

Contractual risk transfer: die hard

By Jason Barney

Contractual risk transfer and its close cousin, additional insurance, are tools implemented by the risk management professional to shift risk from one party to another—usually in the context of a service provider (contractor) performing work on behalf of the Member entity. The services can vary from large public works projects to the more mundane contracts for janitorial services. When claims arise it can be frustrating when all your front-end work on securing risk-transfer doesn't pan out at the claims stage. Let's go over three examples involving successes and failures in risk transfer to draw some lessons from each to help you learn how your contractual risk transfer can "Die Hard".

One recent claim involved a Member and owner of street improvement project, contracted to a private entity. The Member had implemented a written contract for indemnity between it and the contractor, and a separate agreement for the contractor to name it as an additional insured on its policy. This belts-and-suspenders type approach is important because the "belt" (contractual indemnity) is often of limited use in some construction contracts (see [RCW 4.24.115](#)) but the additional insurance coverage (suspenders) agreed by the contractor and provided by its insurer formed the basis to successfully tender the claim. The claim was paid by the contractor's insurer and did not implicate the Member's loss run.

Another recent claim involved alleged negligence by a contract Prosecutor involving the alleged disclosure of social security numbers when the Prosecutor filed criminal charges against a suspect and included a copy of the police report having that information. The City had previously obtained an agreement for contractual indemnity and additional insurance from the contract attorney. In this case there was no coverage under the additional insurance since the claim arose out of professional liability, and the additional insurance secured under the commercial general liability was inapplicable. Fortunately, the "belt" of contractual indemnity stepped in and since the claim did not arise out of a construction contract ([RCW 4.24.115](#)) and the claim was successfully tendered through contractual indemnity.

As a final example, a claim was brought against a Member for damage to a vehicle caused after driving through a recently-completed construction zone. The contractor had left a few days before and the road was put back to its normal use, though the claimant was attributing his property damage to the defective work of the Member's contractor. Contractual liability was of limited use under [RCW 4.24.115](#) and the additional insured coverage the member bargained for had ceased once the contractor's on-site work was completed. Additional insurance usually covers only ongoing operations and does not provide coverage for the Member after the conclusion of the contractor's work. With no belt or suspenders we're not out of luck yet! We can still transfer the risk and refer the claimant to the contractor we believe is responsible for the defect, but costs to defend the litigation and settle any suit may not be transferable.

Contractual indemnity and additional insurance are separate, complementary risk transfer mechanisms—and where one is inapplicable the other usually suffices in most circumstances. Implementing each in your contract documents can help your risk transfer efforts “Die Hard”.