Risk Management

Waivers of immunity and workers comp

The role of the producer

By Donald S. Malecki, CPCU

One area of workers compensation that appears to stump many producers is the contractual requirement dealing with waivers of immunity. A general contractor, for example, may insert a provision in the contract that states that the subcontractor expressly waives its statutory workers compensation immunity. Sometimes this provision specifically identifies the applicable workers compensation code.

If the subcontractor reads this provision, most likely he will contact the producer and ask what the provision means. A producer who is unfamiliar with such waivers of immunity may either advise the subcontractor to have the provision removed or ask the underwriter to modify the workers compensation policy.

Moment of truth

Neither of these actions is likely to succeed. Once the waiver is inserted in a contract, it usually is there to stay. A subcontractor who refuses to waive its workers compensation immunity is unlikely to obtain the job.

Asking an underwriter to adjust the coverage of a workers compensation policy also is pointless *because the waiver of immunity has nothing to do with the insurance policy.* The waiver is a legal issue, which means that the party who is being asked to waive its immunity should be consulting an attorney, not the producer!

This becomes clear when producers understand what an immunity waiver is, why it is necessary, and how it works when it has been accepted by a subcontractor, for example, agreeing to the terms of a contract.

Some background information may be helpful. Workers compensation insurance originally was considered to be the exclusive remedy of employees against their employer (and sometimes other third parties). In other words, once workers compensation benefits (prescribed by statute) were paid or became payable, the employer became immune from any other obligations to pay additional sums to its employees or anyone else.

As time went on, however, the wall of immunity began to weaken. As a result, employers have been required to pay additional sums over and above the amounts paid for benefits prescribed by law.

This situation often arises in the construction business where the so-called "third party over action" is prevalent. A common scenario works this way: An employee of a subcontractor is injured by some hazard created by the general contractor and is paid statutory benefits under his or her employer's workers compensation policy.

The employee then files suit against the general contractor, alleging that the primary cause of his or her injury was the general contractor's failure to provide a safe place to work. The general contractor in turn files suit against the subcontractor for protection (despite the subcontractor's having paid workers compensation benefits) because the subcontractor agreed to hold harmless and indemnify the general contractor to the fullest extent allowed by law.

Indemnitees such as project owners and general contractors who often attempt to transfer risk by contract do not usually anticipate that the assumption of the financial consequences of liability, such as by subcontractors (indemnitors), may not constitute a waiver of an indemnitor's statutory immunity.

If a general contractor (indemnitee) does not obtain that waiver of immunity, however, and then seeks protection from the subcontractor (indemnitor), the general contractor may be surprised to learn that the subcontractor is raising the sole and exclusive remedy of workers compensation as a shield to avoid having to pay additional sums in a third party over action.

In essence, this means: A general contractor who obtains a signed contractual agreement holding it harmless for any injury to a subcontractor's employee may find the agreement to be worthless. This is the reason for the general contractor or other indemnitee to obtain the immunity waiver.

Wording is key

Given the differences in workers compensation requirements among the states, it follows that states also differ in how they view waivers of immunity. This in turn affects how these waivers need to be stated in contracts.

Most state statutes that address waivers of immunity take one of two approaches.

First are statutes that specifically state that an employer's immunity can be waived if expressly provided for in a written contract. Statutes in the second category are silent about express waivers, and it is usually by case law that a statute is either interpreted to be an exclusive remedy or is found to be sufficiently flexible to hold the employer liable for indemnity if agreed to by contract.

Whether the right of an employer to expressly waive its immunity under workers compensation is clearly granted by statute or case law must be known by the parties seeking that immunity as they prepare their written contracts of indemnification. The insured's attorney, not the producer, should research the relevant statutes and ensure that each contract is worded appropriately in accordance with the statute.

A major concern, and a cause of litigation, is the specificity of a waiver in relation to the applicable statute or case law. If a statute requires that the express waiver of immunity be clear and unequivocal but provides no guidance as to the terminology necessary to comply with the law, the result may be a lawsuit.

For example, the fact that Pennsylvania's statute permits express waivers does not mean that they necessarily will be viewed as such by the courts. Much depends on the facts and contractual terms in question. A case in point is *Bester v. Essex Crane Rental Corp., 619 A.2d 304 (Pa. Super. 1993).*

This case involved an indemnitee who claimed protection from liability for injuries to one of the indemnitor's employees that may have been caused by the indemnitee. The pertinent provision of the indemnification clause read:

The Lessee shall defend, indemnify and hold forever harmless Lessor against all loss, negligence, damage, expense, penalty, legal fees, and costs, arising from any action on account of personal injury or damage to property occasioned by the operation, maintenance, handling, storage, erection, dismantling or transportation of any Equipment while in your possession.

The court denied this claim because the agreement to indemnify contained no express waiver of the protection granted by the workers compensation act and did not even contain a reference to the waiver thereto!

Ohio requires that a contract of indemnity make specific reference to the statute in question. For example:

The party expressly waives its statutory and constitutional immunity, as codified in Article II, Section 35 of the Ohio Constitution and at Ohio Revised Code 4123.74, as an employer in compliance with Ohio workers compensation law.

This means that an indemnitor who agrees to a waiver of workers compensation immunity in a contract that does not refer specifically to the statute may not be required to protect an indemnitee who failed to make such specific reference.

Among the states that have permitted waivers of immunity by specific statutory exception or case law are California, Colorado, Delaware, Georgia, Hawaii, Maine, Mississippi, Montana, Nevada, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, Tennessee, and Texas.

Summing up

When the subject of immunity waivers under workers compensation is raised, it makes good risk management sense for the producer to direct the insured to consult its attorney.

It is perfectly acceptable for the producer to explain the concept of waivers, if the question arises, but it is unacceptable to suggest wording. The producer likewise should not advise the insured to have a waiver removed, nor should the producer consult company underwriters about waivers.

As explained earlier, waivers of immunity have nothing to do with the workers compensation policy. A waiver of immunity is strictly a matter of contract law for legal counsel to handle, not the producer!

The author

Donald S. Malecki, CPCU, has spent more than 50 years in the insurance and risk management consulting business. During his career he was a supervising casualty underwriter for a large Eastern insurer, as well as a broker. He currently is a principal of Malecki Deimling Nielander & Associates, LLC, an insurance, risk, and management consulting business headquartered in Erlanger, Kentucky.