



A 10-Point Checklist for Transferring Risk

By Allen R. Wolff and Ethan W. Middlebrooks

If a party provides services to a contractor that could injure a third party or damage a third party's property, the contractor should make sure that the risk of such losses resides with the service provider and with the service provider's general liability insurance. Otherwise, the contractor's insurance has to handle a loss that was the service provider's fault, and the contractor will suffer the impact on its insurance costs.

It is not difficult to transfer the risk of loss to the service provider nor is it difficult to have the service provider's insurance protect the contractor. However, these not-so-difficult tasks must be accomplished before the loss and they must be documented. Here is a 10-point checklist to help ensure that a service provider and the service provider's insurance will be responsive to a loss.



1. WRITTEN CONTRACT

The contractor must have a written contract with the service provider executed before the loss. Document the services to be provided. Be mindful of state laws about oral contracts or oral modifications to contracts; these problems can be avoided with a written contract.

2. CONTRACTUAL INDEMNIFICATION

The written contract must require that the service provider defend, indemnify and hold the contractor harmless from claims for bodily injury or property damage caused in whole or in part by the acts or omissions of the service provider or by those acting on the service providers' behalf, including anyone providing labor, materials, goods or services to the contractor through the service provider.

3. ADDITIONAL INSURED

The written contract must require that the contractor be named as an additional insured to the general liability insurance policy of the service provider.

4. DIRECT CONTRACT

The contract should, whenever possible, be directly between the party requiring additional insured status and the party providing additional insured status. If, however, a more remote party is required to provide additional insured status, check the language in the insurance policies that are involved. Some policies will only extend additional insured status to a party "with whom" the primary insured has directly contracted to confer such status. Don't confuse this with a policy that will more broadly extend additional insured status to someone "for whom" the primary insured had contracted to confer such status.

5. PRIMARY AND NONCONTRIBUTORY

The additional insured status should be primary and noncontributory—requiring that the service provider's insurance fully exhaust before other insurance is drawn upon.

6. WAIVER OF SUBROGATION

If the parties waive subrogation rights, it will eliminate cross-suits later over who is responsible for the bodily injury or property damage. This waiver is usually easy to obtain from the insurance company when there is an additional insured relationship.

7. ANTI-INDEMNIFICATION STATUTE

Beware of anti-indemnification laws in effect in most states. Even when the contract requires unlimited indemnification, this law will prohibit a service provider from indemnifying a service recipient if the bodily injury or property damage was caused solely by the service recipient's acts or omissions. That is the general principle, but different states have different exceptions to this rule. Some of those exceptions are identified in the statute, while others are the result of court decisions. Check state rules and draft the contract accordingly.

8. COMPLETED OPERATIONS

The contract can require the service provider to name the contractor as an additional insured for completed operations as well as for ongoing operations. The statute of limitations is long enough to leave the contractor exposed to risk for many years after the service provider's work was completed. For that duration, the contractor can still be an additional insured to a service provider's insurance for completed operations, protecting the contractor if a lawsuit materializes years later.

9. BEWARE OF EXCLUSIONS ADDED BY ENDORSEMENT

Some exclusions added to an insurance policy through an endorsement can eliminate the very coverage the contractor expected to receive. The main language of the policy may appear to provide the coverage needed, but that coverage may then be restricted or excluded by language added to the policy on a separate form. Some endorsements will exclude:

- coverage for work at heights;
- coverage for work in certain urban environments;
- indemnification from lawsuits brought against the contractor by a subcontractor's employee; or
- losses relating to explosion, collapse or underground damage hazards.

There are many endorsements that can change the policy's coverage in a way that could hurt.

10. GET MORE THAN A CERTIFICATE OF INSURANCE

A certificate of insurance will not be enough to determine whether the contractor actually obtained the additional insured protection for which it contracted. At a minimum, look at the insurance policy declarations page and the list of endorsements. The best approach is to obtain a complete copy of the service provider's policy, which will be useful if there is a loss. By then, stress levels will be high and cooperation from the service provider may not be easy.

As in all types of risk management, clearly establishing the terms of contractual indemnification and additional insured coverage can pay off when done properly in advance of the loss. Review and revise these important parts of the contract with a service provider before the work begins. This checklist should help transfer risk and obtain protection for losses stemming from a service provider's mishap.



Written by Allen R. Wolff - Shareholder, [Anderson Kill](#)
Contact Info: (212) 278-1379 , awolff@andersonkill.com

[Allen R. Wolff](#)'s practice in Anderson Kill's New York office concentrates in construction litigation, insurance recovery and the nexus between the two, as well as in complex commercial litigation. He is co-chair of Anderson Kill's Construction Industry Practice and Corporate and Commercial Litigation practice groups.



Written by Ethan W. Middlebrooks - Attorney, [Anderson Kill](#)
Contact Info: (212) 278-1324 , emiddlebrooks@andersonkill.com

[Ethan W. Middlebrooks](#) concentrates his practice in Anderson Kill's New York office in insurance recovery and commercial litigation. He is also a member of the firm's COVID-19 Task Group.