

An aerial photograph of a city skyline, likely San Francisco, viewed from across a large body of water. The city features numerous skyscrapers and modern buildings. In the foreground, there are some smaller structures and a boat on the water. The sky is clear and blue.

Cavignac

Basics of Contractual Risk Transfer

Presented by Jackie Sousa and Natalie Sherod

Agenda

1. Overview of Indemnification

2. Flow of Risk

3. Coverage Provisions and Endorsements

4. Administration of CRT

5. Claims Examples

6. Q & A

What is **Contractual Risk Transfer**?

- **Contractual Risk Transfer (CRT)** is the use of contractual obligations to pass on a potential risk to another party.
- Typically, risk is allocated to the party who has the appropriate control over the management of the risk

EXAMPLE: A subcontractor assuming the risk for the scope of work they perform for a General Contractor

Contractual Risk Transfer is accomplished through the use of indemnity agreements, waivers of subrogation, and other contractual requirements.

Insurance is a means for financing these indemnification costs.

“Belt and Suspenders”

Indemnification provision in the contract (Belt)

Insurance requirements (Suspenders)



“Suspenders and a belt? You must be the guy from risk management.”

Types of Indemnity

Broad Form Indemnification

Entity agrees to indemnify upstream party for all liability, including cost of defense, arising out of performance of services.

Intermediate Form Indemnification

Entity agrees to indemnify upstream party for all liability including cost of defense arising out of performance of services **except** the sole negligence or willful misconduct of upstream party.

Limited Form Indemnification

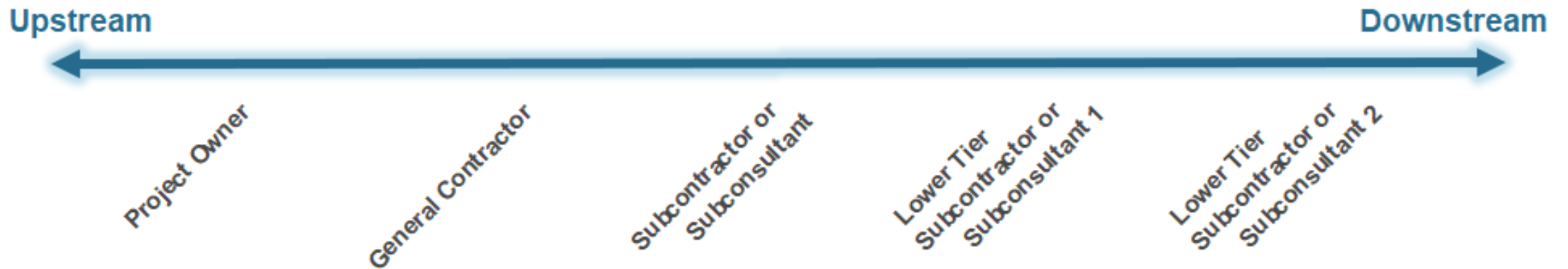
Entity agrees to indemnify upstream party for damages arising out of entity's own negligence in performing services.



Flow of Risk

Understanding where you sit in the contractual chain of risk is key to understanding what risks you are taking on and what risks you are passing on. This may look different, depending on what industry you're in and the type of work or service being performed.

The example below shows the normal flow of risk in Construction agreement:



Sample “Flow Down” Language

12.0 – Requirements of the Prime Contract

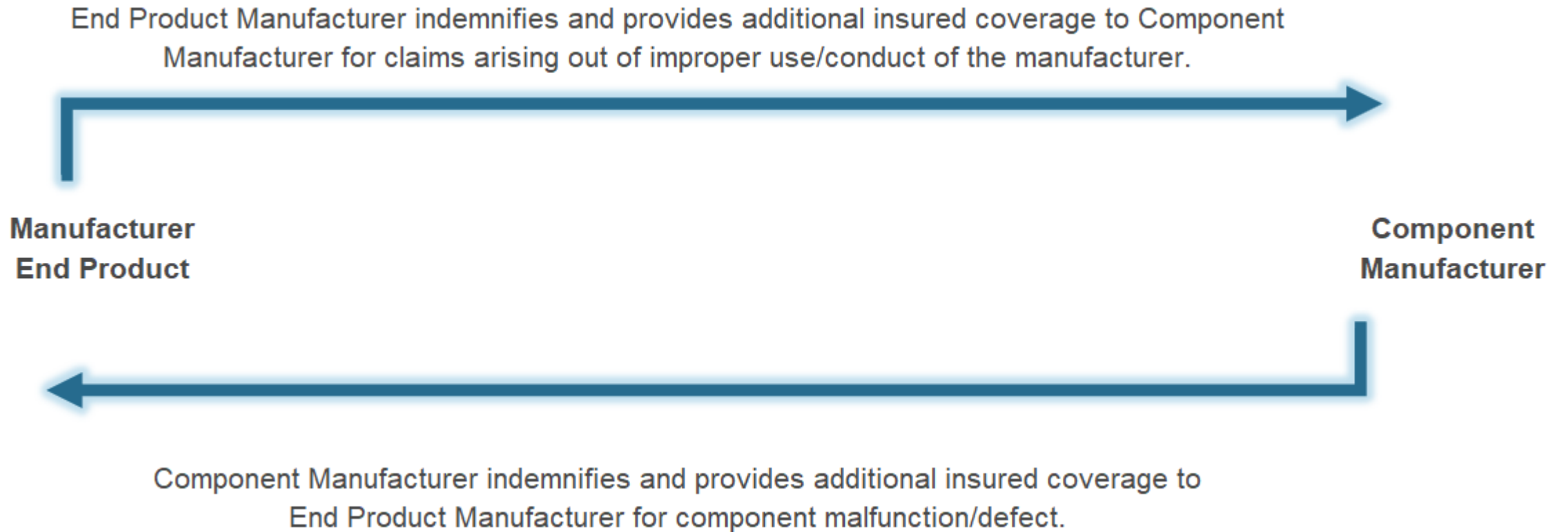
If the prime contract requires limits of insurance higher than the minimum limits outlined in this agreement, or requires broader coverage than the coverages outlined in this agreement, the requirements of the prime contract shall apply to the extent that they exceed the minimum requirements in this agreement.

1.7 – Subcontractors Insurance

Subcontractor shall cause each Sub-Subcontractor employed by Subcontractor to purchase and maintain insurance of the type specified in this agreement. When requested by Contractor, Subcontractor shall furnish copies of certificates of insurance evidencing coverage for each Sub-Subcontractor.

Flow of Risk

In a Manufacturing agreement, the flow of risk may look very different:



Indemnification Provisions – Considerations

- Understand your organization's appetite for risk.
- Understand best practices and market norms for your industry group (what's typical).
- Identify what risks you're agreeing to take on (whether insurable or uninsurable) and what risk you're passing on.
- Work with your Attorney to set indemnification provisions that align with the above
- Work with your Risk Manager to establish appropriate insurance requirements in support of the indemnification

How do we establish and administer Risk Transfer?

1. Executed Subcontract Agreement, Service Agreement or Purchase Order

- ✓ Indemnification provisions tailored to work/service being performed in conformance with state requirements
- ✓ Job and/or service specific insurance requirements

2. Certificates of Insurance

- ✓ Confirm compliance with all contractual insurance coverage requirements and limits
- ✓ Current effective dates

3. Copies of all required endorsements and provisions (including but not limited to)

- ✓ Additional Insured
- ✓ Waivers of Subrogation
- ✓ Primary and Noncontributory
- ✓ Notice of Cancellation
- ✓ Other Provisions – *As Applicable*



Compliance should be verified prior to any work or services being performed


ACORD Certificate

A Certificate is . . .

- ✓ A document used to inform a third party that the named insured has certain insurance in force at the time of issuance
- ✓ An informational document only (do not rely on the COI for additional insured coverage)

A Certificate is not . . .

- ✗ An insurance policy
- ✗ Confers no rights on the certificate holder
- ✗ Cannot change or amend the policy



CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY)
 01/01/2019

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 Cavignac & Associates 450 B Street, Suite 1800 San Diego CA 92101	CONTACT Name: Certificate Department PHONE (A/C No. Ext): 619-744-0574 FAX (A/C No.): 619-234-8801 E-MAIL Address: certificates@cavignac.com
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INSURED ABC Subcontractor 1234 Main Street San Diego, CA 11111	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <th style="text-align: left;">INSURER(S) ACCORDING COVERAGE</th> <th style="text-align: left;">NAIC #</th> </tr> <tr> <td>INSURER A: XYZ Insurance Company</td> <td></td> </tr> <tr> <td>INSURER B: Minimum A.M. Best Rating of A- VII</td> <td></td> </tr> <tr> <td>INSURER C:</td> <td></td> </tr> <tr> <td>INSURER D:</td> <td></td> </tr> <tr> <td>INSURER E:</td> <td></td> </tr> <tr> <td>INSURER F:</td> <td></td> </tr> </table>	INSURER(S) ACCORDING COVERAGE	NAIC #	INSURER A: XYZ Insurance Company		INSURER B: Minimum A.M. Best Rating of A- VII		INSURER C:		INSURER D:		INSURER E:		INSURER F:	
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COVERAGES **CERTIFICATE NUMBER:** 851850778 **REVISION NUMBER:**

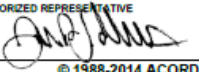
THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE 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.

INSTR	TYPE OF INSURANCE	ADDL	SUBR	POLICY NUMBER	POLICY EFF	POLICY EXP	LIMITS
A	<input checked="" type="checkbox"/> COMMERCIAL GENERAL LIABILITY <input type="checkbox"/> CLAIMS-MADE <input checked="" type="checkbox"/> OCCUR GEN'L AGGREGATE LIMIT APPLIES PER: <input type="checkbox"/> POLICY <input checked="" type="checkbox"/> PROJECT <input type="checkbox"/> LOC <input type="checkbox"/> OTHER		X	POLICY #1	01/01/2019	01/01/2020	EACH OCCURRENCE DAMAGE TO RENTED PREMISES (EA occurrence) \$ 100,000 MED EXP (Any one person) \$ 5,000 PERSONAL & ADV INJURY \$ 2,000,000 GENERAL AGGREGATE \$ 2,000,000 PRODUCTS - COMPIO AGG \$ 2,000,000 DEDUCTIBLE \$ 2,500
A	AUTOMOBILE LIABILITY <input checked="" type="checkbox"/> ANY AUTO <input type="checkbox"/> ALL OWNED AUTOS <input type="checkbox"/> SCHEDULED AUTOS <input checked="" type="checkbox"/> HIRED AUTOS <input checked="" type="checkbox"/> NON-OWNED AUTOS			POLICY #2	01/01/2019	01/01/2020	COMBINED SINGLE LIMIT (EA accident) \$ 1,000,000 BODILY INJURY (Per person) \$ BODILY INJURY (Per accident) \$ PROPERTY DAMAGE (Per accident) \$ UMBRELLA LIAB OCCUR EXCESS LIAB CLAIMS-MADE DED RETENTION \$
A	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? (Mandatory in NH) If yes, describe under DESCRIPTION OF OPERATIONS below		X	POLICY #3	01/01/2019	01/01/2020	<input checked="" type="checkbox"/> PER STRIKE <input type="checkbox"/> OTHER E.L. EACH ACCIDENT \$ 1,000,000 E.L. DISEASE - EA EMPLOYEE \$ 1,000,000 E.L. DISEASE - POLICY LIMIT \$ 1,000,000

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

Re: Project Name and Address

Additional Insured coverage applies to General Liability and for General Contractor, Inc. per policy form. Primary and Non-Contributory coverage applies to General Liability per policy form. Waiver of Subrogation applies to General Liability and Workers Compensation per policy form. Excess/Umbrella policy follows form over underlying policies: General Liability, Auto Liability & Employers Liability (additional insured and waiver of subrogation apply). If the insurance company elects to cancel or non-renew coverage for any reason other than nonpayment of premium they will provide 30 days notice of such cancellation or nonrenewal.

CERTIFICATE HOLDER General Contractor, Inc. 123 Main Street San Diego, CA 92101	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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Key Coverage Provisions & Endorsements

- Additional Insured
- Waiver of Subrogation
- Primary and Noncontributory Coverage
- Notice of Cancellation
- Relevant Exclusions or Limitations?

Additional Insured

An additional insured is a person or entity who is not the owner of the policy (i.e. Named Insured) but who, under certain circumstances, may be entitled to some of the benefits and coverage under the policy.

Additional insured status is used in conjunction with an indemnity agreement between the Named Insured (**the indemnitor**) and the party requesting additional insured status (**the indemnitee**).

For indemnitees, having the rights of an insured under the indemnitor's policy is a way of backing up the promise of indemnification.

Waiver of Subrogation

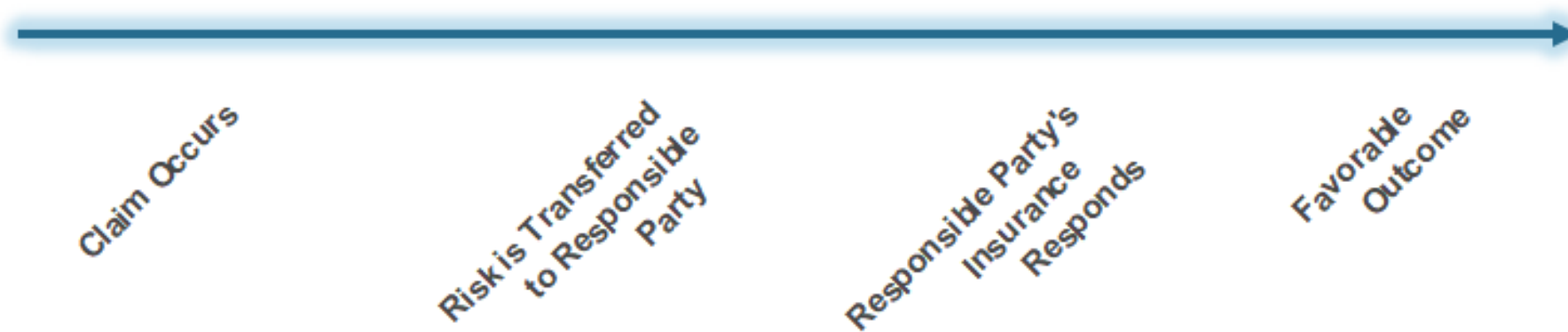
A waiver of subrogation is an acknowledgment by an insurer that it has no right to subrogate (i.e. recoup) against a liable third party after it (the insurer) has paid a loss on behalf of its insured.

Primary and Noncontributory Coverage

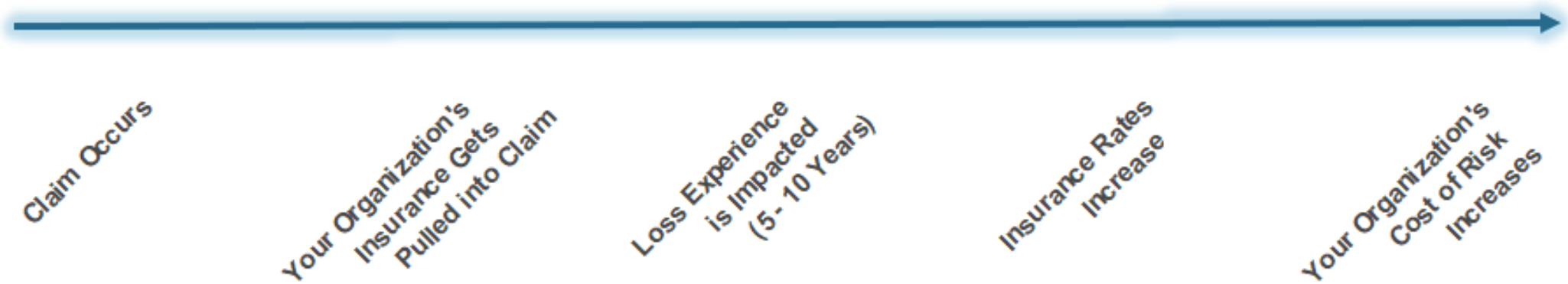
“**Primary**” designates that one party's liability policy is responsible for responding to a claim first before another entity's policy applies.

“**Noncontributory**” stops the primary party's insurer from seeking contribution from the other entity's policy to pay a claim.

What happens when we collect compliant insurance?



What do we risk when we don't collect compliant coverage?



Building Owner Example

A building owner hired an HVAC Contractor to service the air vents. The contractor dropped a piece of the vent and it struck a woman on the head. The contract required that the HVAC contractor indemnify the owner, but certificates were not collected. The damages owed were slightly over \$1 million. The HVAC contractor did not have adequate insurance and could not fulfill indemnification requirements.

The building owner's policy did respond, but they were now left with a \$1 million claim which led to higher premiums.



GC/Subcontractor Example

ABC Construction subcontracts plumbing services to PJ Plumbing. PJ Plumbing subcontracts a portion of those services to Ace Plumbing.

When Ace Plumbing incorrectly secures two pipes together causing a significant water damage claim, the Owner makes a claim against ABC Construction for the damage. ABC tenders to PJ, who tenders to Ace. However, in this process, it is discovered that PJ Plumbing did not pass through ABC's additional insured requirements in their subcontract with Ace. As a result, no additional insured coverage applies to ABC under Ace's GL policy. Instead, PJ Plumbing and their insurer are on the hook and must defend ABC Construction in the claim, as required by their contract.



Manufacturer Example

XYZ Lighting Solutions manufactures lighting fixtures used in restaurants. They source components from a distributor in the US (Components R US) but do not require Additional Insured status. Components R Us source some of their components from outside United States and were unaware that some of the wiring had been known to cause fires.

A fire erupted at one of XYZ Lighting Solution's customers and they were forced to cover the cost of repairs as they did not have any recourse from the distributor.





Questions?



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