Risk allocation is a common feature of commercial agreements. To appropriately allocate risks, contracting parties must pay careful attention to provisions concerning: (i) indemnification; (ii) hold harmless; and (iii) insurance coverage requirements. When properly drafted, analyzed and documented, these separate but interdependent provisions can facilitate the allocation of risk.

CONTRACTUAL INDEMNITY PROVISIONS

In simple terms, “indemnify” typically means an obligation to reimburse following a loss. A contractual indemnification provision may effectively transfer the risk from the entity providing goods or services to the entity receiving them (or vice versa) in the event of a loss stemming from the contractual relationship.

A major limitation on indemnity clauses, however, is that they may be drafted to “cap” the amount to be spent or duration of indemnity, or to exclude certain categories of risk. Moreover, some jurisdictions, by law, do not allow indemnification for the sole and/or concurrent negligence of the indemnitee. As a result, a contractual indemnification provision may potentially be deemed unenforceable depending upon circumstances of the loss. For this reason, commercial contracts often include hold harmless and insurance provisions to “boot-strap” protections that indemnity clauses are intended to provide.

HOLD HARMLESS AGREEMENTS

Another common feature, the hold harmless provision is a promise not to hold another party responsible for damages or other liability arising from a transaction, thereby limiting one entity’s exposure to claims. The hold harmless provision, however, will typically only protect the entity from exposure to claims by the other party to the contract, and not from third parties who may claim injury arising from its performance. Thus, the allocation of risk arising from a contractual relationship can rarely be effectuated through a hold harmless provision alone.

INSURANCE REQUIREMENTS

Given the limitations on indemnification and hold harmless provisions, commercial contracts often include requirements for an entity to procure some form of insurance coverage on behalf of the other. To successfully manage risks, however, it is critically important that contracting parties ensure that all protections they believe are embraced are in fact contained in the contract and insurance documents.

NEGOTIATE RISK ALLOCATION PROVISIONS UP FRONT

As a deal point, negotiations concerning the nature and extent of insurance that one party is required to procure on behalf of another should be among the least contentious in the entire contract. This is because typically both parties – the named insured and the entity seeking additional insurance coverage – have a shared interest in making sure they have sufficient insurance to cover reasonably anticipated risks. As a result, one would expect the contracting parties to work together to ensure that whichever insurance product is purchased is appropriate for the risks they face.

In practice, however, the insurance provisions of a commercial contact are often overlooked and should be more carefully considered before an occurrence takes place. For example, in Mutual Benefit Ins. Co. v. Politopoulos, 75 A.3d 528 (Pa. Sup. Ct. 2013), a restaurant property owner sought additional insured coverage under a policy procured by the restaurant tenant pursuant to a contract between them. After the con-
tract incepted, an employee of the restaurant was injured and sued the property owner, who in turn sought coverage. After reviewing the claim, however, the insurer declined coverage pursuant to an employers’ liability exclusion contained in the policy. At the trial court level, the insurers’ declaration was upheld, but an appellate court more recently found that coverage may exist based upon a separate severability of insureds provision. In 2015, the highest court in Pennsylvania is expected to decide whether the restaurant owner qualifies for additional insured coverage. Thus, while litigation cannot always be avoided, contracting parties may attempt to limit protracted disputes such as those in *Pilipopoulos* by carefully reviewing contracts and insurance policies before a loss takes place.

**THE CONTRACT IS NOT AN INSURANCE POLICY**

Moreover, it is important to keep in mind that the insurance company is rarely, if ever, a party to the commercial contract, and is therefore only required to provide coverage pursuant to the terms of its policy. In *City of Cedar Rapids v. Insurance Company of N. Am.*, 562 N.W.2d 156 (Sup. Ct. Iowa), the city and a hotel owner were parties to a hotel lease agreement. The agreement required the hotel to obtain liability insurance naming the city as an additional insured. After the contract was signed, a hotel guest fell through a plate glass of a second-floor skywalk system, sustaining injuries. The coverage question, however, turned on the specific language of the additional insured endorsement, which only conferred coverage with respect to a “designated premises” in the hotel, a ballroom. Since the injury took place at the skywalk, and not the ballroom, the city was not entitled to coverage. Rather, the court explained that if the hotel failed to procure the insurance required by contract, “the city must look to the hotel for recourse and not the insurance company.” Id. at 158.

Similarly, in *Raymond Corp. v. National Union Fire Ins. Co.*, 5 N.Y.3d 157, 833 N.E.2d 232, 800 N.Y.S.2d 89, New York’s highest court found that the additional insured endorsement a forklift manufacturer procured on behalf of its installation vendor did not provide coverage for the vendor’s negligent acts. After the contract was entered, the vendor’s technicians improperly fit the guide rollers, which caused them to wobble, jam, and ultimately injure a worker. The additional insured endorsement provided that the vendor was to be included as an insured “but only with respect to ‘bodily injury’ or ‘property damage’ arising out of ‘your products.’” Since the injuries stemmed from the installation vendor’s negligence, not the manufacturer’s defective product, the court ruled the vendor had no rights to coverage. See id. at 162-63.

In other words, the question of whether an entity qualifies as an additional insured will generally turn on the language of the insurance policy as opposed to the underlying contract. In *Franklin Mut. Ins. Co. v. Security Indemnity Ins. Co.*, 275 N.J. Super. 335, 646 A.2d 443 (N.J. App. Div. 1994), a law firm sought additional insured coverage following a slip and fall accident at a restaurant to which it leased space. Under the policy the restaurant had purchased, the law firm qualified as an additional insured “with respect to the liability arising out of the ownership, maintenance, or use” of the leased premises. Id. at 445.

Since there was a substantial nexus between the steps where the accident occurred and the leased premises, the court found the liability arose out of the “use” of the premises within the meaning of the additional insured endorsement. Id. at 446. If, however, the policy had contained an additional insured endorsement more similar to those considered in *Cedar Rapids* or *Raymond Corp.*, the entity seeking coverage may have found itself with no coverage at all. See also *Tropani v. 10 Arial Way Assoc.*, 301 A.D.2d 644 (2d Dept. (N.Y.) 2003) (holding contractual requirement for party to be named as additional insured must be “expressly and specifically stated”); *In re Deepwater Horizon*, No. 13-0670 (Tex. Sup. Ct., Feb. 13, 2015) (finding underlying transactional documents may be relevant to additional insured dispute “if the policy directs us elsewhere” such that additional insured status is “inexorably linked” to extent of indemnity obligations).

Despite the importance of insurance policy language, few commercial contracts actually require a party to provide the other entity with a copy of the policy. As a result, many entities will enter into contracts assuming they qualify as additional insureds, but will never actually see the insurance policy until after an occurrence. To avoid these surprises, contracting parties should amend their agreements to require the other party to forward copies of all insurance policies naming them as an additional insured before the contract incepts.

**INSURANCE CERTIFICATES ARE NOT POLICIES**

Finally, the majority of jurisdictions have found that a certificate of insurance alone is not sufficient to confer insured status on a party. See, e.g., *Tribeca Broadway Assoc. LLC v. Mount Vernon Fire Ins. Co.*, 774 N.Y.S.2d 11, 13 (N.Y. App. Div. (1st Dept.) 2004) (certificate of insurance is “not a contract to insure the designated party nor conclusive proof, standing alone, that such a contract exists”). Accordingly, an entity seeking additional insured coverage pursuant to a contract should request not only a certificate of insurance, but also complete copies of the policy jacket, declarations, and all endorsements, including any additional insured endorsement. By addressing risk allocation provisions up front, contracting parties will be far better poised to respond in the event of a claim, because they will have negotiated how and where the risks arising from their contractual relationship should be allocated.

**CONCLUSION**

The allocation of risk is a critical component of commercial contracts spanning various industries. When appropriately negotiated and drafted, indemnification, hold harmless, and insurance provisions can work symbiotically to spread risks of loss. Each of these components, however, contains its own inherent limitations and must be carefully evaluated. In particular, contracting parties should review these risk allocation provisions with a knowledgeable professional before the contract is signed. By addressing risk allocation language up front, the parties to a contract can most effectively assess and seek to minimize risks accompanying a contract.

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