

The **WILD WEST OF RISK**

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Does your indemnity pass the attorney test?

Presented By:
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Introduction



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Contractual Risk Transfer

*Assigning Liability
of a Project or Activity
to Another Party
Via Contract*

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Who's who in risk transfer?

Transferor (Usually the Agency) $\xrightarrow{\text{Risk}}$ **Transferee** (Usually the Vendor)

Indemnitor (Usually the Vendor) $\xleftarrow{\text{Indemnifies}}$ **Indemnitee** (Usually the Agency)

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Why transfer risk via contract?

- Protect the transferor (the agency) from liability.
- Transferee (vendor or contractor) is typically in a better position to control the risk.
- Avoid confusion and disagreement when a claim occurs.

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PRESUMPTION:

“With risk transfer in place, there is no legal wiggle room as to which party must respond to a claim.”

ATTORNEY COROLLARY NO. 1:

“There is always wiggle room.”

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ATTORNEY COROLLARY NO. 1:

“There is always wiggle room.”

- Maybe the risk at issue isn't really being transferred...
- Perhaps the indemnitee is claimed as being responsible, and the contract doesn't address that risk...
- The contractual “whoops”...
- Mutual indemnity...
- “We are still investigating.”

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Indemnity defined

“To make compensation to an entity, person, or insured for incurred injury, loss, or damage.”

~ **International Risk Management Institute (IRMI)**

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Indemnity is a PROMISE

To Protect

To Hold Harmless

To Defend

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PRESUMPTION:

“All indemnity agreements require the indemnitor to defend the indemnitee.”

ATTORNEY COROLLARY NO. 2:

“Maybe.”

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ATTORNEY COROLLARY NO. 2:

“Maybe.”

- When is a Party actually required to begin defending?
- What if there are mutual indemnity provisions?
- Does your risk transfer agreement actually establish when the duty to defend arises?
- Does that duty to defend require a determination from a court or arbitrator?


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Types of indemnity clauses

01 Strong	02 Medium	03 Soft
Vendor will indemnify Agency, “except for the sole negligence or willful misconduct of Agency.”	Vendor will indemnify Agency, “except for the active negligence, sole negligence or willful misconduct of Agency.”	Vendor will indemnify Agency to the extent of Vendor’s comparative fault .

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PRESUMPTION:

“Indemnity for all but your sole negligence is bulletproof and is always in your best interest.”

ATTORNEY COROLLARY NO. 3:

“It depends.”

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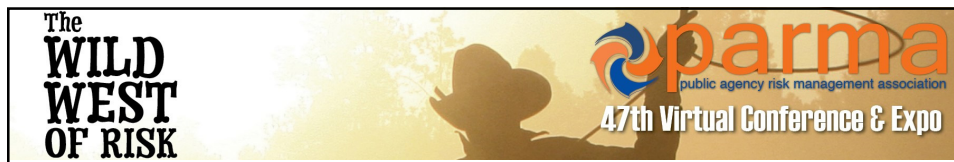
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ATTORNEY COROLLARY NO. 3:

“It depends.”

- Is a Type 1 Indemnity Agreement legal in your jurisdiction?
- Will the courts in your jurisdiction enforce a Type 1 Agreement, or is it “disfavored?”
- Are the potential claims triggering the Type 1 Agreement adequately identified?
- Is your contractor capable of honoring the obligation?
- When does the defense obligation arise?

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PRESUMPTION:

“The level of negligence (sole, active, passive) you specify as an indemnity exception carries significant weight in a court of law.”

ATTORNEY COROLLARY NO. 4:

“Potentially.”

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ATTORNEY COROLLARY NO. 4:

“Potentially.”

- Types of negligence are questions of fact.
- 99% of cases settle before trial.
- Questions of fact generally require a finding of fact.
- Without a trial, the odds are that there will not be a determination as to the characterization of negligence.


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Why use insurance clauses?

- Specifies the lines of coverage and limits of insurance required for the project.
- Provides transferor a direct path to the transferee's insurance carrier.
- Ensures availability of funds to support the indemnification obligations assumed by the vendor, up to the limits specified in the contract.

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PRESUMPTION:

“The limits we require in a contract will be available to us in the event of a claim.”

ATTORNEY COROLLARY NO. 5:

“Sometimes.”

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ATTORNEY COROLLARY NO. 5:

“Sometimes.”

- Did the contractor really get the coverage?
- Is the claim within the scope of the additional insured endorsement?
- Is the carrier going to treat the request to defend as a coverage tender, or a contractual indemnity issue?
- Did the contractor have a self-insured retention?

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Endorsements

- Endorsements show the policy has been modified to add our Agency as an Additional Insured.
- “Additional Insured” means the Agency is covered by the vendor/contractor’s policy.

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PRESUMPTION:

“An AI endorsement ensures that my contractor's carrier will accept any liability claims for a given project.”

ATTORNEY COROLLARY NO. 6:

“Not necessarily.”

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ATTORNEY COROLLARY NO. 6:

“Not necessarily.”

- Is the claim within the scope of the additional insured endorsement?
- Did the contractor have a self-insured retention?
- If the contractor had a self-insured retention, is that contractor still solvent?

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Questions and Discussion

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Contact information



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