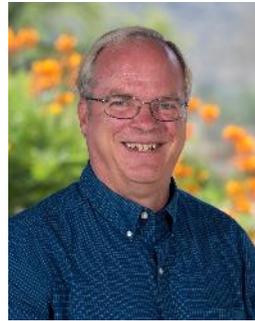
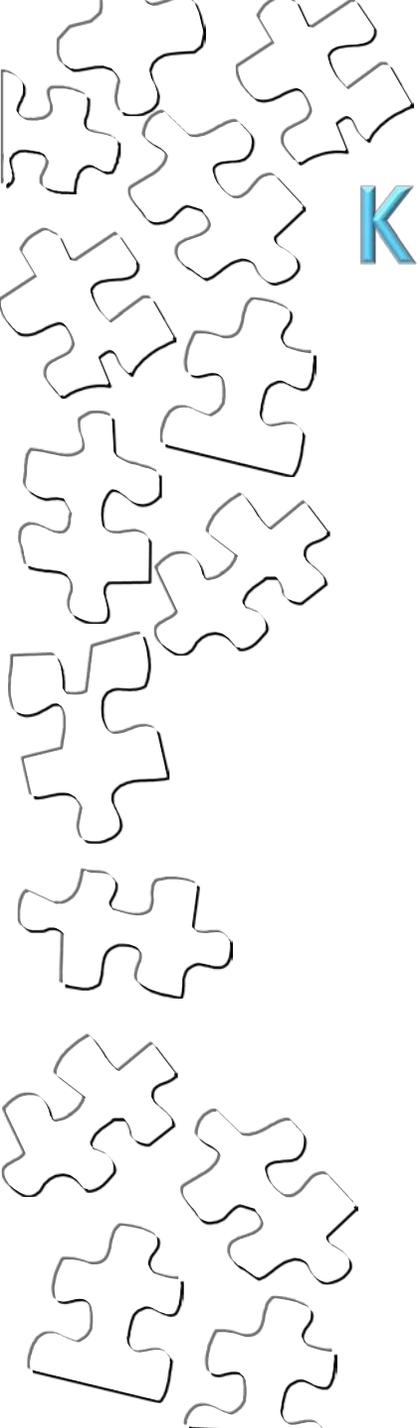




# Don't Pay Twice!



David Parker, ARM-P, CPM<sup>®</sup>, IPMA-SCP  
Central Arizona Project  
Enterprise Risk Management



# Key Takeaways

## HOW AND WHY OF INSURANCE AND INDEMNIFICATION

APPROPRIATE LANGUAGE FOR VARIOUS CONTRACT TYPES

Indemnification agreements

Additional insured coverage

Favorable and detrimental contract terms

Waivers of subrogation

Limitations of liability

Certificates of insurance

# Common Types of Contracts

- › Design
  - › Intergovernmental/Interlocal
- › Construction
  - › Mutual Aid
- › Products and Services
  - › Services we provide
- › Professional Services
  - › Space we lease
- › Leases
- › Licenses
- › IT/Security

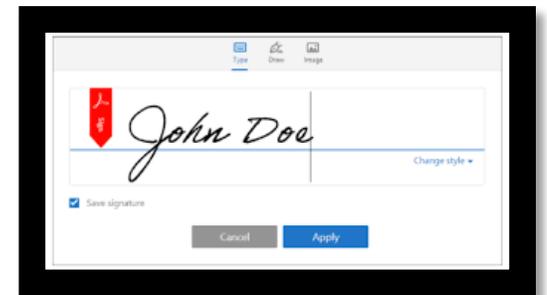


Photo credit: theblog.adobe.com

# Common Indemnification Principles

## Common Law

- › Verbal or written contract
- › Where contract is silent on indemnity
  - No contractual remedy
- › Active negligence only
  - Contributory negligence voids



Photo credit: hbswk.hbs.edu

# Common Indemnification Principles

## Contract Law

- › As insurable as possible
- › States parties' intentions
- › Clear and unambiguous
- › Doctrine of Adhesion
- › Public policy concerns
- › Limiting, broadening, savings language
- › Contractual remedy



Photo credit: ucl.ac.uk

# Common Indemnification Principles

## Public Policy Issues

- › Courts don't like them
- › Non-negotiable impact
- › Not limited to insurance coverage
- › Anti-indemnification statutes
- › "Insurance Cramdown"

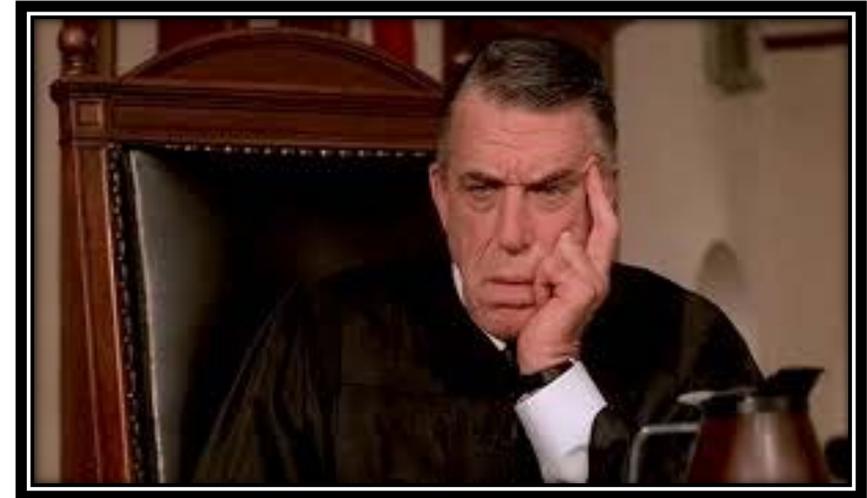
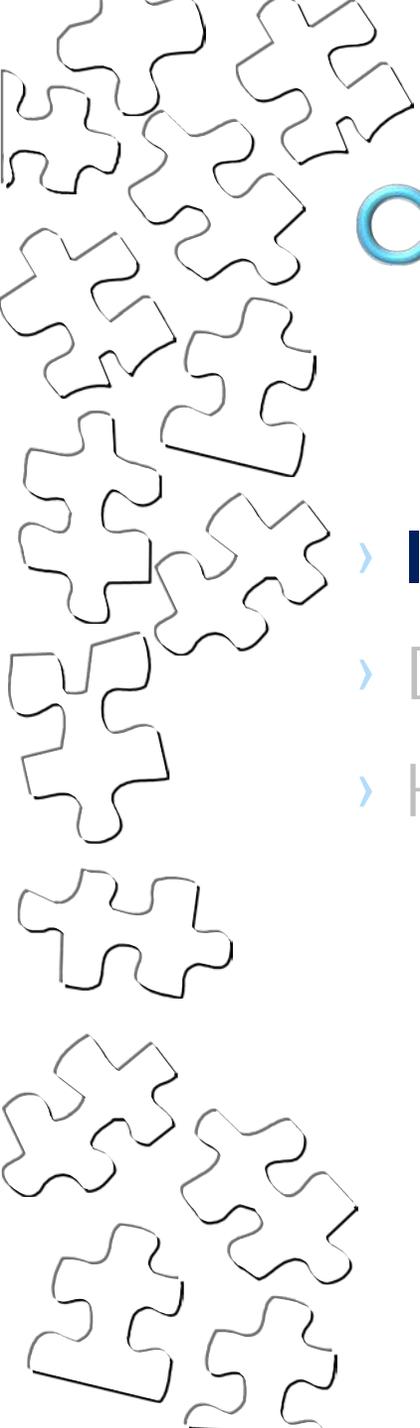


Photo credit: my cousin vinny



# Common Indemnification Terms

## Contractual Duties

- › **Indemnify**
- › Defend
- › Hold (Save) Harmless

### **indemnify**

*v. to guarantee against any loss which another might suffer. Example: two parties settle a dispute over a contract, and one of them may agree to pay any claims which may arise from the contract, holding the other harmless.*

<http://dictionary.law.com/Default.aspx?typed=indemnify&type=1>



# Common Indemnification Terms

## Contractual Duties

- › Indemnify
- › **Defend**
- › Hold (Save) Harmless

{insurer} had both "the right and the duty to defend any suit against the insured seeking damages on account of bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent." Under such a provision, an insurer's obligation to defend is broader than its obligation to pay, and arises whenever the complaint alleges facts and circumstances, some of which would, if proved, fall within the risk covered by the policy.

*Lerner v. General Ins. Co of America*  
245 S.E.2<sup>nd</sup> 249 (1978)

<https://www.leagle.com/decision/1978494245se2d2491488>



# Common Indemnification Terms

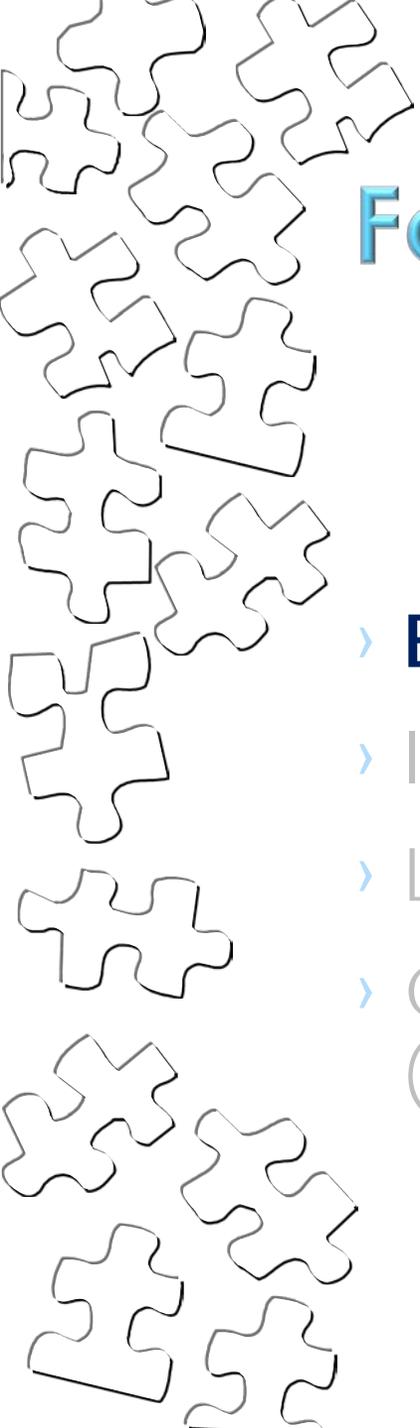
## Contractual Duties

- › Indemnify
- › Defend
- › **Hold (Save) Harmless**

### **hold harmless**

*n. a promise to pay any costs or claims which may result from an agreement. Quite often this is part of a settlement agreement, in which one party is concerned that there might be unknown lawsuits or claims stemming from the situation, so the other party agrees to cover them*

<http://dictionary.law.com/Default.aspx?typed=hold%20harmless&type=1>



# Forms of Indemnity

## Three or Four Types (Breadth of Responsibility)

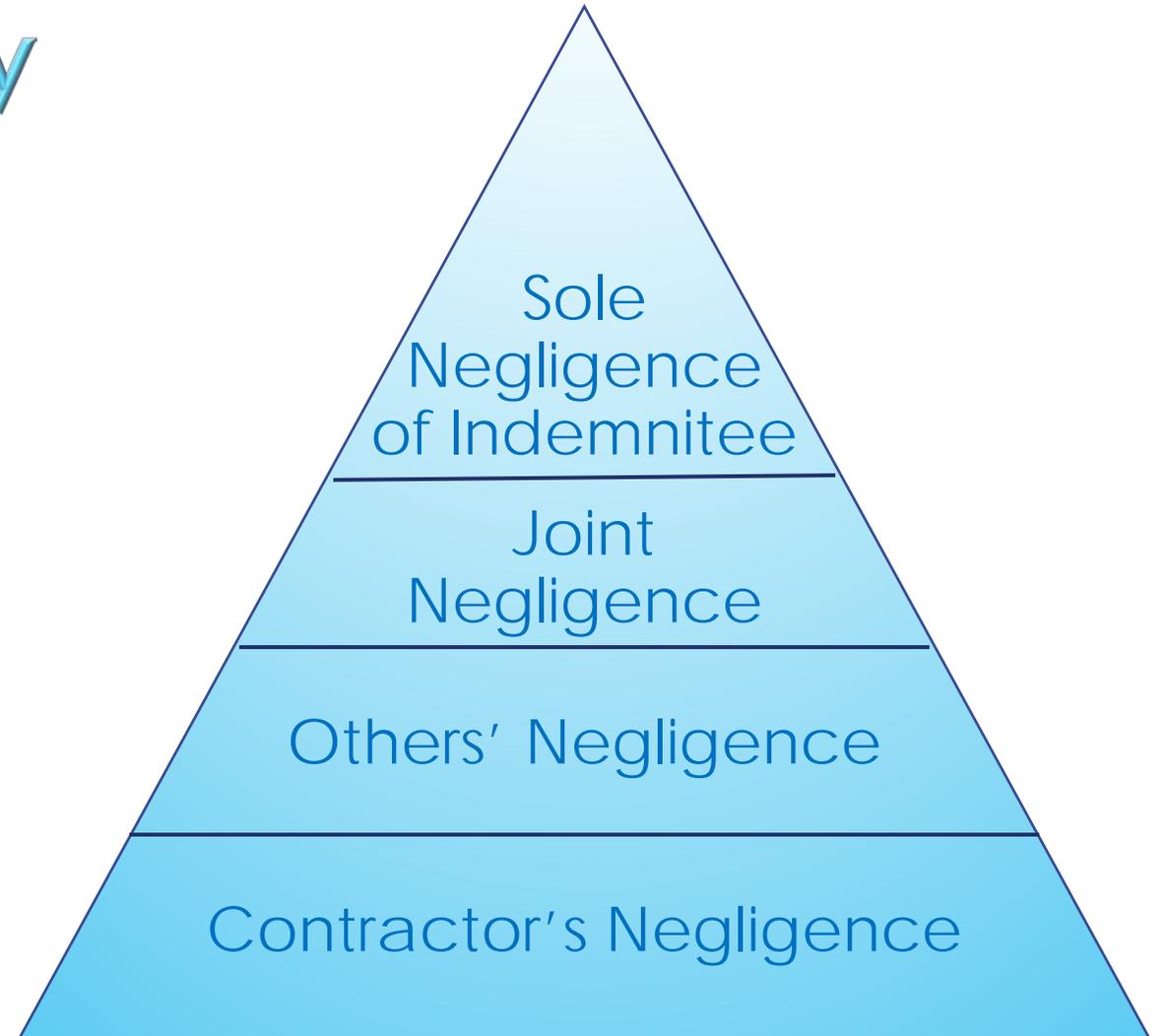
- › **Broad Form**
- › Intermediate Form
- › Limited Form
- › Comparative Form  
(Vicarious Liability)

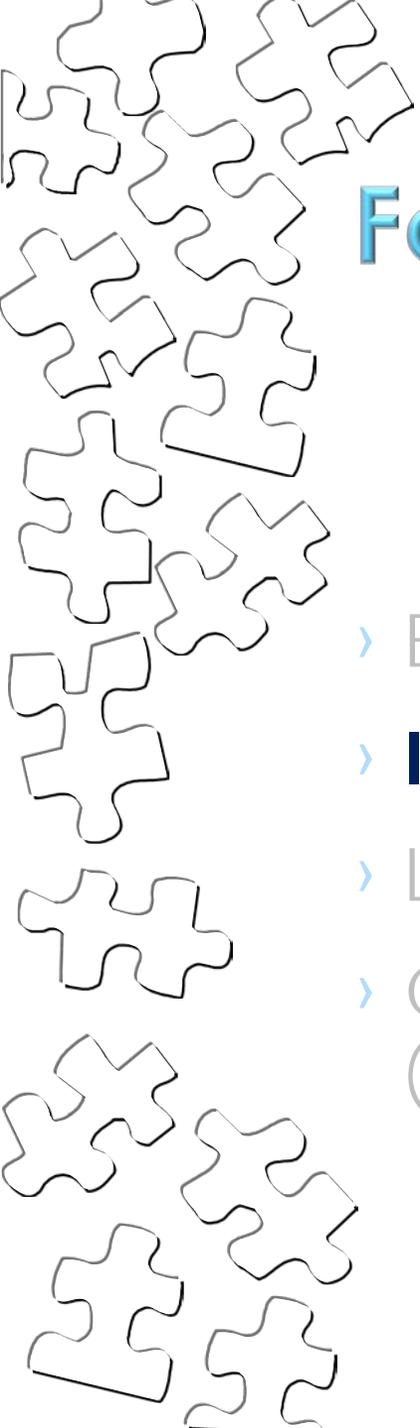
*To the fullest extent permitted by law, Contractor agrees to indemnify, defend, and hold harmless Owner and [. . .] from any and all claims [. . .] including claims alleged to have arisen from the sole negligence of Owner or its officers, employees, agents, or any other for which Owner may be liable.*

# Forms of Indemnity

## Three or Four Types (Breadth of Responsibility)

- › **Broad Form**
- › Intermediate Form
- › Limited Form
- › Comparative Form  
(Vicarious Liability)





# Forms of Indemnity

## Three or Four Types (Breadth of Responsibility)

- › Broad Form
- › **Intermediate Form**
- › Limited Form
- › Comparative Form  
(Vicarious Liability)

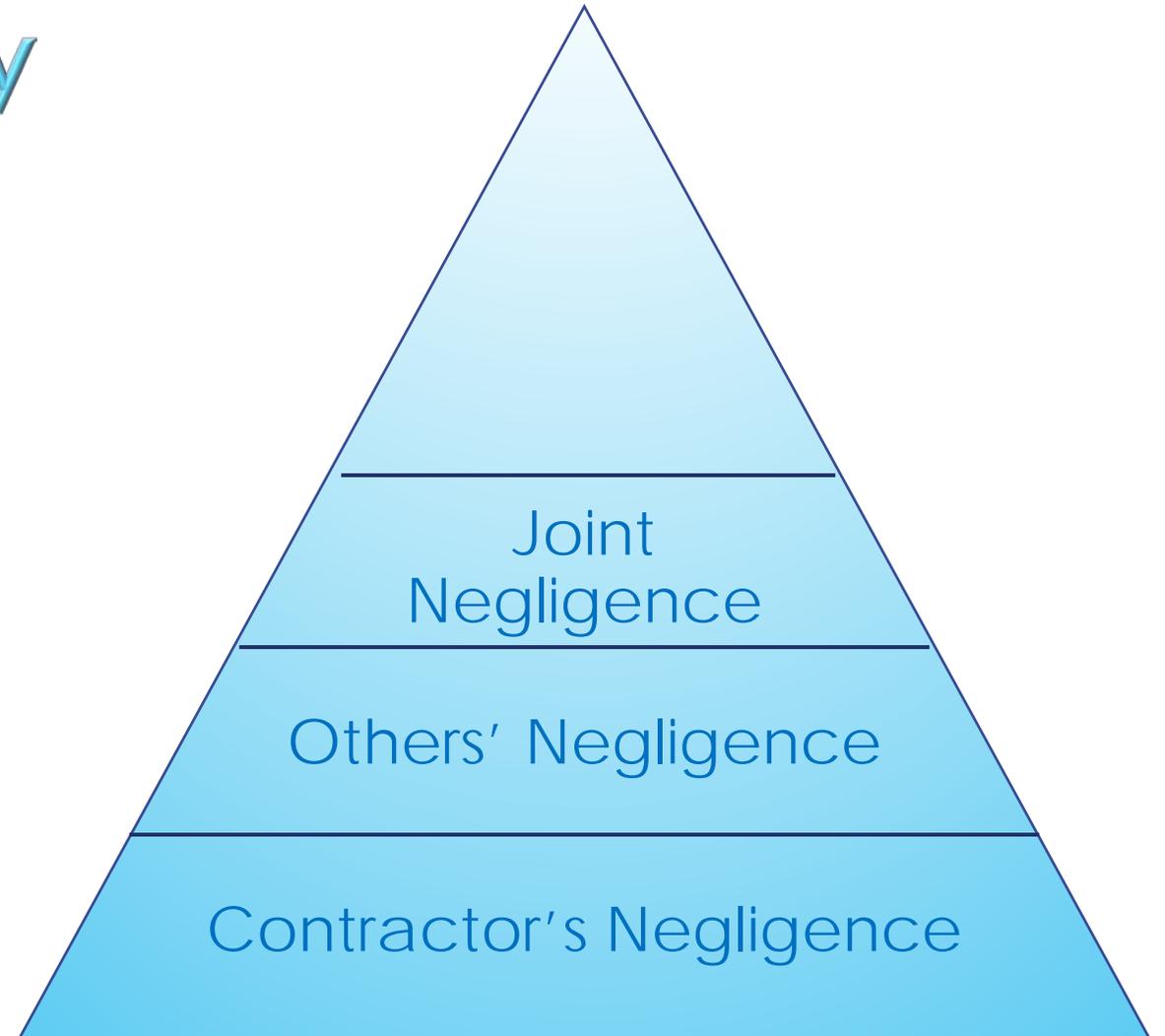
*To the fullest extent permitted by law, Contractor agrees to indemnify, defend, and hold harmless Owner and [. . .] from any and all claims [. . .]*

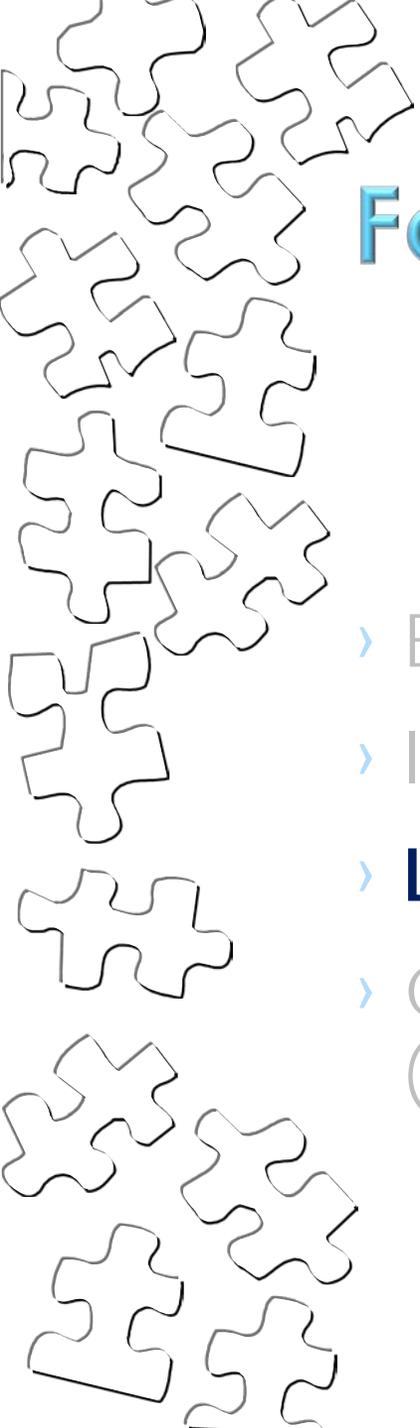
*Contractor's obligation shall not extend to the sole negligence of Owner or its officers, employees, agents, or any other for which Owner may be liable.*

# Forms of Indemnity

## Three or Four Types (Breadth of Responsibility)

- › Broad Form
- › **Intermediate Form**
- › Limited Form
- › Comparative Form  
(Vicarious Liability)





# Forms of Indemnity

## Three or Four Types (Breadth of Responsibility)

- › Broad Form
- › Intermediate Form
- › **Limited Form**
- › Comparative Form  
(Vicarious Liability)

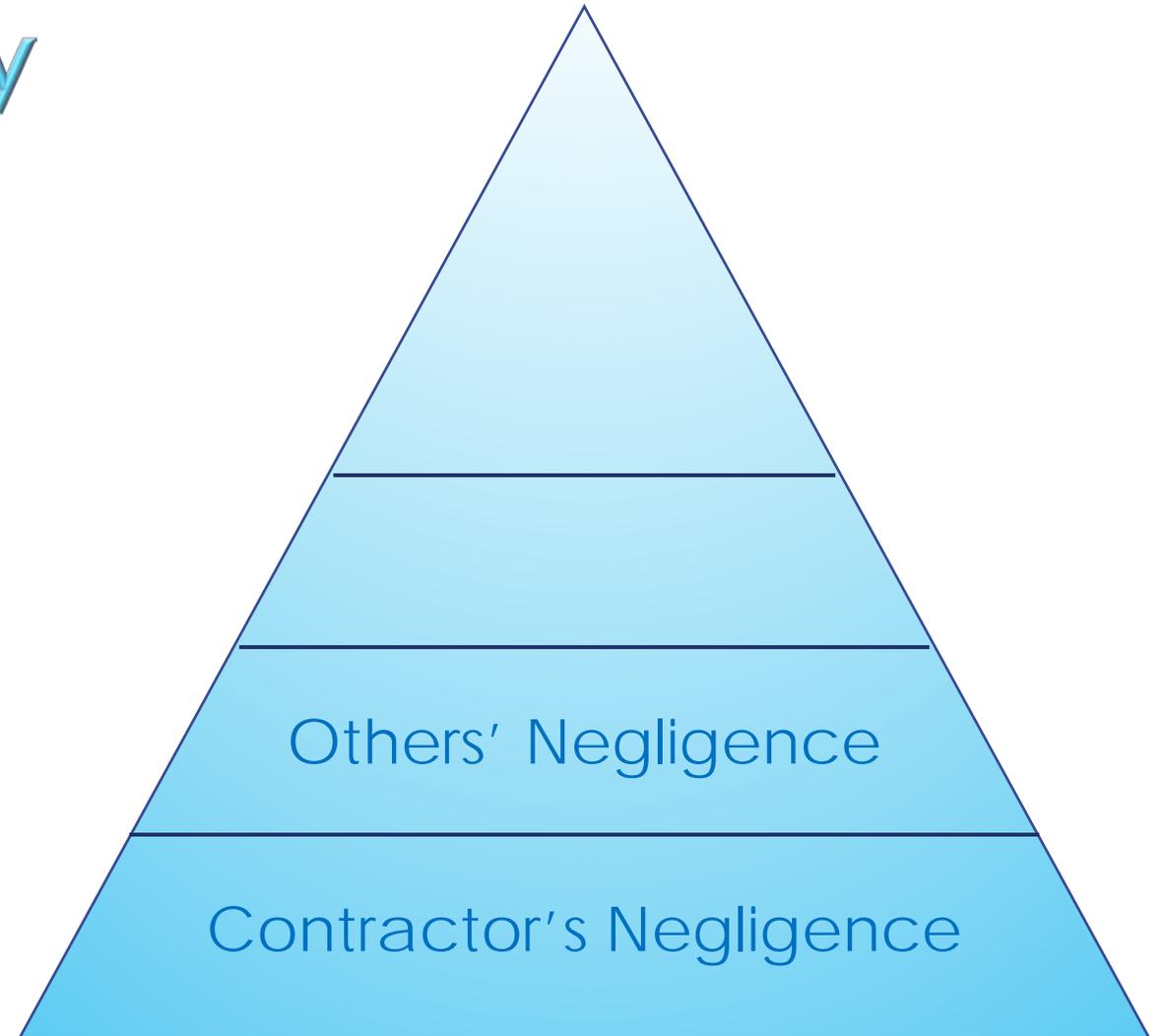
*To the extent permitted by law, Contractor agrees to indemnify, defend, and hold harmless Owner and [. . .] from any and all claims [. . .]*

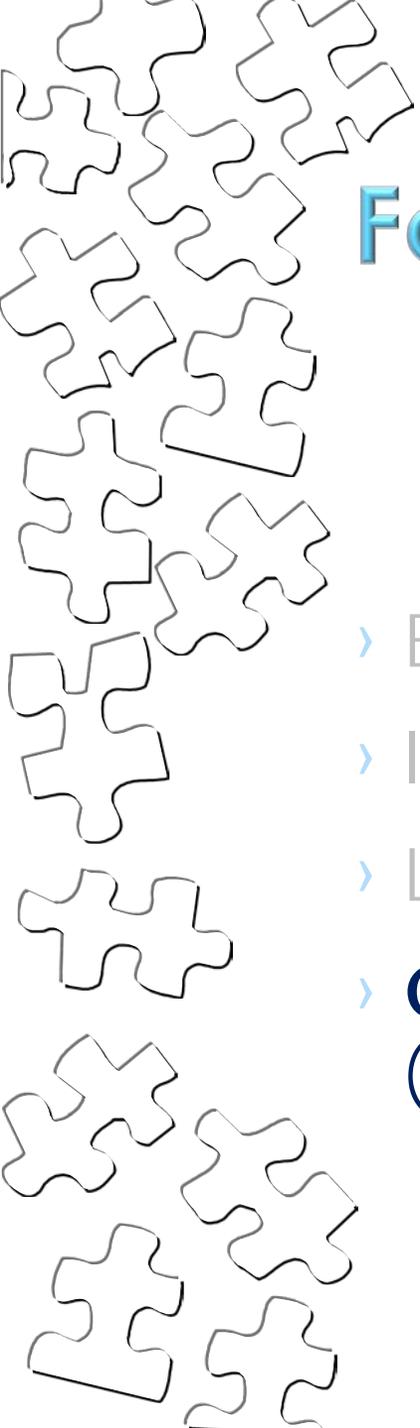
*Contractor's obligation shall not extend to the negligence of Owner or its officers, employees, agents, or any other for which Owner may be liable.*

# Forms of Indemnity

## Three or Four Types (Breadth of Responsibility)

- › Broad Form
- › Intermediate Form
- › **Limited Form**
- › Comparative Form  
(Vicarious Liability)





# Forms of Indemnity

## Three or Four Types (Breadth of Responsibility)

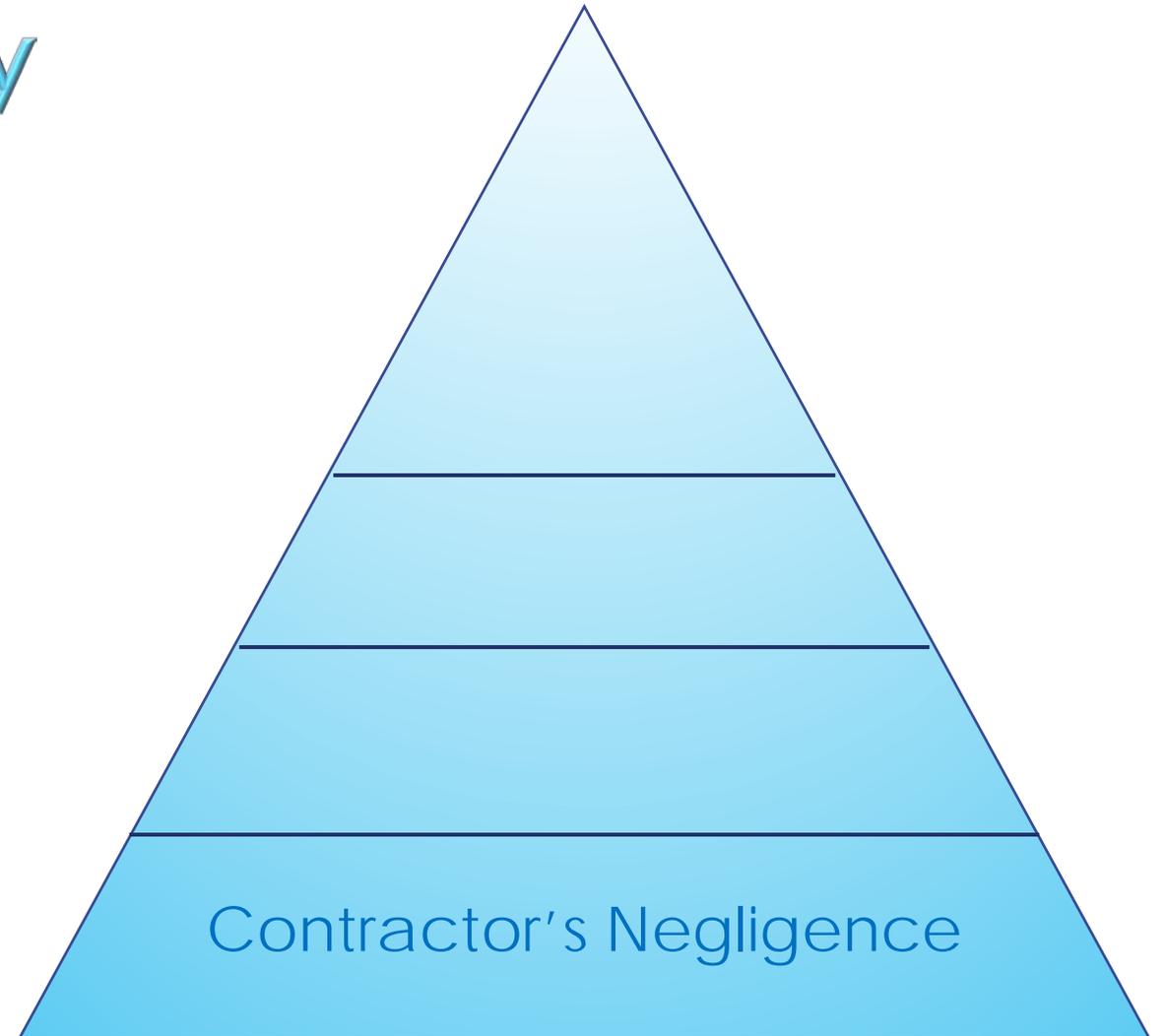
- › Broad Form
- › Intermediate Form
- › Limited Form
- › **Comparative Form**  
(Vicarious Liability)

*To the extent permitted by law, Contractor agrees to indemnify, defend, and hold harmless Owner and [...] from any and all claims [...] but only to the extent of Contractor's negligence or that of Contractor's officers, employees, agents, or any other for which Contractor is liable.*

# Forms of Indemnity

## Three or Four Types (Breadth of Responsibility)

- › Broad Form
- › Intermediate Form
- › Limited Form
- › **Comparative Form**  
(Vicarious Liability)





# Where Do They Normally Show Up?

## **Broad Form**

- › Security Monitoring
- › Internet/IT

## **Limited Form**

- › Design/Construction
- › Improvement to Land
- › Medical/Professional

## **Intermediate Form**

- › General Services
- › Leases

## **Comparative Form**

- › Mutual Indemnification
- › Between Public Entities



# Contractual Liability Coverage

## How it Applies

- › Most common in CGL
- › Typically excludes all contractual liability
- › Adds back coverage meeting “Insured Contract” definition
  - Defined term
  - Includes a standard indemnification clause

*(f) That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another to pay for “bodily injury” or “property damage” to a third party or organization.*

# Contractual Liability Coverage

## Belt and Suspenders Approach

- › Third party beneficiary
  - Usually no direct action against insurer
- › Use language that is as insurable as possible
- › Broader than additional insured
- › Additional insured necessary for direct access to assured funding source (insurer)

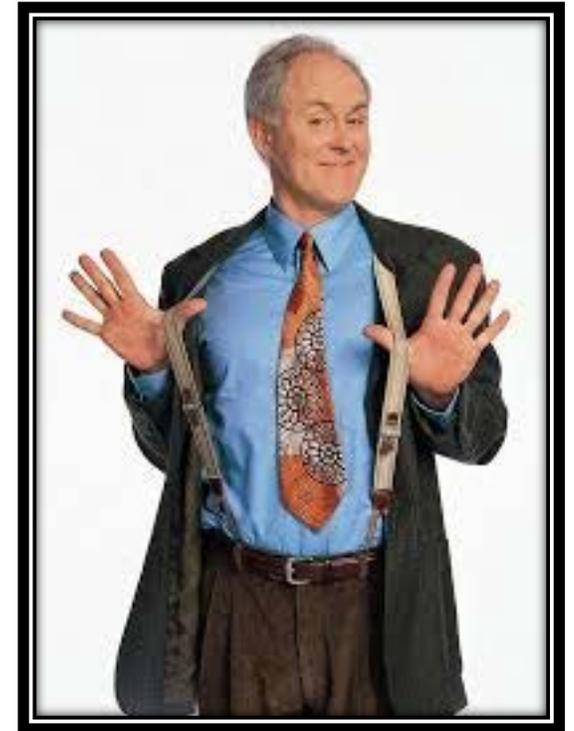


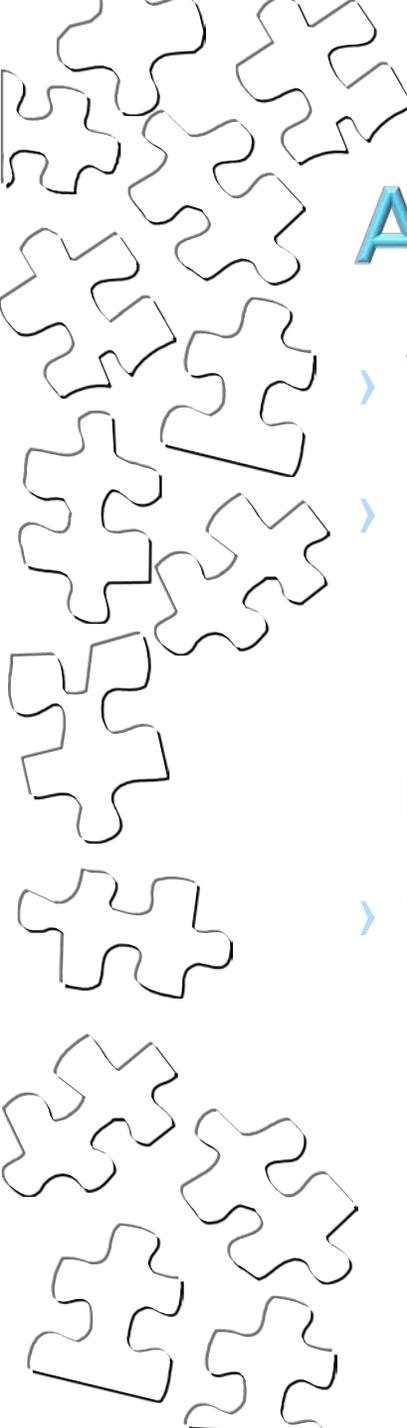
Photo credit: editions.lib.unm.edu



# Anti-Indemnification Statutes

- › Vary from State to State
- › Exceeding statutory limitation may void entire indemnification requirement
- › States vary upon including broader coverage as an additional insured

*A.R.S. § 34-226 (C) Except as provided in subsection B of this section, a construction contract or subcontract or design professional services contract or subcontract entered into in connection with a public building or improvement shall not require that the contractor, subcontractor or design professional defend, indemnify, insure or hold harmless the contracting agent or its employees, officers, directors, agents, contractors or subcontractors from any liability, damage, loss, claim, action or proceeding, and any contract provision that is not permitted by subsection B of this section is against the public policy of this state and is void.*



# Anti-Indemnification Statutes

- › Vary from State to State
- › Exceeding statutory limitation may void entire indemnification requirement
- › States vary upon including broader coverage as an additional insured

*MD Cts & Jud Pro Code  
Section 5-401:  
Construction: Sole negligence  
Insurance exception*

*Also applies to:  
Motor Carriers*



# Limitation of Liability Clauses

- › Separate clause, usually in different location
- › Limit type and amount of damages
- › Eliminate consequential damages
- › Can negate indemnity provisions.

***Carve Out The Indemnity Clause***

*Except as provided in Paragraph XX, Indemnification,  
In no event shall Contractor be liable for special, indirect, incidental, consequential, exemplary, or punitive damages, even if it has been advised of the possibility of such damages. Contractor's maximum liability to Owner under this agreement shall be the recovery of actual damages up to the amount payable by Owner to Contractor pursuant to this agreement.*



# Subrogation

Meaning: To stand in the shoes of another

## **subrogation**

n. assuming the legal rights of a person for whom expenses or a debt has been paid.

## **subrogate**

verb

1. to put into the place of another; substitute for another.
2. Civil Law. to substitute (one person) for another with reference to a claim or right.

<http://dictionary.law.com/Default.aspx?typed=subrogate&type=1>  
<https://www.dictionary.com/browse/subrogate>

An insured's waiver is binding upon the insurer

It's hard to collect from an insured you have agreed to indemnify

Separation of insureds or separation of interests clause adds protection



# Subrogation

Meaning: To stand in the shoes of another

## **subrogation**

n. assuming the legal rights of a person for whom expenses or a debt has been paid.

## **subrogate**

verb

1. to put into the place of another; substitute for another.
2. Civil Law. to substitute (one person) for another with reference to a claim or right.

<http://dictionary.law.com/Default.aspx?typed=subrogate&type=1>  
<https://www.dictionary.com/browse/subrogate>

## **Read the Policy**

### General Guidelines:

An insured can usually waive a right to subrogation before a loss.

An insured must usually protect a right to subrogation following a loss.

*(Against public policy in some states)*

### **Property Insurance:**

A typical contractual provision

### **Liability Insurance:**

Usually permitted

### **Workers' Compensation:**

Must be endorsed

# Additional Insured or Named Insured?

- › First Named Insured
  - Responsible for premium
  - Reporting responsibilities
- › Named Insured
  - May be responsible for premium
  - Reporting responsibilities
- › Additional Insured 
  - Most of the benefits
  - Few of the responsibilities



Photo credit: lifelessons.co



# Commercial General Liability

## › Scheduled

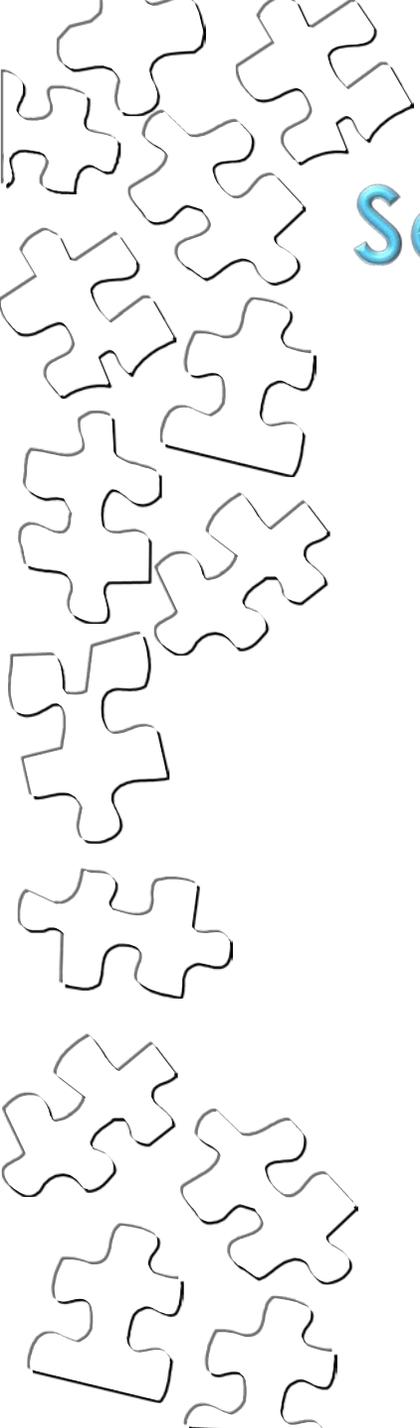
- CG 20 10 / CG 20 26
- Current vs 1985 (Your Work vs. Your Ongoing Operations)
- CG 20 37 Products/Completed Operations

## › Blanket

- CG 20 33 (uses “if required in contract” language)
- Must maintain copy of contract to prove coverage

## › Specify Minimum Coverage

- Example: CG 20 22
- (Permits Issuance, no coverage if work performed for you)



# Self-Insurers

Can the funding source respond appropriately?

Is the risk funded?

Is the funding acceptable?

Is the risk capped?

Should you be an additional insured on the excess/umbrella policy?

Is an alternative funding mechanism in place?

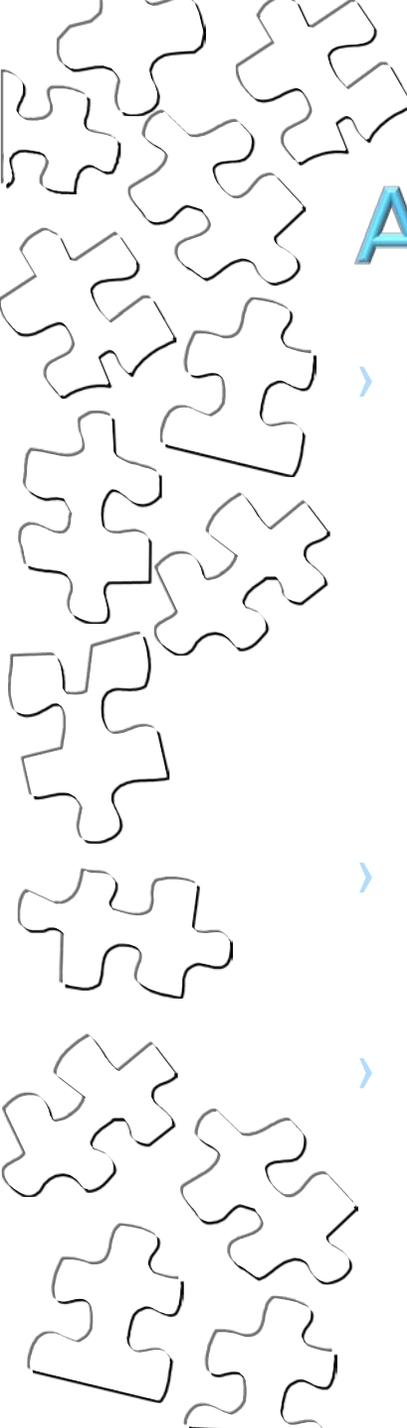
Do we have direct access to the funding source?

If fully self-insured:

The indemnification clause defines coverage

Usually gives direct access

Can be complicated by parental guarantees and alternative funding mechanisms



# Auto Liability

- › Omnibus Insured Definition
  - Named Insureds
  - All permissive use
  - Anyone else liable for their use
- › Designated Insured
  - CA 20 48
- › Blanket
  - Company/manuscript forms

*We will pay all sums an “insured” legally must pay . . . resulting from the ownership, maintenance or use of a covered “auto”*

*The following are “insureds.”*

- a. You for any covered “auto.”*
- b. Anyone else while using with your permission . . . except (list)*
- c. Anyone liable for the conduct of an “insured” described above but only to the extent of that liability.*



# Coverage and Limitations

- › Read the contract carefully
  - Limiting or modifying language
- › Limited to Policy coverage
  - Additional insured and contractual liability
  - Exclusions may affect parties differently
- › Shared limits
  - Project or location limits
- › Erosion of limits
  - First claims defended/paid, first protected
  - Aggregate limits

# Professional Liability and Medical Malpractice

## Cross Liability Exclusion:

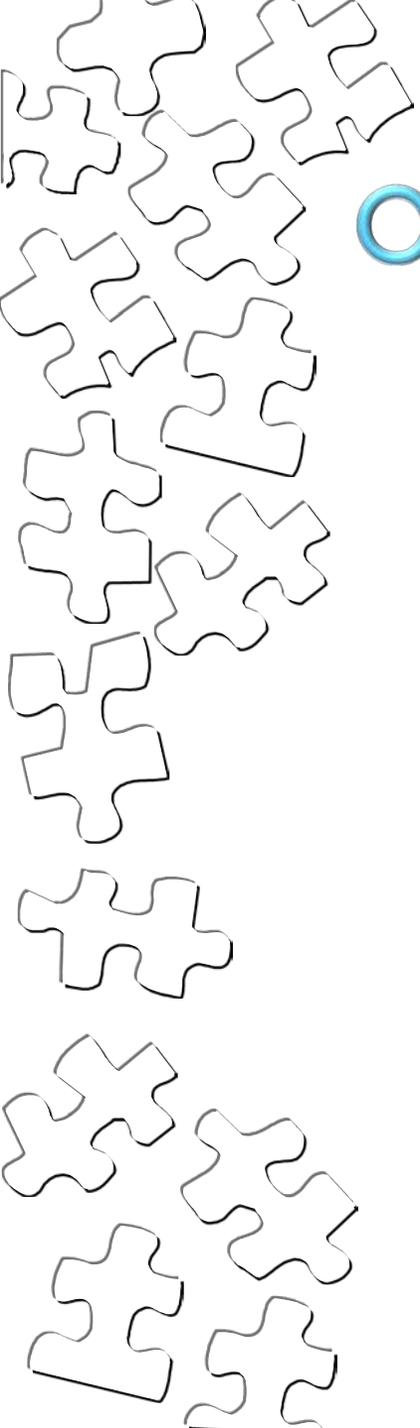
- › No contractual liability
- › No additional insured

### Impact

You may need to defend lawsuit and seek indemnification for what is proven.



Photo credit: uh.edu



# Occurrence vs Claims Made Form

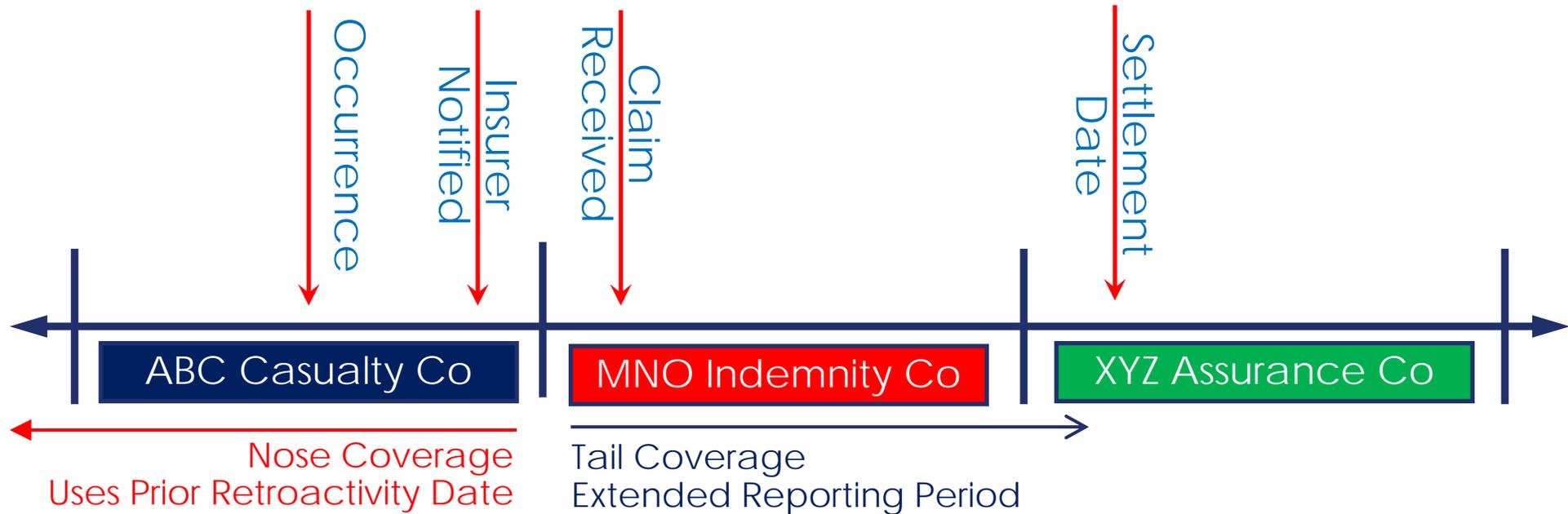
## Occurrence Form

Covers claims occurring during the coverage period no matter when claim is made

## Claims Made Form

Covers claims made or reported during the coverage period where occurrence was on or after the retroactivity date

# Occurrence vs Claims Made Form



**Occurrence Form:** **ABC is responsible**

**Claims Made Form:** **ABC or **MNO** may be responsible**

**MNO** with nose coverage, **ABC** with tail coverage

Notice of event prior to expiration triggers **ABC**

*No coverage without prior notice, nose or tail coverage!*

# Occurrence vs Claims Made Form



**If you have Claims Made Coverage and Change Insurers:**  
*Notify current insurer of all incidents that may result in claims*  
*Nose coverage provides more certain coverage*  
*Tail coverage may still leave a coverage gap*

# Occurrence vs Claims Made Form



## Contractual Claims-Made Coverage Maintenance:

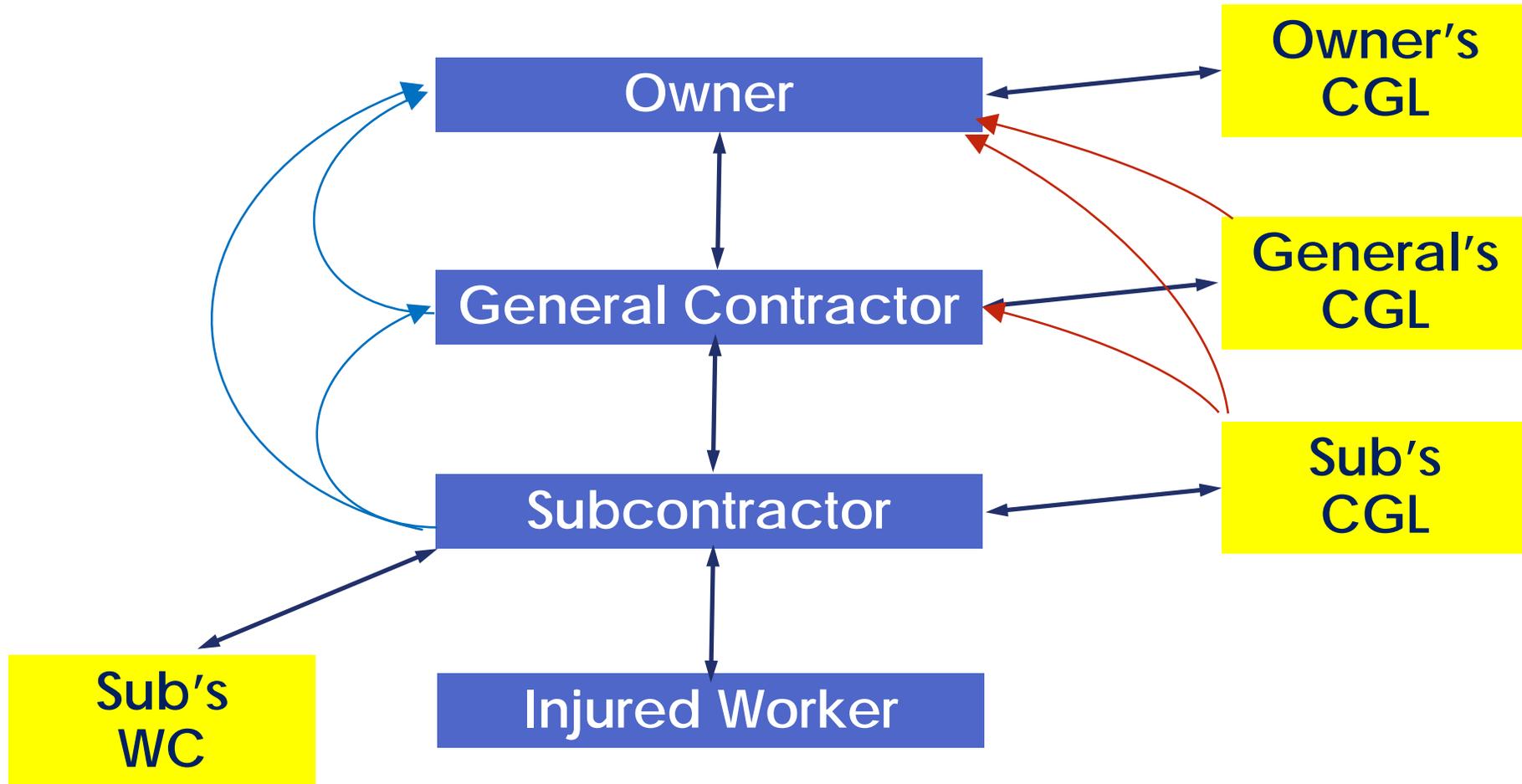
*Likely period for statute of limitations tolling +  
Statute of limitations period (federal and state) +  
Reasonable notice period =  
Years of maintenance requirement*



## Third Party Over Claims

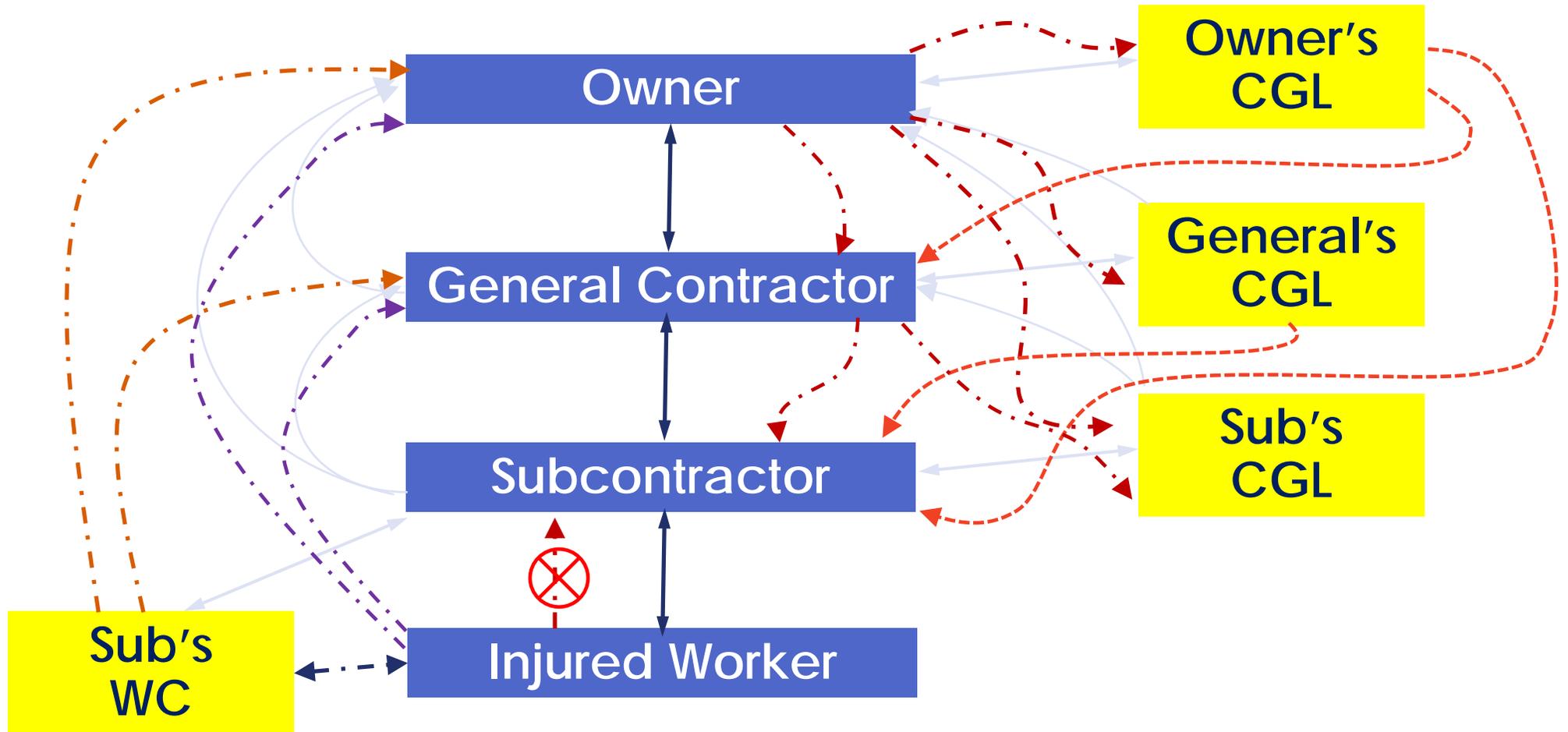
- › Injured employee's sole remedy against employer or fellow employee is WC
- › Injured employee sues others who may be liable
  - Property owner
  - General contractor
  - Subcontractor
  - Architect or engineer
- › Triggers multiple indemnity, contractual liability, and additional insured responsibilities

# Third Party Over Claims



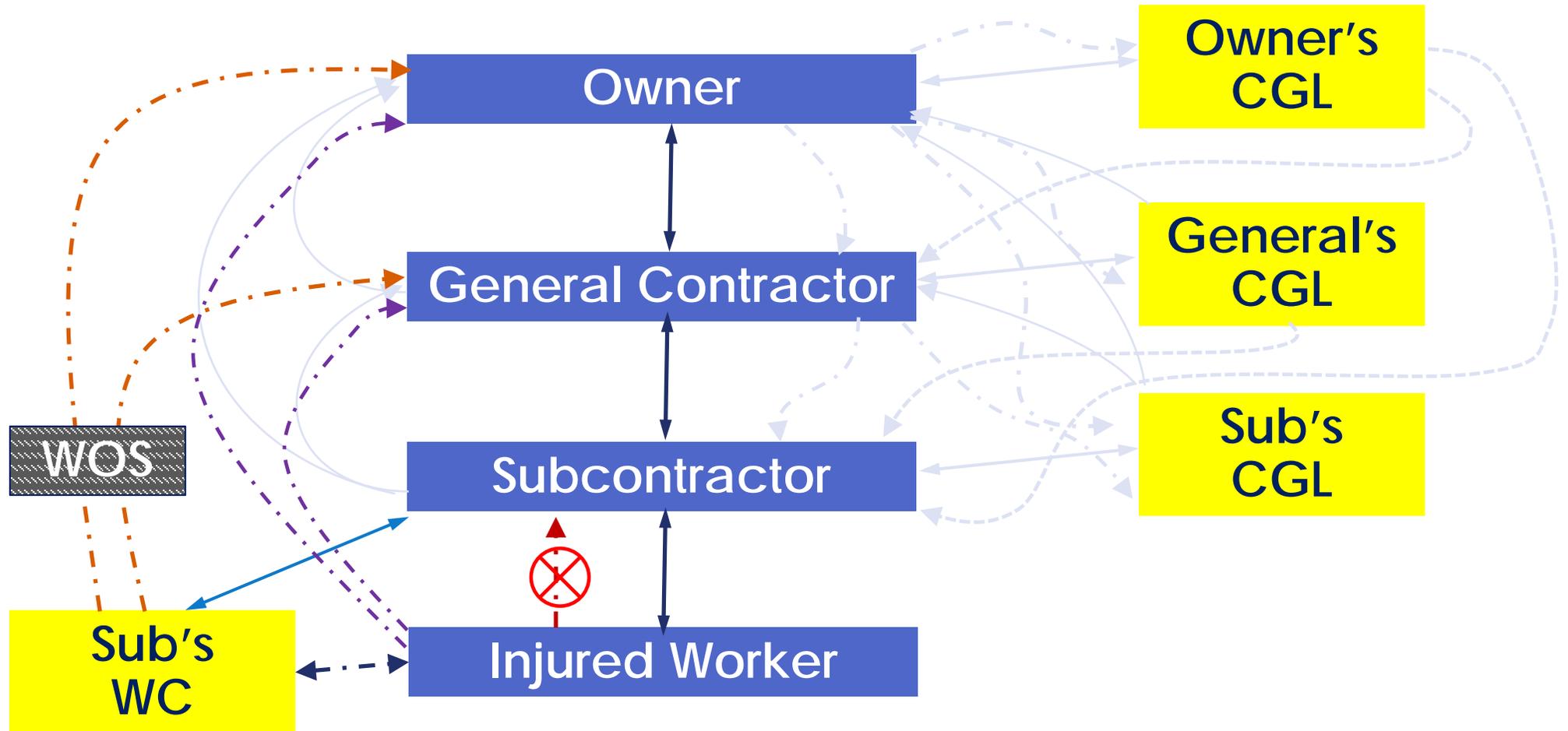
Based upon work by the International Risk Management Institute (IRMI)

# Third Party Over Claims



Based upon work by the International Risk Management Institute (IRMI)

# Third Party Over Claims



Based upon work by the International Risk Management Institute (IRMI)

# Certificates of Insurance

- › Provide a snapshot in time
- › Don't ask producer to do something they can't do
  - Conveys information, not rights
  - Cannot misrepresent coverage
  - Can't extend coverage via COI
- › Obtain copies of language that grants or limits coverage

**ACORD** **CERTIFICATE OF LIABILITY INSURANCE** DATE (MMDDYYYY)

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).

<b>PRODUCER</b>	CONTACT NAME: _____ PHONE (A.C. No. Ext. _____) FAX (A.C. No.): _____ E-MAIL ADDRESS: _____ ADDRESS: _____
<b>INSURED</b>	INSURER A: _____ NAIC # _____
	INSURER B: _____
	INSURER C: _____
	INSURER D: _____
	INSURER E: _____
	INSURER F: _____

**COVERAGES** **CERTIFICATE NUMBER:** **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.

TYPE / LTR	TYPE OF INSURANCE	RISK RATIO (INS/ RVD)	POLICY NUMBER	POLICY EFF (MMDDYYYY)	POLICY EXP (MMDDYYYY)	LIMITS
	<b>COMMERCIAL GENERAL LIABILITY</b> <input type="checkbox"/> CLAIMS-MADE <input type="checkbox"/> OCCUR  GEN'L AGGREGATE LIMIT APPLIES PER: <input type="checkbox"/> POLICY <input type="checkbox"/> PRO-JECT <input type="checkbox"/> LOC <input type="checkbox"/> OTHER					EACH OCCURRENCE \$ _____ DAMAGE TO RENTED PREMISES (Ea occurrence) \$ _____ MED EXP (Any one person) \$ _____ PERSONAL & ADV INJURY \$ _____ GENERAL AGGREGATE \$ _____ PRODUCTS - COMP/OP AGG \$ _____
	<b>AUTOMOBILE LIABILITY</b> <input type="checkbox"/> ANY AUTO <input type="checkbox"/> ALL OWNED AUTOS <input type="checkbox"/> HIRED AUTOS <input type="checkbox"/> SCHEDULED AUTOS <input type="checkbox"/> NON-OWNED AUTOS					COMBINED SINGLE LIMIT (Ea accident) \$ _____ BODILY INJURY (Per person) \$ _____ BODILY INJURY (Per accident) \$ _____ PROPERTY DAMAGE (Per accident) \$ _____
	<b>UMBRELLA LIAB</b> <input type="checkbox"/> EXCESS LIAB <input type="checkbox"/> OCCUR <input type="checkbox"/> RETENTION \$ _____					EACH OCCURRENCE \$ _____ AGGREGATE \$ _____
	<b>WORKERS COMPENSATION AND EMPLOYERS LIABILITY</b> ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? (Mandatory in NH) If yes, describe under DESCRIPTION OF OPERATIONS below	<input type="checkbox"/> Y / <input type="checkbox"/> N / <input type="checkbox"/> A				E.L. EACH ACCIDENT \$ _____ E.L. DISEASE - EA EMPLOYEE \$ _____ E.L. DISEASE - POLICY LIMIT \$ _____
DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (ACORD 101, Additional Remarks Schedule, may be attached if more space is required)						

<b>CERTIFICATE HOLDER</b>	<b>CANCELLATION</b>
	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 _____



# Typical COI Challenges

- › Minimum coverage definitions
- › Notice provisions
  - Cancellation
  - Material Changes
  - Reduction of limits
- › Specifying coverage elements
- › Erosion of limits
  - Project or location limits
- › Coordination of coverage
  - › Policy periods vs contract periods
- › Certificates of insurance or declarations page and endorsements
  - › Consequences
- › Management vs tracking
  - › Whose responsibility?



GEN'L AGGREGATE LIMIT APPLIES PER: <input type="checkbox"/> POLICY <input checked="" type="checkbox"/> PROJECT <input checked="" type="checkbox"/> LOC <input type="checkbox"/> OTHER:							GENERAL AGGREGATE \$ 2,000,000 PRODUCTS - COMPROP AGG \$ Exc \$
A	<b>AUTOMOBILE LIABILITY</b> <input type="checkbox"/> ANY AUTO <input type="checkbox"/> ALL OWNED AUTOS <input checked="" type="checkbox"/> HIRED AUTOS <input checked="" type="checkbox"/> SCHEDULED AUTOS <input checked="" type="checkbox"/> NON-OWNED AUTOS	X	X	1977879-03	3/3/19	3/3/23	COMBINED SINGLE LIMIT (Ea accident) \$ 1,000,000 BODILY INJURY (Per person) \$ BODILY INJURY (Per accident) \$ PROPERTY DAMAGE (Per accident) \$ \$
B	<input checked="" type="checkbox"/> UMBRELLA LIAB <input type="checkbox"/> EXCESS LIAB <input checked="" type="checkbox"/> OCCUR <input type="checkbox"/> CLAIMS-MADE DED \$      RETENTION \$	X	X	19-0002378	3/3/19	3/3/23	EACH OCCURRENCE \$ 4,000,000 AGGREGATE \$ 4,000,000 \$
C	<b>WORKERS COMPENSATION AND EMPLOYERS' LIABILITY</b> ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? (Mandatory in NH) If yes, describe under DESCRIPTION OF OPERATIONS below Y/N <input type="checkbox"/>	N/A	X	19-0002378	3/3/19	3/3/23	<input checked="" type="checkbox"/> PER STATUTE <input type="checkbox"/> OTH-ER E.L. EACH ACCIDENT \$ 1,000,000 E.L. DISEASE - EA EMPLOYEE \$ 1,000,000 E.L. DISEASE - POLICY LIMIT \$
D	Professional Liability			PL 2019-2022	1/1/19	1/1/23	\$500,000 SIR    1,000,000

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

Certificate Holder and its officers, agents, and employees are additional insured when required by contract per CG 20 33. WC includes waiver of subrogation when required by Contract per WC 00 03. CGL and Auto Liability policies are primary, non-contributory when required by contract. CGL limits do not exceed amount required in contract, even if listed as "minimum."

**CERTIFICATE HOLDER**

City of San Tan  
 555 Main Street  
 San Tan, AZ 85555

Attn: Contract Manager

**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**

*James A Brown*

© 1988-2014 ACORD CORPORATION. All rights reserved.



## When We Are Indemnitor

- › Use 'comparative form' indemnity
  - Ability to fund liability of others is limited
- › Impact upon funding and outstanding liabilities if not limited
- › Indemnification clause provides direct access within SIR
- › Should you make others an additional insured?

# Final Thoughts and Recommendations

- › Develop model language
- › Use appropriate indemnity form
- › Be as insurable as possible
- › Maintain broadest rights
- › Language negotiable
- › Principles non-negotiable
- › Confidence in funding source
- › Who minds the store?
- › Maintain critical records



Photo credit: completetetri.com

# Discussion Time



Photo credit: Source Unknown (Bing)