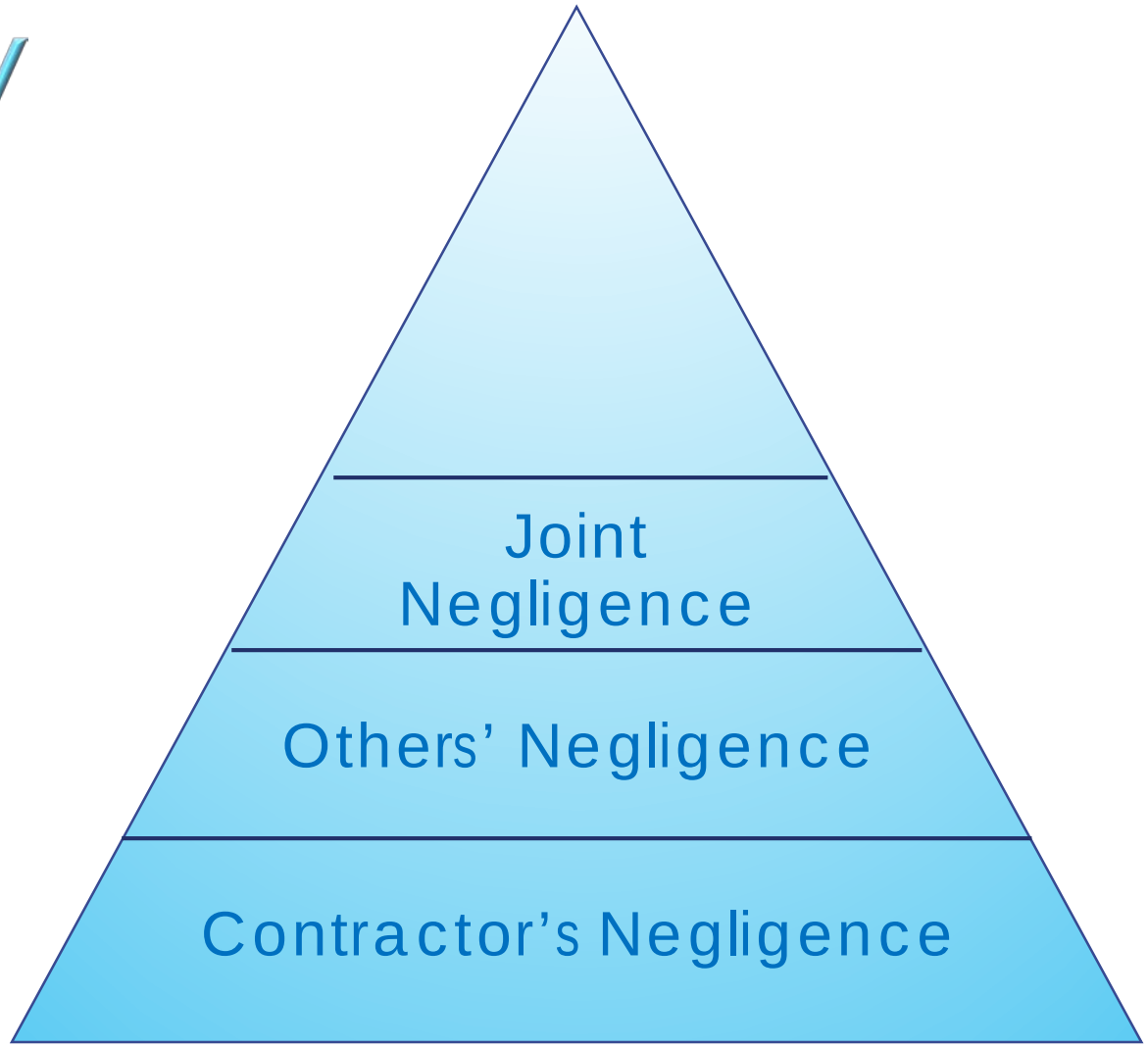
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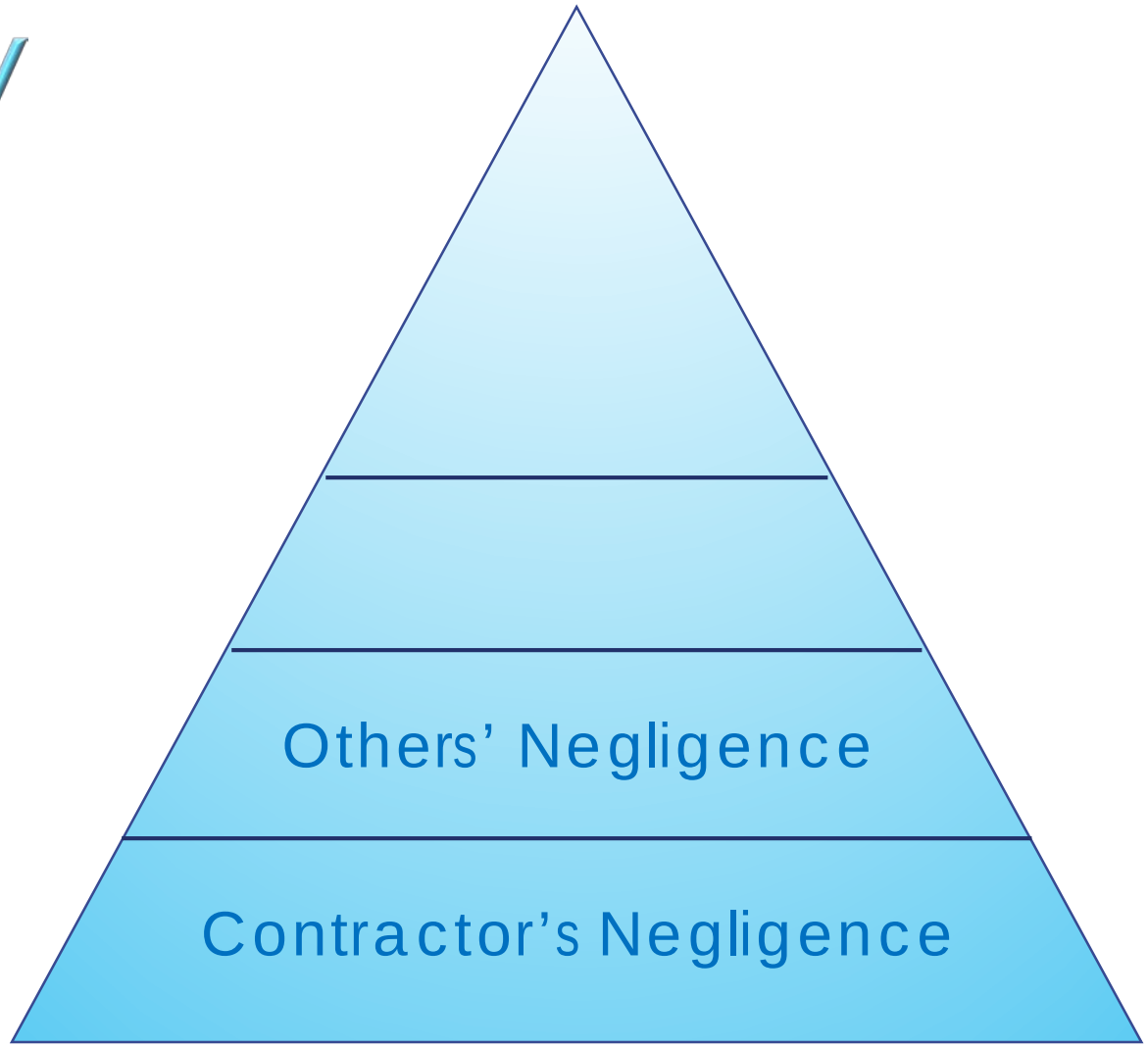
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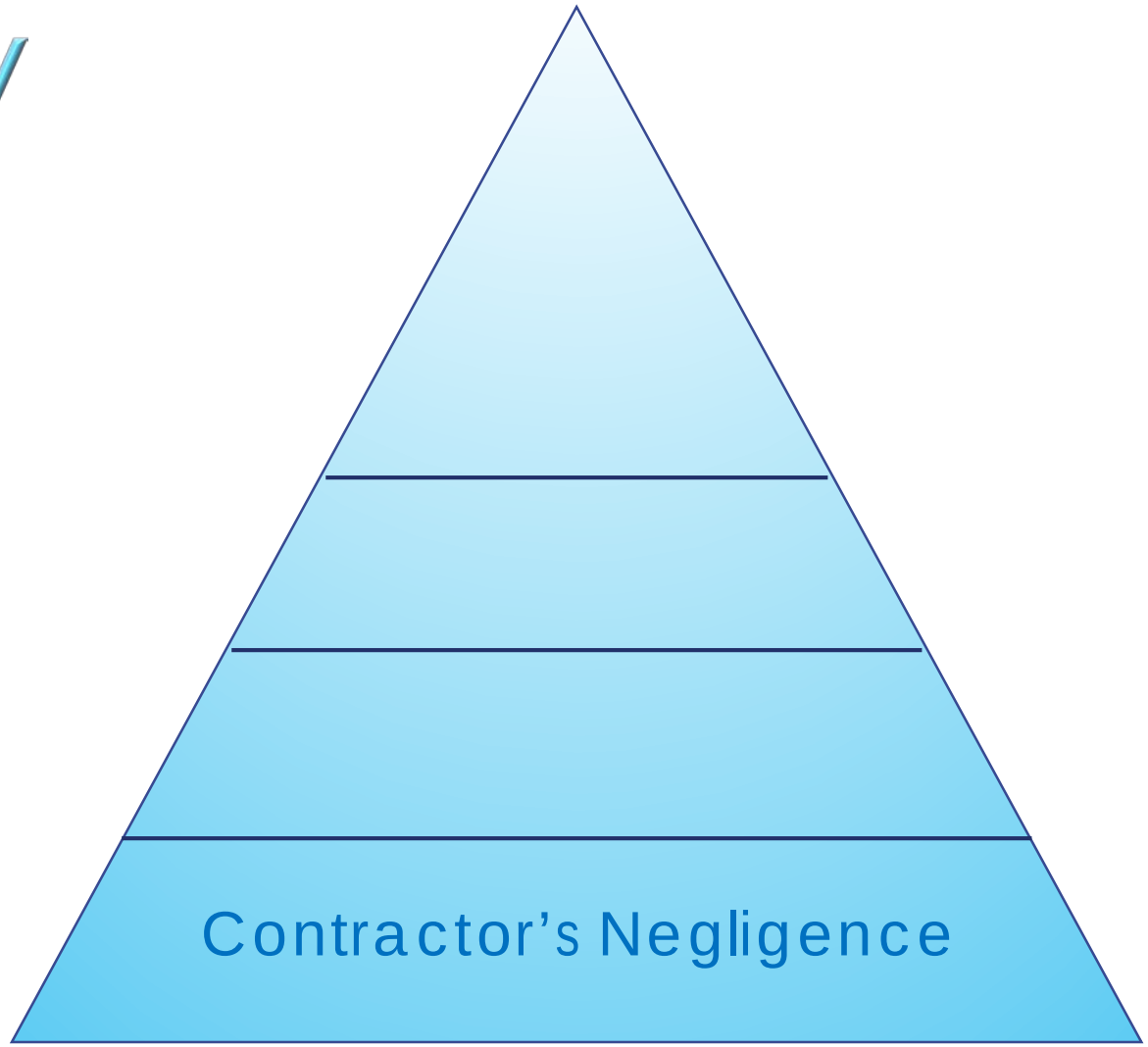
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Where Do They Normally Show Up?

Broad Form

- Security Monitoring
- Internet/IT

Intermediate Form

- General Services
- Leases

Limited Form

- Design/Construction
- Improvement to Land
- Medical/Professional

Comparative Form

- Mutual Indemnification
- Between Public Entities

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Contractual Liability Coverage

How it Applies

- Most common in CGL
- Typically excludes all contractual liability
- Adds back coverage meeting "Insured Contract" definition
  - Defined term
  - Includes a standard indemnification clause

(f) That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another to pay for "bodily injury" or "property damage" to a third party or organization.

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Contractual Liability Coverage

Belt and Suspenders Approach

- Third party beneficiary
  - Usually no direct action against insurer
- Use language that is as insurable as possible
- Broader than additional insured
- Additional insured necessary for direct access to assured funding source (insurer)



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Anti-Indemnification Statutes

- Vary from State to State
- Exceeding statutory limitation may void entire indemnification requirement
- States vary upon including broader coverage as an additional insured

A.R.S. § 34-226 (C) *Except as provided in subsection B of this section, a construction contract or subcontract or design professional services contract or subcontract entered into in connection with a public building or improvement shall not require that the contractor, subcontractor or design professional defend, indemnify, insure or hold harmless the contracting agent or its employees, officers, directors, agents, contractors or subcontractors from any liability, damage, loss, claim, action or proceeding,* ***and any contract provision that is not permitted by subsection B of this section is against the public policy of this state and is void.***

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Limitation of Liability Clauses

- Separate clause, usually in different location
- Limit type and amount of damages
- Eliminate consequential damages
- Can negate indemnity provisions.

Carve Out The Indemnity Clause

Except as provided in Paragraph XX, Indemnification,
In no event shall Contractor be liable for special, indirect, incidental, consequential, exemplary, or punitive damages, even if it has been advised of the possibility of such damages. Contractor's maximum liability to Owner under this agreement shall be the recovery of actual damages up to the amount payable by Owner to Contractor pursuant to this agreement.

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Subrogation

Meaning: To stand in the shoes of another

subrogation

n. assuming the legal rights of a person for whom expenses or a debt has been paid.

subrogate

verb

1. to put into the place of another; substitute for another.
2. Civil Law. to substitute (one person) for another with reference to a claim or right.

http://dictionary.law.com/Default.aspx?typed=subrogate&type=1
https://www.dictionary.com/browse/subrogate

An insured's waiver is binding upon the insurer

It's hard to collect from an insured you have agreed to indemnify

Separation of insureds or separation of interests clause adds protection

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Read the Policy

General Guidelines:

An insured can usually waive a right to subrogation before a loss.

An insured must usually protect a right to subrogation following a loss.

(Against public policy in some states)

Property Insurance:
A typical contractual provision

Liability Insurance:
Usually permitted

Workers' Compensation:
Must be endorsed

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Additional Insured or Named Insured?

- First Named Insured
  - Responsible for premium
  - Reporting responsibilities
- Named Insured
  - May be responsible for premium
  - Reporting responsibilities
- Additional Insured ★
  - Most of the benefits
  - Few of the responsibilities



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Commercial General Liability

- Scheduled
  - CG 20 10 / CG 20 26
  - Current vs 1985 (Your Work vs. Your Ongoing Operations)
  - CG 20 37 Products/Completed Operations
- Blanket
  - CG 20 33 (uses “if required in contract” language)
  - Must maintain copy of contract to prove coverage
- Specify Minimum Coverage
  - Example: CG 20 22
  - (Permits Issuance, no coverage if work performed for you)

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Self-Insurers

Can the funding source respond appropriately?

Is the risk funded?

Is the funding acceptable?

Is the risk capped?

Should you be an additional insured on the excess/umbrella policy?

Is an alternative funding mechanism in place?

Do we have direct access to the funding source?

If fully self-insured:
The indemnification clause defines coverage

Usually gives direct access

Can be complicated by parental guarantees and alternative funding mechanisms

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Auto Liability

- Omnibus Insured Definition
  - Named Insureds
  - All permissive use
  - Anyone else liable for their use
- Designated Insured
  - CA 20 48
- Blanket
  - Company/manuscript forms

We will pay all sums an "insured" legally must pay . . . resulting from the ownership, maintenance or use of a covered "auto"

The following are "insureds."

a. *You for any covered "auto."*
b. *Anyone else while using with your permission . . . except (list)*
c. *Anyone liable for the conduct of an "insured" described above but only to the extent of that liability.*

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Coverage and Limitations

- Read the contract carefully
  - Limiting or modifying language
- Limited to Policy coverage
  - Additional insured and contractual liability
  - Exclusions may affect parties differently
- Shared limits
  - Project or location limits
- Erosion of limits
  - First claims defended/paid, first protected
  - Aggregate limits

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Professional Liability and Medical Malpractice

Cross Liability Exclusion:

- No contractual liability
- No additional insured

Impact

You may need to defend lawsuit and seek indemnification for what is proven.



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Occurrence vs Claims Made Form

Occurrence Form

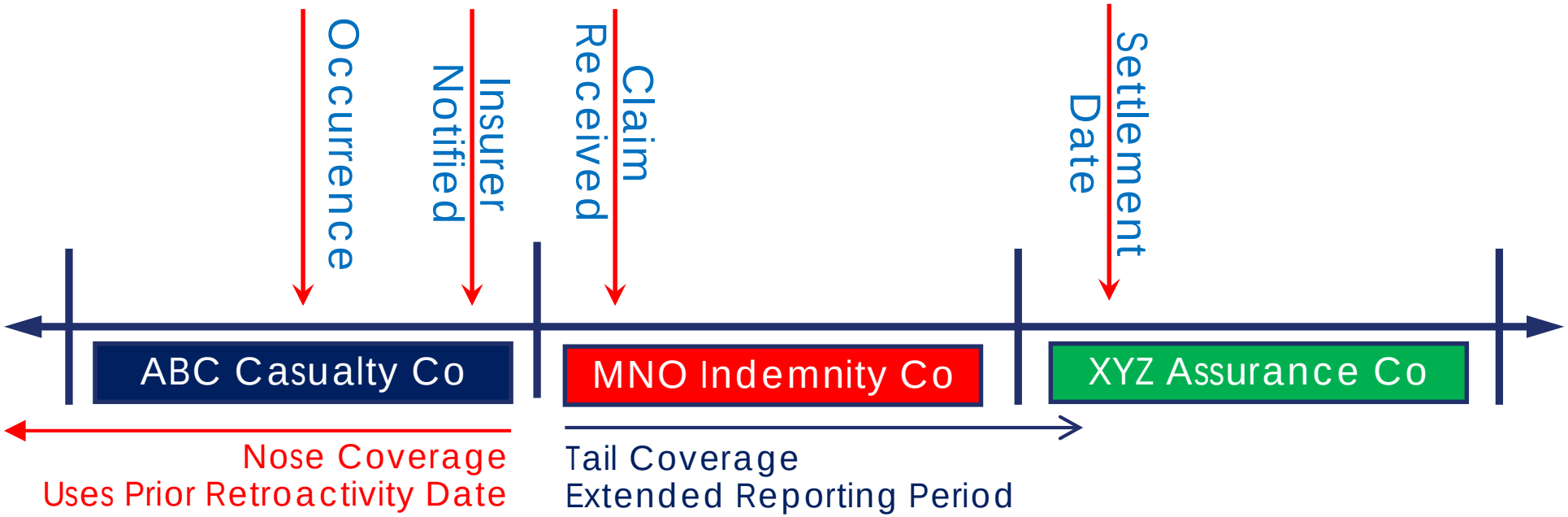
Covers claims occurring during the coverage period no matter when claim is made

Claims Made Form

Covers claims made or reported during the coverage period where occurrence was on or after the retroactivity date

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Occurrence vs Claims Made Form



Occurrence Form: **ABC is responsible**

Claims Made Form: **ABC or MNO may be responsible**

MNO with nose coverage, **ABC** with tail coverage

Notice of event prior to expiration triggers **ABC**

No coverage without prior notice, nose or tail coverage!

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Occurrence vs Claims Made Form



If you have Claims Made Coverage and Change Insurers:

Notify current insurer of all incidents that may result in claims

Nose coverage provides more certain coverage

Tail coverage may still leave a coverage gap

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Occurrence vs Claims Made Form



Contractual Claims-Made Coverage Maintenance:

Likely period for statute of limitations tolling +
Statute of limitations period (federal and state) +
Reasonable notice period =
Years of maintenance requirement

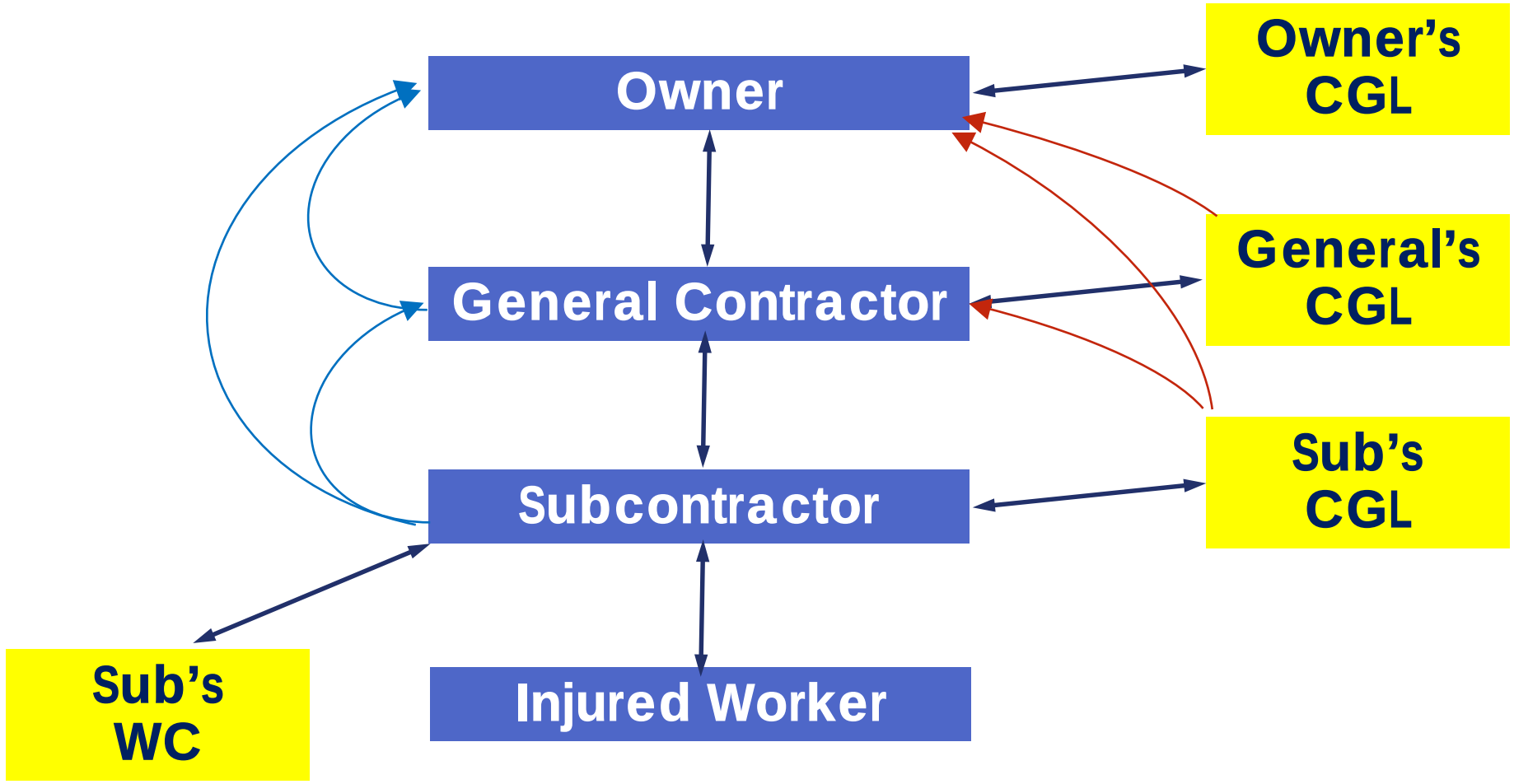
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Third Party Over Claims

- Injured employee's sole remedy against employer or fellow employee is WC
- Injured employee sues others who may be liable
  - Property owner
  - General contractor
  - Subcontractor
  - Architect or engineer
- Triggers multiple indemnity, contractual liability, and additional insured responsibilities

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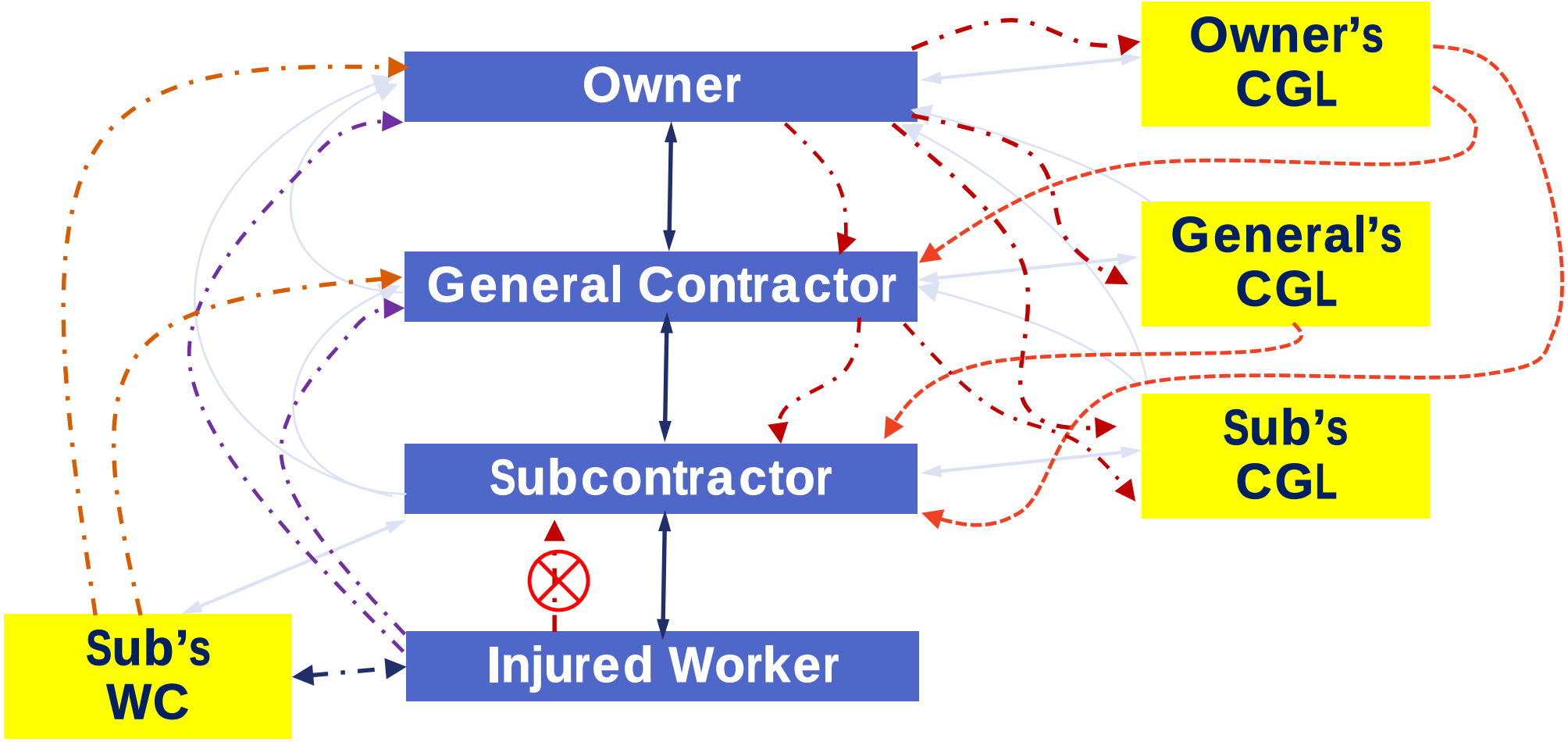
Third Party Over Claims



Based upon work by the International Risk Management Institute (IRMI))

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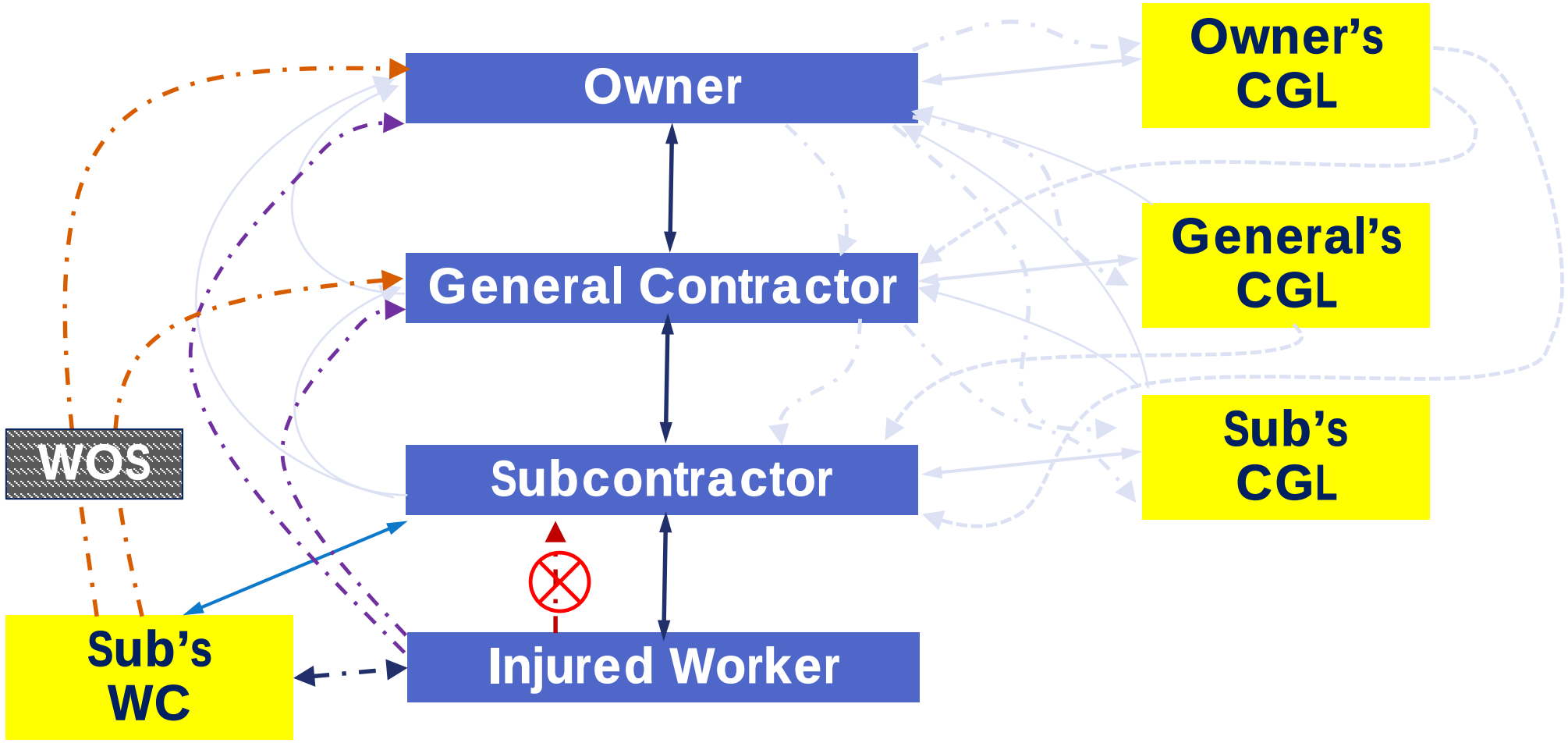
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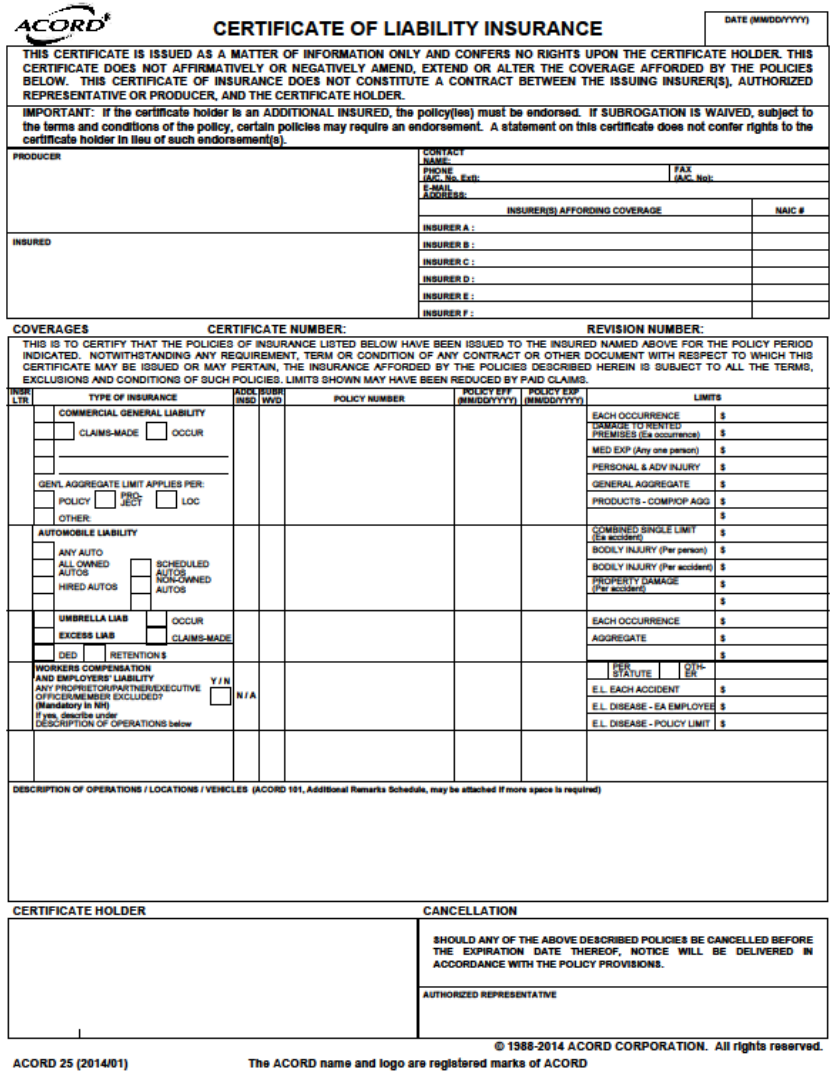


Based upon work by the International Risk Management Institute (IRMI))

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Certificates of Insurance

- Provide a snapshot in time
- Don't ask producer to do something they can't do
  - Conveys information, not rights
  - Cannot misrepresent coverage
  - Can't extend coverage via COI
- Obtain copies of language that grants or limits coverage



ACORD

CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY)

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.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

PRODUCER | CONTACT NAME: | PHONE (A/C, No, Ext): | FAX (A/C, No): | E-MAIL ADDRESS:

INSURER(S) AFFORDING COVERAGE | NAIC #

INSURER A : | INSURER B : | INSURER C : | INSURER D : | INSURER E : | INSURER F :

INSURED

COVERAGES | CERTIFICATE NUMBER: | REVISION NUMBER:

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR LTR	TYPE OF INSURANCE	ADDL INSD	SUBR WVD	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY EXP (MM/DD/YYYY)	LIMITS
	COMMERCIAL GENERAL LIABILITY CLAIMS-MADE OCCUR GEN'L AGGREGATE LIMIT APPLIES PER: POLICY PRO-JECT LOC OTHER:						EACH OCCURRENCE $ DAMAGE TO RENTED PREMISES (Ea occurrence) $ MED EXP (Any one person) $ PERSONAL & ADV INJURY $ GENERAL AGGREGATE $ PRODUCTS - COMP/OP AGG $
	AUTOMOBILE LIABILITY ANY AUTO ALL OWNED AUTOS SCHEDULED AUTOS HIRED AUTOS NON-OWNED AUTOS						COMBINED SINGLE LIMIT (Ea accident) $ BODILY INJURY (Per person) $ BODILY INJURY (Per accident) $ PROPERTY DAMAGE (Per accident) $
	UMBRELLA LIAB OCCUR EXCESS LIAB CLAIMS-MADE DED RETENTION $						EACH OCCURRENCE $ AGGREGATE $
	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? (Mandatory in NH) If yes, describe under DESCRIPTION OF OPERATIONS below	Y / N N / A					PER STATUTE OTH-ER E.L. EACH ACCIDENT $ E.L. DISEASE - EA EMPLOYEE $ E.L. DISEASE - POLICY LIMIT $

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (ACORD 101, Additional Remarks Schedule, may be attached if more space is required)

CERTIFICATE HOLDER

CANCELLATION

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.

AUTHORIZED REPRESENTATIVE

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Typical COI Challenges

- Minimum coverage definitions
- Notice provisions
  - Cancellation
  - Material Changes
  - Reduction of limits
- Specifying coverage elements
- Erosion of limits
  - Project or location limits
- Coordination of coverage
- Policy periods vs contract periods
- Certificates of insurance or declarations page and endorsements
- Consequences
- Management vs tracking
- Whose responsibility?

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PRODUCER Your Local-Regional Broker 12345 Main St. Anytown, CA 96345	CONTACT NAME: James Brown PHONE (A/C, No, Ext): 234-567-8901 FAX (A/C, No): E-MAIL ADDRESS: James.Brown@YLRB.com
INSURED Contracting Consultants PO Box 888 Elsewhere, CA 96345	INSURER(S) AFFORDING COVERAGE — NAIC # INSURER A : ABC Casualty Co INSURER B : MNO Indemnity Co INSURER C : XYZ Assurance INSURER D : Professional Protected Cell Captive INSURER E : INSURER F :

COVERAGES **CERTIFICATE NUMBER:** **REVISION NUMBER:**

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A	COMMERCIAL GENERAL LIABILITY CLAIMS-MADE [X] OCCUR GEN'L AGGREGATE LIMIT APPLIES PER: POLICY [X] PRO-JECT [X] LOC OTHER:	X	X	19-0002378	3/3/19	3/3/23	EACH OCCURRENCE DAMAGE TO RENTED PREMISES (Ea occurrence) MED EXP (Any one person) PERSONAL & ADV INJURY GENERAL AGGREGATE PRODUCTS - COMP/OP AGG	$ 1,000,000 $ $ $ Inc $ 2,000,000 $ Exc
A	AUTOMOBILE LIABILITY ANY AUTO ALL OWNED AUTOS [X] SCHEDULED AUTOS [X] HIRED AUTOS [X] NON-OWNED AUTOS	X	X	1977879-03	3/3/19	3/3/23	COMBINED SINGLE LIMIT (Ea accident) BODILY INJURY (Per person) BODILY INJURY (Per accident) PROPERTY DAMAGE (Per accident)	$ 1,000,000 $ $ $

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	GEN'L AGGREGATE LIMIT APPLIES PER: ☐ POLICY ☒ PRO-JECT ☒ LOC ☐ OTHER:						GENERAL AGGREGATE	$ 2,000,000
							PRODUCTS - COMP/OP AGG	$ Exc
								$
A	AUTOMOBILE LIABILITY ☐ ANY AUTO ☐ ALL OWNED AUTOS ☒ SCHEDULED AUTOS ☒ HIRED AUTOS ☒ NON-OWNED AUTOS ☐	X	X	1977879-03	3/3/19	3/3/23	COMBINED SINGLE LIMIT (Ea accident)	$ 1,000,000
							BODILY INJURY (Per person)	$
							BODILY INJURY (Per accident)	$
							PROPERTY DAMAGE (Per accident)	$
								$
B	☒ UMBRELLA LIAB ☒ OCCUR ☐ EXCESS LIAB ☐ CLAIMS-MADE ☐ DED ☐ RETENTION $	X	X	19-0002378	3/3/19	3/3/23	EACH OCCURRENCE	$ 4,000,000
							AGGREGATE	$ 4,000,000
								$
C	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? (Mandatory in NH) If yes, describe under DESCRIPTION OF OPERATIONS below Y / N ☐	N / A	X	19-0002378	3/3/19	3/3/23	☒ PER STATUTE ☐ OTH-ER	
							E.L. EACH ACCIDENT	$ 1,000,000
							E.L. DISEASE - EA EMPLOYEE	$ 1,000,000
							E.L. DISEASE - POLICY LIMIT	$
D	Professional Liability			PL 2019-2022	1/1/19	1/1/23	$500,000 SIR	1,000,000

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (ACORD 101, Additional Remarks Schedule, may be attached if more space is required)

Certificate Holder and its officers, agents, and employees are additional insured when required by contract per CG 20 33. WC includes waiver of subrogation when required by Contract per WC 00 03. CGL and Auto Liability policies are primary, non-contributory when required by contract. CGL limits do not exceed amount required in contract, even if listed as "minimum."

CERTIFICATE HOLDER

City of San Tan
555 Main Street
San Tan, AZ 85555

Attn: Contract Manager

CANCELLATION

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AUTHORIZED REPRESENTATIVE

James A Brown

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When We Are Indemnitor

- Use ‘limited form’ indemnity
  - Ability to fund liability of others is limited
- Impact upon funding and outstanding liabilities if not limited
- Indemnification clause provides direct access within SIR
- Should you make others an additional insured?

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Final Thoughts and Recommendations

- Develop model language
- Use appropriate indemnity form
- Be as insurable as possible
- Maintain broadest rights
- Language negotiable
- Principles non-negotiable
- Confidence in funding source
- Who minds the store?
- Maintain critical records



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Discussion Time



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