



# Commentary

BY MICHAEL EMERSON

## A False Sense of Security

**E**VERY COMMERCIAL LEASE and most construction contracts provide for some level of security from liability for damages, loss or injury.

Legally, this security is commonly provided through an indemnity clause, naming the contracting party as “additional insured” on the promisor’s insurance policy and a requirement that a certificate of insurance be provided before the tenant can take possession or an owner will issue a notice to proceed.

When the lease or contract is signed and the owner or general contractor has certificates of insurance in hand, surely the matter is well in hand and performance under the lease or contract can proceed. Right? Think again.

Indemnity clauses are fully enforceable in Arkansas as long as they use specific language that fully sets forth

the circumstances under which they will apply.

There are four basic levels of indemnity clauses, which run the gamut from extremely tough to moderately onerous, to quite lenient, all the way down to unintelligible/unenforceable.

At a minimum, an indemnity clause must state that the promising party will indemnify and hold harmless the promisee for all accidents and claims arising out of the promisor’s use of the premises, activities or operations on behalf of the promisee, even if the accidents, claims or lawsuits were caused in part by the negligence or conduct of the promisee. You can be entitled to indemnity in Arkansas even if you were partially or totally at fault, as long as the contract specifically provides.

Based on years of personal experience litigating indemnity claims, the lack of specificity is the single most

common reason these clauses fail in court.

Because indemnity clauses can often be difficult to enforce, “additional insured clauses” became popular. These require the tenant, contractor or subcontractor to name the owner as an additional insured under his liability insurance policy. A separate endorsement or rider to the insurance policy was added in the past. Many standardized policies now accomplish this designation under the policy’s definition of “Who is an Insured.”

The problem is that some insurance policies are much less protective of the so-called additional insured — AI — than the underlying contract or lease. Even with a certificate of insurance in hand, keep in mind that a certificate is still subject to all the terms and conditions of the insurance policy and does not itself create any legal rights against the insurance company. Coverage is determined solely by the policy.

Many AI clauses in contracts and leases do not state what kind or scope of coverage is required or what limits are required. At a minimum, AI clauses should state the kind of coverage required and that the coverage should be “blanket.” Some policies also have restrictions on coverage, such as that the same law firm be able to represent both parties in a lawsuit. Since that is rarely allowed to occur, the contract or lease requirement of AI coverage is defeated.

When the contracting party has an unenforceable indemnity clause,

no coverage under an AI clause and a certificate that is meaningless, the only remedy is a claim for breach of contract/lease. Such a claim, frequently in the middle of a lawsuit and between colleagues and business associates, is the last thing anyone wants and a remedy of last resort.

The amazing thing is that such claims are anything but sure things. The promisor can defend by showing that the indemnity claim is unenforceable and that it did not violate the AI clause: It got AI coverage, just not blanket coverage, which was not required under the contract or lease.

Imagine breaking this bad news to clients after the fact. In essence, they have no protection and no viable breach of contract claim.

The way to avoid these pitfalls is to not only review and understand the various contract indemnity and AI clauses, but to require and obtain a copy of the promisor’s insurance policy before you allow occupancy or construction to proceed. Only then can you determine — before the need arises — whether you have the protection you think you have under the contract. ■

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