



# Risk Transfer & Insurance Coverage

Contractual Indemnification & Additional Insured Issues



hilb rog al & hobbs

# Risk Management Prevents Financial Disasters



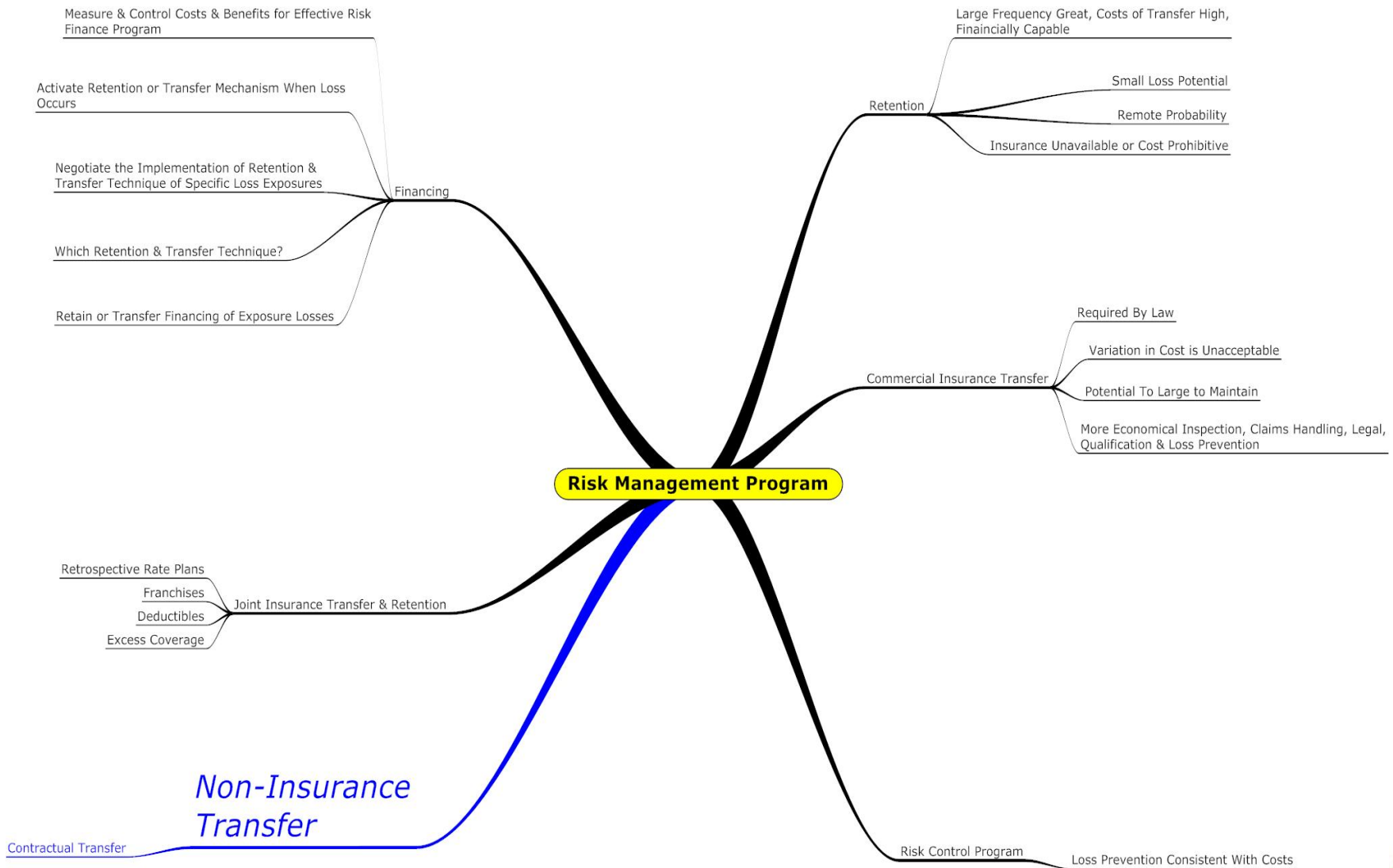




# Outline

- Risk Management Program - Non-Insurance Transfer
- Risk Allocation
- Contractual Risk Transfer
- Indemnification
- Contract Language – Risk Management Techniques
- Negotiate Contract Risk & Insurance Provisions
- Risk Management Program





## Risk Allocation – Theory vs. Reality

- Theory:
  - Should allocate to party in best position to manage risks
  
- Reality:
  - Risk allocated to party in weaker bargaining position



# Contractual Risk Transfer

- Risk allocation through contract
  - lease, purchase agreement, purchase order, or service agreement
- Specific paragraphs for indemnity
- Hidden provisions throughout contract



## Effect of Indemnity Provisions

- Shifts payment of:
  - defense
  - cost of remedy





## Indemnity Provision Defined

- Agreement to
  - Secure another against anticipated loss, or
  - Forbear, or
  - Forbearance by a third person, or
  - Hold harmless against existing and/or future liability.





## State Law Determines Enforceability

- Enforceable if provision clearly reflects an agreement by both parties to transfer liability
- Courts will void if against public policy or statutes (see “State Construction Anti-Indemnity Statutes” hand out).
  - Enforceability depends on whether the liability transferred is:
    - Sole negligence of indemnity
    - Concurrent negligence
    - Sole negligence of indemnitor



## Choice Of Law/Venue

If no choice of law or venue provision:

- Court will decide applicable law based choice of law rules of venue
- Promotes venue shopping
- Adds expense
- Can be outcome determinative





## Additional Insured (AI) vs. Indemnity

- AI coverage and indemnity operate independently
- Indemnity covered as contractual liability
- AI coverage determined by policy and AI endorsement
- AI coverage still exists, even if indemnity limited by State Law



## Coordinate Additional Insured Status with the Indemnity Agreement

- AI status may expand risk transfer beyond negotiated indemnity limits
  - AI covered to full limits including excess/umbrella
  - If indemnity is capped, the AI coverage should also be capped





# Coverage for Contractual Indemnification

This insurance does not apply to:

\* \* \*

## Contractual Liability

“Bodily injury” or “property damage” for which the insured is obligated to pay damages by reason of the *assumption of liability* in a contract or agreement.





## Contractual Indemnification

This exclusion does not apply to liability for damages:

- (1) Assumed in a contract or agreement that is an *“insured contract,”* provided the “bodily injury” or “property damage” *occurs subsequent to the execution* of the contract or agreement; or
- (2) That the insured would have in the absence of the contract or agreement.”





# Contractual Indemnification

- “Insured Contract” means:
  - (a) A contract for a lease of premises;
  - (b) A sidetrack agreement;
  - (c) Any easement or license agreement;
  - (d) An obligation, as required by ordinance, to indemnify a municipality;
  - (e) An elevator maintenance agreement;
  - (f) That part of any other contract or agreement under which you *assume the tort liability of another party* to pay for “bodily injury” or “property damage





## Additional Insured Issues

### CG 20 10 11 85

- “WHO IS AN INSURED is amended to include as an insured the person or organization shown in the Schedule, but only with respect to *liability arising out of ‘your work’* for that insured by or for you.”



## Additional Insured Issues

### CG 20 10 07 04

- “A. Section II – WHO IS AN INSURED is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to *liability* for ‘bodily injury’, ‘property damage’ or ‘personal and advertising injury’ *caused in whole or in part by:*
  1. Your *acts or omissions*; or
  2. The acts or omissions of those acting on your behalf;in the *performance of your ongoing operations* for the additional insured(s) at the location(s) designated above.





## Additional Insured Issues

### CG 20 10 07 04 (cont.)

With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This insurance does not apply to 'bodily injury' or 'property damage' occurring after:

1. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or





## Additional Insured Issues

### CG 20 10 07 04 (cont.)

2. That portion of ‘your work’ out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.”





# Blanket Additional Insured Endorsements

- Blanket endorsement automatically provides additional insured status to anyone the named insured agrees to name as such in a contract or agreement.
  - Avoids the risk of failing to fulfill the agreement to provide additional insured status
  - Avoids claim of breach of contract claim





## Who Should Use AI Endorsements

- If routinely add AIs (e.g., contractors):
  - use a blanket additional insured endorsement
- If infrequently add AIs:
  - list AI by name





## Tailor Scope of Endorsements

- Scope of coverage should be tailored to coincide with the types of risks for which the indemnitee is entitled to protection
  - Make sure the additional insured endorsement limits coverage to liability arising out of the intended operations, such as a particular construction project or a specific location.
    - Examples: landlord should only be AI only for liability arising out of the tenant's premises; general contractor should only be AI for liability arising out of subcontractor's work
  - ISO endorsements do this; manuscript endorsements may not
- Use endorsements tailored to contract for which they apply
  - employ separate endorsements for each type of contract (e.g., construction contracts, real estate leases, equipment rentals, etc.)



# Contractual Obligations and Aggregate Limits

- Businesses that agree to indemnify increase their aggregate liability with each agreement
  - aggregate liabilities should be taken into consideration when selecting the appropriate limits
  - Even if no breach of contract, if the aggregate limits are insufficient indemnitor may be uninsured for some of its exposure
- Indemnitees may require dedicated limits for the project or premises



# Subrogation

- Subrogation allows a party who has paid a loss or debt on the part of another to succeed to the rights of that other party to pursue recovery from a third party who was responsible for causing the loss
- The right to subrogation can be waived prior to loss



## Waivers of Subrogation

- Allocate the risk of property damage and do not permit reallocation through subrogation
    - contractually waive subrogation
- and/or
- include party and all of its subcontractors as insureds since insurers can not subrogate against their own insureds



## AIs and Completed Operations

- Completed operations losses are losses arising out of the named insured's work after it has been completed or put to its intended use
- Contracts may stipulate time for AI completed operations coverage.
- [CG 20 10](#) as revised excludes AI's completed operations liability
- Where completed operations coverage is required:
  - Pre-1993 [CG 20 10](#) generally are considered to afford completed operations coverage.
  - insurers are more receptive to [CG 20 26](#) versus a manuscript endorsement.

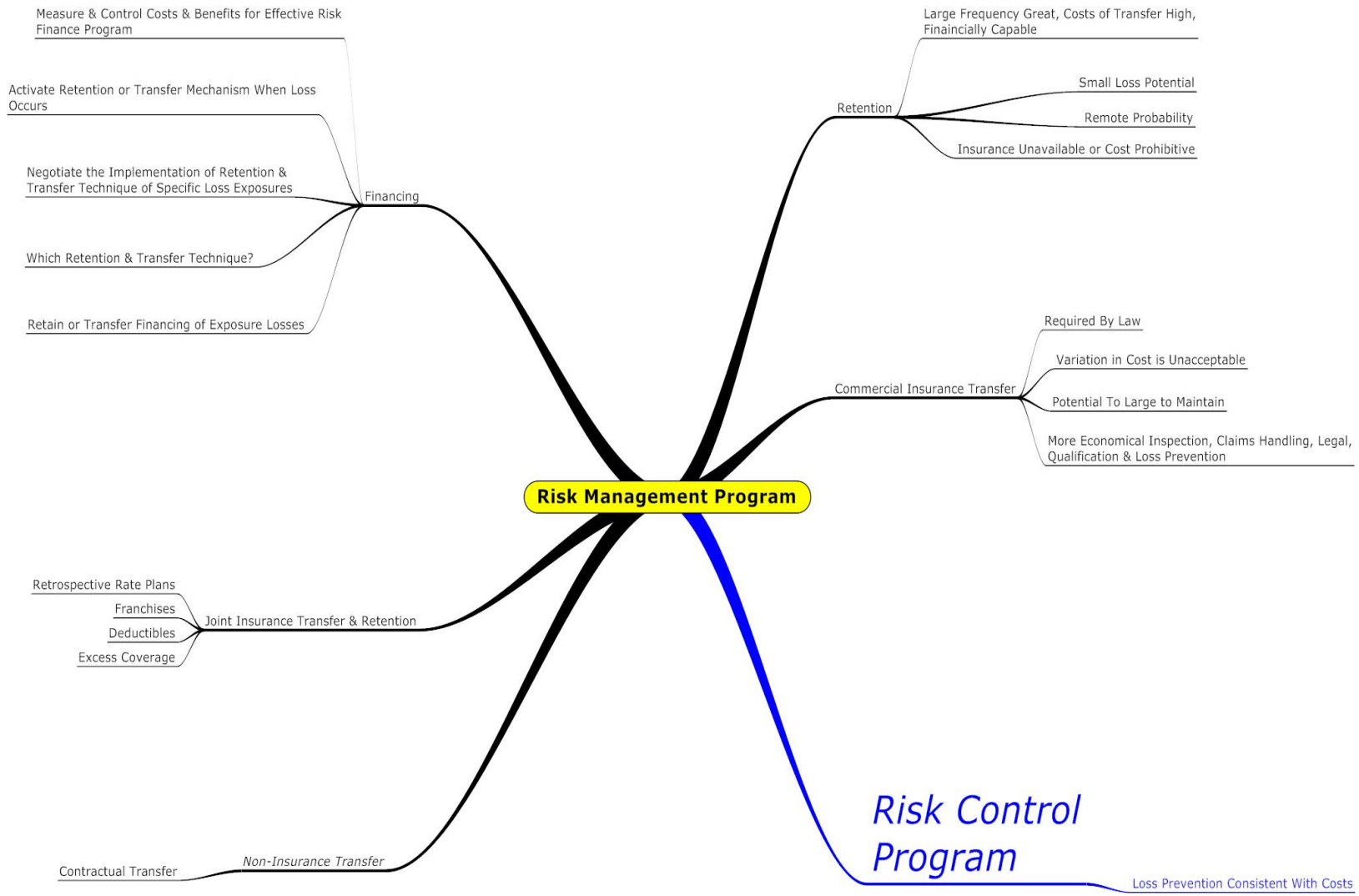




## AIs and Completed Operations

- CGL policies are occurrence based
  - Policy in place is triggered on date BI/PD occurs
  - Must continue to name AI on policies purchased after contract until statute of limitations/repose expires





## Loss Control Activities

- Review indemnification agreements
  - Applicable jurisdiction
  - Type of indemnification clause
  - Extent of “any and all”
  - Extent of “expense”
  - Defense requirement
  - Existence of insured contract



## Loss Control Activities

- Review insurance requirements
  - Additional insured wording
  - Notice of cancellation, non-renewal, or material change
  - Other insurance clause wording
    - Primary/excess
    - Contributory/Noncontributory
  - Waiver of right of recovery wording





## Pre-Loss Loss Control Point 1

- Assist in changing way transfer agreements are written through education
- Assist insured with contractual compliance
  - Insured complies with its contracts
  - Insured requires others to comply with their contracts





## Pre-Loss Loss Control Point 2

- Assist insured in selecting appropriate Additional Insured endorsements
- Assist insured in selecting appropriate Notice wording
- Assist insured in selecting appropriate Other Insurance wording



## Pre-Loss Loss Control Point 3

- Assist insured in selection appropriate permission to Waive Right of Recovery wording
  
- Assist in meaningful documentation of proof of insurance
  - Insured status
  - Notice requirements



## Read the Entire Contract

- Risks can be transferred in virtually any provision of a contract, all too often the contract reviewer is provided only a copy of the contract insurance requirements and indemnity clause.
- Such limited information can obscure significant risks inherent in the business endeavor that may have been overlooked in other contract provisions.
- Further, hold harmless, indemnity, limitation of liability, and other significant types of risk transfer clauses can be inserted in other parts of the contract, and these provisions may go unnoticed without a thorough review of the entire contract.



Typical Construction Service, Installation, or Sales Contracts

Purchase Orders

Atypical Contracts (where customers demand specific negligence, hold harmless, exculpatory clauses)

**Non-Insurance Transfer**

Waivers of Subrogation

Negligence Clauses

Hold Harmless Agreements

Exculpatory Clauses

Vendors Endorsements



# Risk Control Programs – Contract Review

- Every Organization is Different
  - Risk Manager
  - Insurance Agent/Broker
  - Insurance Consultant
  - Contract Attorney
  
- Organization's vary
  - Create a Management Policy Statement
  - Develop a Procedure Manual
  - Insurance Certificate Management
  - Support operations management who negotiate and execute contracts.



## Certificates of Insurance

- Used as proof that the person providing the certificate has a policy
- Usually summarizes limits, conditions, duration of the policy and AI status
- Not binding on insurer and do not provide coverage





# Reviewing Certificates of Insurance

- Is the company named precisely the same as in the contract?
- Are you certificate holder?
- Are policies issued by reputable insurers?
- Has it been signed by insurance company or agency representative?
- Are types and limits of insurance listed on the form the same or greater than those required?
- Are the policy numbers listed in the certificate?
- Are the dates of coverage adequate?
- Are the “notice of cancellation” provisions acceptable?
- Does certificate indicate all special requirements specified?
- Does certificate cite contract number or job location to tie insurance to the work?
- Has the provider made any unapproved modifications to the certificate?



## Deficient Certificates

- Develop a procedure for responding to deficient certificates.
- At a minimum, this should address providing the certificate provider with written notice of any identified deficiencies and requiring that the contractor provide a corrected certificate before they are allowed to start work.
- Also, contract documents should clearly state any penalties for failing to provide the certificate.



## Do

- Convince other party to only seek recovery from negligent party
- Refuse AI status or tailor to contract indemnity
- Seek achievable AI requirements
- Educate other party on why unreasonable requirements aren't necessary
- Use standard endorsement or negotiate manuscript endorsement
- Tailor endorsement to the risks associated with your work
- Consider your contractual obligations when determining limits
- Cap indemnity and AI limits
- Use blanket AI endorsement on your policy
- Agree on an appropriate strategy with your insurer re: certificate issuance



## Do Not

- Accept provisions as offered
- Make unnecessary modifications to your insurance (e.g., waiver and cross-liability)
- Forget to have other parties added as AIs whenever agreed
- Have your AI endorsement apply to “all contracts”
- Cap the limit available to an Additional Insured unless you also cap the indemnity
- Forget that limits dilute every time you indemnify or add an AI
- Agree to add someone as an AI with nonstandard endorsements
- Negotiate more restrictive indemnity clause and negate it by providing AI status
- Agree to add another party as an AI on your WC policy
- Agree to provide evidence of insurance on a manuscript certificate form unless your insurer has consented to it





Test & Verify

Risk Assessment

**Risk Management Elements**

Organizational Roles & Responsibilities

Educate & Train

Document & Record

Operational Review

Communicate



Planning

Policy & Leadership

Operational Elements

Relentless Root Cause

