



PUBLICATIONS

9706

CONTRACTS - KNOW WHAT YOU ARE SIGNING

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Contractual requirements should be reasonable for the circumstances.

Reviewing contracts and being aware of what risks or liability you may be assuming or not appropriately transferring should be part of every organization's overall risk management program (i.e. **contractual transfer for risk control**).

A contractual transfer for risk control is an agreement under which one party (the transferor) shifts to another (the transferee) the loss exposures associated with an asset or activity. Your organization is involved on both sides of such a transfer on many occasions every year (e.g. lease/rental agreement, building construction projects, contracted services, etc.).

Regardless of which side of the transfer your organization falls, the contractual requirements

should be reasonable under the circumstances. Many lawyers, however, would disagree with this statement, as they often attempt to transfer any and all liability to the other party. The courts are generally somewhat reluctant to allow one organization to escape liability to a third party by subcontracting with another organization, especially if the subcontractor is not financially strong and the third party claimant is seriously injured. Every contractual transfer should: (1) **clearly** state the responsibilities of each party; (2) ensure the transfer recipient is **willing** and **able** to handle the transfer; and have **control** over the extent of the losses; (3) be cost effective; and (4) be legally enforceable.

The method of transferring liability can be accomplished through the use of hold harmless/indemnification clauses, as well as through the use of waivers/releases/disclaimers within a contract. An

indemnity clause is only as good as the guarantee, which is why whenever possible, such a clause should be followed with a request for insurance. The transferor should be satisfied that the transferee has: financial strength; sufficient limits of cover; added the transferor as an additional insured; current coverage; and no coverage restrictions which would affect the scope of their agreement.

If we examine the following two examples, it should be clear why one party has legitimate reasons to transfer liability to the other.

Example #1 - Lease Agreement

Landlord A owns a building, a portion of which they agree to lease to Tenant B. Landlord A, as owner of the building, owes a statutory duty to ensure that an entrant will not be harmed while on their premises for all

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permitted activities. Since Tenant B will have exclusive use and control of a portion of these premises, Landlord A desires to make Tenant B hold them harmless and indemnify them from all claims arising out of Tenant B's occupancy. We deem this to be "reasonable" under these circumstances.

Example #2 - Contracted Services

Company A purchases the expert services of Company B for the provision of specific functions on their behalf. In the service agreement, Company B is required to be responsible and liable for all claims arising out of their performance of these services. As such Company B agrees to hold Company A harmless and indemnify them from any third party claims arising from Company B's negligent performance and/or

omission to perform the services as set out in the agreement. Again, it is reasonable that the contractor, who is paid a fee for services, be responsible for all claims arising from these.

Always transfer liability to the responsible party whenever and wherever possible to avoid being involved in a claim over which your organization has little or no control over the circumstances.

From our experience in assisting many of you in the review of your various contract wordings, it is not unusual for an organization that is deemed more powerful (such as a large, international corporation, or a higher tiered government) to attempt to impose unreasonable and unfair requirements upon you. Many of these requirements involve the transferee agreeing to indemnify the

transferor from all claims including the transferor's own negligence; or a lease agreement whereby the tenant sets out the landlord's obligations! We remind you not to lose sight of which party should have control or the ability to transfer liability--which should have no bearing on **who** the other party is!

In summary, we stress the importance of carefully reviewing all agreements, paying particular attention to who is transferring and who is assuming the risk and liabilities under such contract. If the wording does not seem reasonable under your particular circumstances, please obtain a legal opinion **before** you sign! Any legal fees incurred prior to signing a contract will likely be far less than the cost of resolving disputes following a claim. ➡

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