

What does change look like?

AEGIS 2017 **PHC**

Contractual Risk Transfer Techniques

Garrett Finnegan – *Moderator*

Senior Litigation Counsel – AEGIS Insurance Services, Inc.

David P. Abernathy

Vice President & Deputy General Counsel – Spire, Inc.

Bryony Bowers Hodges

Assistant General Counsel – SCANA Corporation

Steve Verbeski

Executive Vice President – Hays Companies

AEGIS 2017 **PHC**

Some Subjects We Will Cover

- Evaluating new contractors
- Contractual protections
 - Indemnity
 - Insurance requirements
- Typical contractor and vendor insurance requirements
- Common issues encountered along the way: “I can’t get that much coverage!”
- Discussion & questions

AEGIS 2017 **PHC**

Three Lawyers and a Broker: **The Disclaimer**

The information presented herein is intended to be general in nature. Any thoughts, ideas or suggestions contained herein are strictly educational in nature, and **should not be considered as legal advice or recommendations for specific business applications**, as all businesses have unique characteristics which should be fully evaluated before implementing any of the ideas or strategies discussed herein. The presenters recommend that utilities fully assess their specific risk management needs and objectives when considering the extent that these techniques are appropriate for their companies, and incorporate the involvement of risk / insurance, legal, procurement and operations teams as appropriate when designing and implementing risk management strategies.

AEGIS 2017 **PHC**

Increased Use of Contractors

- Utility companies are increasingly relying upon a contractor workforce
- Reasons why
 - Cost savings
 - Increased flexibility
 - Access to innovative construction methods
 - Labor qualifications and staffing issues
 - Reallocation of risk
- Contractors like working for us! Utility companies pay vendors in full, on time, and cautiously avoid liens on their assets.

AEGIS 2017 **PHC**

Risks of Using Contractors

- Wide variation in contractors' skill and expertise
- Does the contractor's commitment to safety mirror your own?
- Not every contractor has the financial capability to fulfill its responsibilities in the event of injuries or damages that may occur as a result of its actions
- A utility is the classic "deep pocket," and must protect itself and its customers from liability for loss caused by others

AEGIS 2017 **PHC**



AEGIS 2017 PHC


Be Wary of the Legal Definition of an Independent Contractor

- Does your company conduct on-site inspections of contractors' work?
- The desire to manage your contractors' work activities must take into account the legal limits of doing so
- **The definition of "independent contractor" is a state law-specific analysis**
- South Carolina uses the "Right to Control" test
 - Direct evidence of the right to, or exercise of, control
 - The method of payment
 - The furnishing of equipment
 - The right to fire
- Federal and state agencies and plaintiffs' lawyers are trying to move from an "actual control" standard to a "potential control" standard

Note: This test looks not at the utility's **actual** control of its contractor, but rather at the utility's **RIGHT** to control the activities of its contractor. It is important to study your company's POs, terms & conditions, and other contract documents.

AEGIS 2017 PHC

Guiding Principles For the Contract Process

- The party with the greater control of the risk is in the better position to avoid risk, and should be responsible for the financial burden if a loss occurs
- The utility must ensure that its contractors are financially responsible if the contractors' operations cause loss to the utility, its employees, or to the public
- How well do you know your contractors' safety or risk control track record?
- Before the contractor passes  on a new project, do a financial analysis

AEGIS 2017 **PHC**

Managing Risk in Activities of **Others**

- When engaging outside parties for goods and services, a utility must expect and intend that contractors and vendors will apply prudent and safe practices to protect persons and property from injuries and damages
- Because of this, the utility must ensure that its contractors and vendors are financially responsible if those entities' operations cause loss to the utility, its employees or to the general public

AEGIS 2017 **PHC**

Managing Risk in Activities of **Others**

- A complete understanding and trust in the contractor's financial condition (balance sheet, liquidity, creditworthiness, tangible net worth, etc.) is one way to determine financial responsibility to pay for injuries and damages. In many situations a vendor's financial condition is not easily ascertained or is not sufficient, so adequate insurance is the most common form of independent verification of financial responsibility to pay losses.

AEGIS 2017 **PHC**

Improving Quality & Consistency of Contract Insurance Requirements

Belt & Suspenders Risk Management

Indemnity + Insurance = Protection

- While the two provisions are complementary, they also need to be able to operate independently from one another

AEGIS 2017 **PHC**

How Does the Utility Protect Itself?

First, through contractual protections in agreements

- **Indemnity & limitation of liability clauses:** The portion of the contract or agreement defining how one party will protect the other. This part of the contract describes what the contractor / vendor must do to protect the company if the utility is faced with liability arising out of the contractor's operations and activities

AEGIS 2017 PHC

How Does the Utility Protect Itself?

Second, through financial responsibility of counterparty

- **Insurance requirements:** Portion of the contract or agreement stipulating the minimum types and amounts of insurance that must be maintained by the contractor or vendor in order to evidence a measure of financial responsibility for losses and legal liability. It is an independent verification of financial assets available to fund losses arising out of the contractor's operations and activities.
 - What insurance limits should the utility require?

AEGIS 2017 PHC

Three General Types of Indemnity

- **Limited form:** Party A will indemnify Party B only for liability arising from Party A's actual negligence. Often the basis for mutual indemnification. (a/k/a: comparative fault)
- **Intermediate form:** Party A will indemnify Party B for all liability associated with Party A's activities, except for liability arising out of Party B's sole negligence
- **Broad form:** Party A will indemnify Party B for all liability associated with Party A's activities, regardless of – and including – the negligence of Party B

AEGIS 2017 PHC

Example : Indemnity Clause

Intermediate form

- The Contractor/Consultant also hereby agrees to indemnify, hold harmless and assume responsibility for the full defense of Utility and its affiliated companies, their agents, servants, and employees from all claims and suits for loss of or damage to property of Utility and its affiliated companies or others, including loss of use thereof, or for injuries, including death, to persons, and from all judgments recovered therefore, and from all expense in defending such claims, or suits, including court costs, attorneys' fees and other expense, caused in whole or in part, directly or indirectly, by any act or omission of the Contractor/Consultant and/or its subcontractors, their respective agents, servants or employees, and not caused by the sole fault or negligence of Utility and its affiliated companies, their agents, servants or employees.

AEGIS 2017 PHC

Example : Indemnity Clause

Intermediate form

- It is expressly understood and agreed that the foregoing undertaking of the Contractor/Consultant to indemnify Utility and its affiliated companies, their agents, servants, and employees includes the obligation to indemnify and hold harmless such parties from any and all claims resulting from injury to any employee of the Contractor/Consultant which injury is in any manner related to the Project/Services and the fact that Contractor/Consultant provides Workers' Compensation to any such injured employee shall not relieve Contractor/Consultant of this contractual undertaking.

AEGIS 2017 **PHC**

Five Ways Indemnification Can Operate

- **Owner takes all liability** (broad form favoring contractor)
- **Owner takes all liability except for sole fault of the contractor** (intermediate form favoring contractor)
- **Comparative fault** (limited / each responsible for its own fault)
- **Contractor takes all liability except for sole fault of owner** (intermediate form favoring owner)
- **Contractor takes all liability** (broad form favoring owner)

AEGIS 2017 **PHC**

Additional Contractual Considerations

- How long is coverage needed?
 - Contractor shall procure and maintain in effect during the term of the agreement, and for a period of _____ years thereafter for the following coverages. State statutes of limitations for contractor work?
- Require contractor's coverage to be "primary and noncontributory"
 - Contractor agrees to stipulate that such insurance is primary and is not additional to; or contributing with, any other insurance carried by on for the benefit of the owner

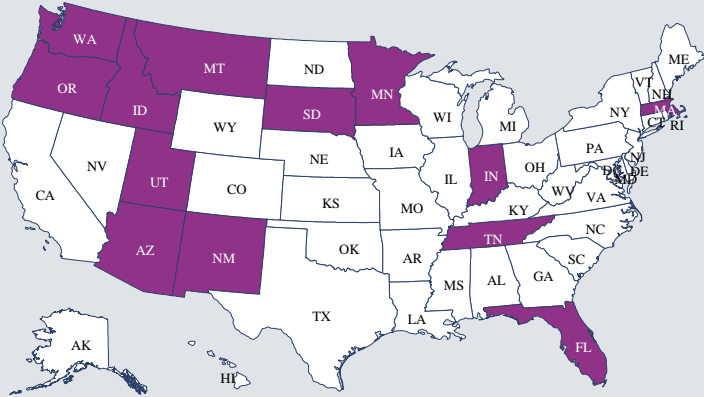
AEGIS 2017 **PHC**

Additional Contractual Considerations

- Beware of the Limitation of Liability clause: the fine print can hurt you
 - Evaluate the risk and understand how the limit of liability will apply before agreeing to the contract
 - Negotiate – even if it is part of a standard form
 - Limits of insurance is a possible compromise if the amount of the insurance reflects the amount of the risk

AEGIS 2017 **PHC**

States with Anti-Indemnity Statutes and No Exceptions

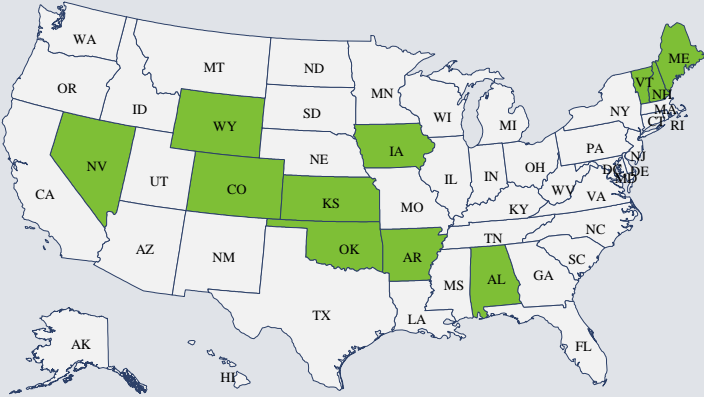


- | | |
|---------------|--------------|
| Arizona | New Mexico |
| Florida | Oregon |
| Idaho | South Dakota |
| Indiana | Tennessee |
| Massachusetts | Utah |
| Minnesota | Washington |
| Montana | |

Disclaimer: confirm the applicable law in the states where the contract is executed and performed!

AEGIS 2017 **PHC**

States with No Anti-Indemnity Statutes Voiding Hold Harmless Provisions



- | | |
|----------|---------------|
| Alabama | New Hampshire |
| Arkansas | Nevada |
| Colorado | Oklahoma |
| Iowa | Vermont |
| Kansas | Wyoming |
| Maine | |

Disclaimer: confirm the applicable law in the states where the contract is executed and performed!

AEGIS 2017 **PHC**

AEGIS 2017 **PHC**

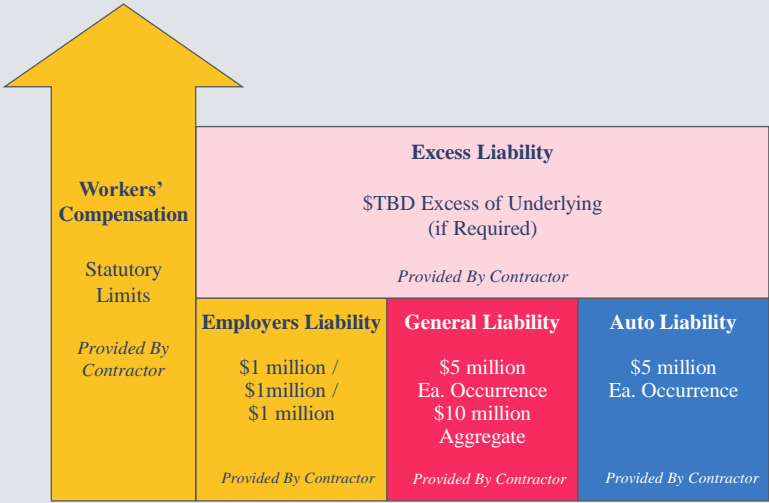
AEGIS 2017 PHC

Types of Insurance Often Required By Contract

- **Excess Liability** – additional limits above primary limits of required general liability, auto liability and employers liability coverages
- **Professional Liability** – coverage for financial loss to third parties arising out of negligent errors or omissions in providing professional advice or services (e.g. design, engineering, etc.)
- **Pollution Liability** – coverage for environmental spills and cleanup to land and water
- **Cyber Liability** – coverage for loss and expense due to breach of private data/information

AEGIS 2017 PHC

Typical Contractor / Vendor Insurance Requirements



AEGIS 2017 PHC

Typical Contractor / Vendor Insurance Requirements



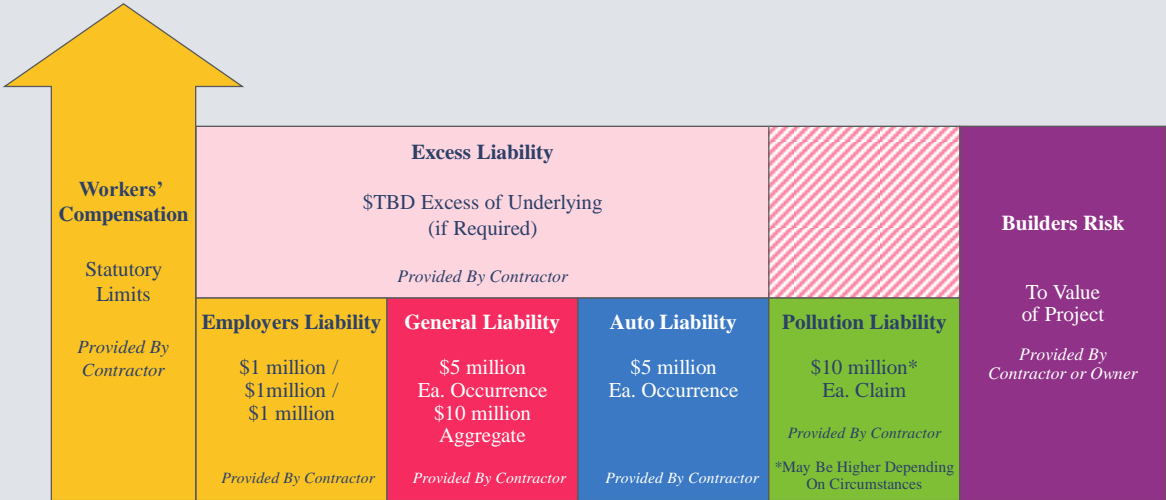
AEGIS 2017 **PHC**

Typical Contractor / Vendor Insurance Requirements



AEGIS 2017 **PHC**

Typical Contractor / Vendor Insurance Requirements



AEGIS 2017 **PHC**

Additional Insured Status

- Additional insured status is not granted by contract alone; must have an endorsement to the contractor’s insurance policies to confer status. Named v. Additional status.
- Aligns the contractor’s insurance coverage with the obligation to protect the utility against liability arising out of the contractor’s operations and activities performed on behalf of the utility
- Allows the utility direct and immediate access to and defense by the insurer and insurance policy(ies) that the contractor maintains for the protection of both the contractor and the utility

AEGIS 2017 **PHC**

Additional Insured Status

- Keeps both the contractor and the utility “on the same side of the table” vs. assuming an adversarial position against one another. The utility has the same rights and protections as the contractor.
- Reinforces the intent of a Waiver of Subrogation – an insurer cannot attempt to force recovery from one of its own insureds

Additional Insured vs. Indemnification

Additional Insured	Indemnification
<ul style="list-style-type: none">• Transfers the risk to insurer with financial means• Defense coverage• Insurer bound by duties of good faith and fair dealing	<ul style="list-style-type: none">• Contractor may not have financial means to pay for the loss• No defense coverage, fees probably not recoverable• Contractor can litigate zealously

Example – Additional Insured

Additional Insured endorsement states

- Definition of Insured is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person or organization have **agreed in writing in a contract or agreement** that such person or organization be added as an additional insured on your policy



AEGIS 2017 **PHC**

Additional Insured (AI) Endorsement Options

- **Thirteen (13) additional insured options** – **if not effectively selected, may leave coverage shortfalls**
 - e.g., AI but no contractual liability
- Option 1: CG 20 10 11 85 or equivalent
 - Provides the broadest additional insured coverage, including completed operations (**Note: no longer a current ISO endorsement and rarely obtainable as a manuscripted endorsement**)

AEGIS 2017 **PHC**

Additional Insured (AI) Endorsement Options

- Option 2: CG 20 10 10 01 with CG 20 37 10 01 or equivalent combination
 - Provides coverage similar to CG 20 10 11 85 by adding completed operations coverage; still contains “arising out of” language which provides broader coverage for the AI
- Option 3: CG 20 10 07 04 with CG 20 37 07 04 or equivalent combination
 - CG 20 37 provides coverage for completed operations, however, the AI will not have coverage for liability resulting from their sole negligence

AEGIS 2017 **PHC**

Additional Insured Status

Don't Trust:

VERIFY

AEGIS 2017 **PHC**

Contractual Liability

- Included within the Commercial General Liability (“CGL”) policy, and followed by excess or umbrella forms
- Despite the term, Contractual Liability is not a warranty or insurance that covers breach of contract
- It is an exception to an exclusion in the CGL, which allows the policy to respond to the Insured’s promise of indemnity in an “Insured Contract”
- Second “belt and suspenders” of a program
- Automatically included in an ISO policy

AEGIS 2017 **PHC**


Waiver of Subrogation

- Contractor’s insurer(s) waive their rights to recover from utility for payments made to or on behalf of contractor
- Many policies provide automatic waiver if agreed to in the contract or other written agreement by the contractor and prior to a loss
- In some cases and for large exposures, the contractor may have to endorse and pay additional premium for the waiver of subrogation to apply



AEGIS 2017 **PHC**

Certificates of Insurance

	<h2 style="margin: 0;">CERTIFICATE OF LIABILITY INSURANCE</h2>	DATE:
<p>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 AWARD, INTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF LIABILITY INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURERS, AUTHORIZED REPRESENTATIVE OF PRODUCER, AND THE CERTIFICATE HOLDERS.</p> <p>IMPORTANT: If a certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. If ENDORSEMENT IS WANTED, 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 endorsements.)</p>		
PRODUCER (NAME) (ADDRESS) (CITY) (STATE) (ZIP)	INSURED (NAME) (ADDRESS) (CITY) (STATE) (ZIP)	DATE (DATE) (ADDRESS) (CITY) (STATE) (ZIP)
COVERAGES		
CERTIFICATE NUMBER	REVISION NUMBER	
<p>IN ORDER TO VERIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED, PLEASE REFER TO THE POLICY PROVIDED IDENTIFYING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY Pertain, THE REQUIREMENTS ATTACHED BY THE POLICIES OCCURRED HEREIN SUBJECT TO ALL THE TERMS, CONDITIONS AND EXCLUSIONS OF SUCH POLICIES. THE POLICIES ARE AVAILABLE FOR REVIEW AT THE FOLLOWING ADDRESS:</p>		
INSURANCE COVERAGE	PRODUCT	PROPERTY
<input type="checkbox"/> GENERAL LIABILITY	<input type="checkbox"/> COMMERCE	<input type="checkbox"/> LIABILITIES
<input type="checkbox"/> PRODUCT LIABILITY	<input type="checkbox"/> COMMERCE	<input type="checkbox"/> LIABILITIES
<input type="checkbox"/> COMMERCE LIABILITY	<input type="checkbox"/> COMMERCE	<input type="checkbox"/> LIABILITIES
<input type="checkbox"/> COMMERCE LIABILITY	<input type="checkbox"/> COMMERCE	<input type="checkbox"/> LIABILITIES
<input type="checkbox"/> COMMERCE LIABILITY	<input type="checkbox"/> COMMERCE	<input type="checkbox"/> LIABILITIES
<input type="checkbox"/> COMMERCE LIABILITY	<input type="checkbox"/> COMMERCE	<input type="checkbox"/> LIABILITIES
<input type="checkbox"/> COMMERCE LIABILITY	<input type="checkbox"/> COMMERCE	<input type="checkbox"/> LIABILITIES
<input type="checkbox"/> COMMERCE LIABILITY	<input type="checkbox"/> COMMERCE	<input type="checkbox"/> LIABILITIES
<input type="checkbox"/> COMMERCE LIABILITY	<input type="checkbox"/> COMMERCE	<input type="checkbox"/> LIABILITIES
<input type="checkbox"/> COMMERCE LIABILITY	<input type="checkbox"/> COMMERCE	<input type="checkbox"/> LIABILITIES
<input type="checkbox"/> COMMERCE LIABILITY	<input type="checkbox"/> COMMERCE	<input type="checkbox"/> LIABILITIES
<input type="checkbox"/> COMMERCE LIABILITY	<input type="checkbox"/> COMMERCE	<input type="checkbox"/> LIABILITIES
<input type="checkbox"/> COMMERCE LIABILITY	<input type="checkbox"/> COMMERCE	<input type="checkbox"/> LIABILITIES
<input type="checkbox"/> COMMERCE LIABILITY	<input type="checkbox"/> COMMERCE	<input type="checkbox"/> LIABILITIES
<input type="checkbox"/> COMMERCE LIABILITY	<input type="checkbox"/> COMMERCE	<input type="checkbox"/> LIABILITIES
<input type="checkbox"/> COMMERCE LIABILITY	<input type="checkbox"/> COMMERCE	<input type="checkbox"/> LIABILITIES
<input type="checkbox"/> COMMERCE LIABILITY	<input type="checkbox"/> COMMERCE	<input type="checkbox"/> LIABILITIES
<input type="checkbox"/> COMMERCE LIABILITY	<input type="checkbox"/> COMMERCE	<input type="checkbox"/> LIABILITIES
<input type="checkbox"/> COMMERCE LIABILITY	<input type="checkbox"/> COMMERCE	<input type="checkbox"/> LIABILITIES
<input type="checkbox"/> COMMERCE LIABILITY	<input type="checkbox"/> COMMERCE	<input type="checkbox"/> LIABILITIES
<input type="checkbox"/> COMMERCE LIABILITY	<input type="checkbox"/> COMMERCE	<input type="checkbox"/> LIABILITIES
<input type="checkbox"/> COMMERCE LIABILITY	<input type="checkbox"/> COMMERCE	<input type="checkbox"/> LIABILITIES
<input type="checkbox"/> COMMERCE LIABILITY	<input type="checkbox"/> COMMERCE	<input type="checkbox"/> LIABILITIES
<input type="checkbox"/> COMMERCE LIABILITY	<input type="checkbox"/> COMMERCE	<input type="checkbox"/> LIABILITIES
<input type="checkbox"/> COMMERCE LIABILITY	<input type="checkbox"/> COMMERCE	<input type="checkbox"/> LIABILITIES
<input type="checkbox"/> COMMERCE LIABILITY	<input type="checkbox"/> COMMERCE	<input type="checkbox"/> LIABILITIES
<input type="checkbox"/> COMMERCE LIABILITY	<input type="checkbox"/> COMMERCE	<input type="checkbox"/> LIABILITIES
<input type="checkbox"/> COMMERCE LIABILITY	<input type="checkbox"/> COMMERCE	<input type="checkbox"/> LIABILITIES
<input type="checkbox"/> COMMERCE LIABILITY		

AEGIS 2017 **PHC**

Insurance Certificates

- Imperfect, but likely the best system we have to understand contractor and vendor insurance coverages and to efficiently check compliance with the utility's requirements
- However, note that Insurance Certificates are not always accurate: establish process to periodically review and request updated Insurance Certificates
 - If it's not in the policy, it can't be put on a certificate; and if it's on a certificate, it **MUST** specifically be a part of the policy
 - In many cases, this includes the practice of only showing partial limits

AEGIS 2017 **PHC**

Evaluating Insurance Certificates

- Review for compliance with what was asked for in the contract with the contractor or vendor
- Check for coverage dates, policy limits, and policy numbers
- Correct parties on Certificate?
 - Contractor / vendor properly identified? Same party as in the contract?
 - Utility company properly named as additional insureds / contractual / waiver of subrogation
 - Are parent / subsidiaries / affiliates of the utility named?
- Note: Insurance Certificates do not in and of themselves confer coverage: not a binding document

AEGIS 2017 **PHC**

Notice of Cancellation

- Cancellation provision – requires contractor’s insurer to provide the utility with advance notice that contractor’s insurance policy will be cancelled
- One of the most frequent “hang-ups” experienced in contract insurance requirements and certificates of insurance
- Concept was to ensure that an Additional Insured and/or a Certificate holder would be directly notified by the contractor’s insurance company
- Rarely works that way, and never has
- Now most cancellation provisions must be specifically and individually endorsed to the policy – this is not a slam dunk

AEGIS 2017 **PHC**

Certificate Changes – Cancellation

Old Text	New Text
Should any of the above described policies be cancelled before the expiration date thereof, the issuing insurer will endeavor to mail days written notice to the certificate holder named to the left, but failure to do so shall impose no obligation or liability of any kind upon the insurer, its agents or representatives.	Should any of the above described policies be cancelled before the expiration date thereof, notice will be delivered in accordance with the policy provisions.

AEGIS 2017 **PHC**

**Selected Areas of Concern,
Confusion or Misunderstanding**
And perhaps a few points to consider

Waiver of Subrogation

- If at all possible, vendor & contractor agreements should require that contractor / vendor / subcontractor insurers waive rights of subrogation against utility / owner
- Ideally, language should be crafted to include **all** contractor/vendor policies – not just those embodied in the contract insurance requirements (e.g. property / contractors equipment insurance, etc.)
- Potential resistance citing cost, insurer refusal, negative impact on WC experience modules, potential for “double-dipping”, fairness, etc.
- Remember – this is certainly not a new or unreasonable request; many policies allow the insured to waive without permission from insurer

AEGIS 2017 **PHC**

Utility Agreeing to Carry Primary CGL Policy

- Agreements requiring the utility to provide commercial general liability (CGL) policy are often accepted without modification
- The terms “Commercial General Liability” and “CGL” are terms of art referring to a specific policy form published by ISO
- Assumption is that an self-insured retention (SIR) followed by excess liability complies with the CGL requirement – but technically it does not!

AEGIS 2017 **PHC**

Utility Agreeing to Carry Primary CGL Policy

- Utility could be forced to purchase a costly insurance policy it does not need or want
- If complying using SIR – modify the requirements to allow such, or better yet, insert omnibus language that allows the utility to self-insure all or a portion of the insurance coverages required by the counterparty

AEGIS 2017 **PHC**

Professional Liability

- Common confusion as to what professional liability covers and / or is intended to cover
- Responds to economic damages resulting from inaccurate or erroneous professional services to others for a fee; typically excludes liability for property damage and bodily injury
- The terms “Professional Liability” and “Errors & Omissions” (E&O) liability are often used interchangeably, but slight technical difference

AEGIS 2017 **PHC**

Professional Liability

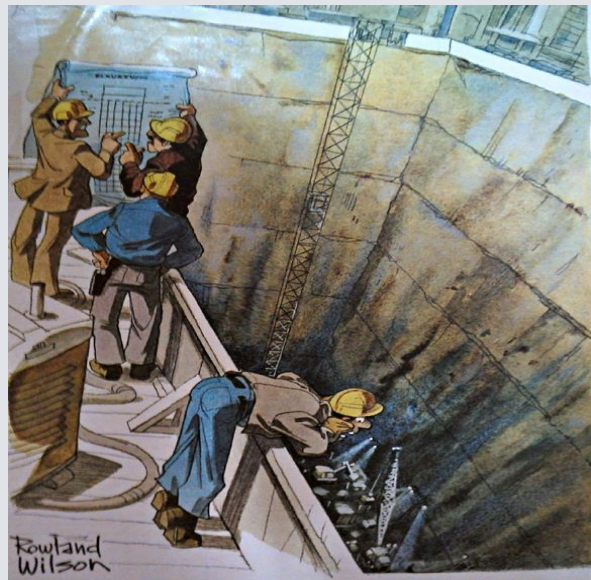
- Generally, true professional liability insurance provides coverage for liability arising out of the services of technical professionals possessing a specialized degree and training (e.g., architects, engineers, etc.). True errors & omissions (E&O) insurance is similar, but for less formally trained professionals (e.g., accountants, real estate agents, insurance agents, etc.)

AEGIS 2017 **PHC**

Professional Liability

STOP DIGGING!

The plans were upside down!



AEGIS 2017 **PHC**

Professional Liability

- Professional liability insurance is characterized by relatively low limits and high cost of coverage
- Requirements for specific professional liability insurance should be for those professionals providing critical design, engineering or planning input as a key element of their service
- Engineering and design that is an integral part of a manufactured product is typically addressed in the products liability coverage in CGL policy;
- Construction contractors who may also perform ad-hoc field engineering may have a professional liability component endorsed to their CGL policy

AEGIS 2017 **PHC**

Rigger's Coverage – What Is It and When Is It Needed?



AEGIS 2017 **PHC**

Rigger's Coverage – What Is It and When Is It Needed?

- Coverage should be considered for any operation where high-value property or equipment owned by the utility may be hoisted, lowered or moved by a contractor – typically by the use of “mobile equipment” (e.g., cranes, derricks, lifts, etc.)
- Coverage can either take the form of a third party liability policy or endorsement to the CGL / umbrella (“Riggers Liability”) issued to the contractor, or in the form of a 1st party inland marine or builders risk property policy covering the interests of the contractor and the utility as they may appear during construction or erection

AEGIS 2017 **PHC**

Rigger's Coverage – What Is It and When Is It Needed?

Rigger's coverage – first party property coverage

- Typically made part of a Builders Risk / Construction All Risk (CAR) / Erection All Risk (EAR) inland marine property form
- Can be addressed as “all risk” or specified / named perils basis
- Provides coverage without regard to fault of the contractor (or lack thereof)
- Valuation in the event of loss can be stipulated at RC
- Contractors, rigging subcontractors and owners are insureds and loss payees based on the extent of their interest in damaged property

AEGIS 2017 **PHC**

Rigger's Coverage – What Is It and When Is It Needed?

Rigger's liability – third party legal liability coverage

- Essentially works to remove the exclusion for damage to property of others while in the contractor's care, custody & control (CCC) and during "rigging, hoisting, lifting, lowering or moving" operations
- Legal liability coverage: the policy will respond only if the contractor was somehow negligent and therefore legally liable
- Potential for the contractor and insurer to argue liability, and that a claim will be disputed in full or in part
- Valuation of damaged property is also typically at the value of the property at the time of the loss (ACV) vs. replacement cost

AEGIS 2017 **PHC**

Rigger's Coverage – What Is It and When Is It Needed?

Rigger's coverage – which form and when

- Option 1: work is to be performed under Builders Risk / CAR / EAR that provides coverage for the utility / owner, general contractor and subcontractors of every tier – first party coverage is preferable
- Option 2: work is to be performed by the general contractor or subcontractor, and the contractor is not providing Builders Risk / CAR / EAR for the benefit of the utility / owner – third party rigger's liability form endorsement to the GL policy is necessary, at minimum

AEGIS 2017 **PHC**

Rigger's Coverage – What Is It and When Is It Needed?

Rigger's coverage – which form and when

- Option 1 provides better certainty to utility / owner (all risk terms possible, RC valuation, no determination of fault needed, utility / owner is loss payee)
- Option 2 provides less certainty and control, but preserves utility's insurers rights of subrogation (assuming utility hasn't waived subrogation – which it shouldn't)

AEGIS 2017 **PHC**

Transportation Risk

- Who has and insures risk of loss?
 - FOB origin – receiver has the risk
 - FOB destination – shipper has the risk
- Some OEMs and shops offer bundled solutions – including transit risk & insurance
- Many utilities prefer to assume transit risk and insure themselves as a cost management effort vs. OEM / shop insuring or relying on common carrier coverage

AEGIS 2017 **PHC**

Transportation Risk

- Most utility “all risk” property insurance programs provide transit coverage sub limits – which can often be increased on a trip-transit basis for high-dollar shipments
- The devil is in the details
- Examples of where risk of loss may change hands
 - Entering or exiting shipper’s or receiver’s facility
 - Leaving or arriving on shipper’s or receiver’s dock
 - Once on the hook, off the hook or under the hook

AEGIS 2017 **PHC**

Transportation Risk

- Knowing when risk of loss transfers can be key to avoiding confusion or misunderstandings – not to mention insurance coverage gaps
- Protect your insurance asset
 - Avoid waiving subrogation if at all possible
 - Consider request to remove CCC exclusion from GL coverage
- Let’s discuss an example

AEGIS 2017 **PHC**

Transportation Risk



AEGIS 2017 **PHC**

Transportation Risk

- Turbine rotor shipped to repair facility for refurbishment
- For return trip to utility, contract specified FOB shop dock
- Turbine was loaded onto flatbed trailer, and prepared for common or contract carrier to transport to utility's power plant for installation
- Shop's shag truck was moving flatbed to another area of the facility to await pick-up by trucking company. During the move, the shag driver attempted too tight of a turn, causing load to shift and ultimately dumped turbine rotor onto the ground

AEGIS 2017 **PHC**

Transportation Risk

- Issue: while the rotor was still at the facility and within the shop's care, custody & control, the rotor left the dock and therefore was technically the utility's risk of loss at that point
- Happy ending: since it was the negligent operation of the shop's shag that caused the loss, and for customer relations purposes, shop agreed to repair at no charge

AEGIS 2017 **PHC**

Transportation Risk

What about hidden damage on equipment awaiting installation?

- Example: A turbine rotor was received and stored on site in original packaging, awaiting installation weeks or months later. When unpacked just prior to installation, damage to turbine blades was discovered – resulting in delay and costly repairs
- If transit risk is not 100% covered by builders / Risk / CAR, assure that both builders risk / car and separate transit cover have 50/50 clauses attached
 - In case where it is not possible to determine where / when damage occurred, each policy affirmatively covers 50% of the loss

AEGIS 2017 **PHC**

Beware the Dirty Laundry

- The “dirty laundry” coverages
 - Employment practices liability
 - Fiduciary liability
 - Crime
 - Directors & officers
- Covers situations that companies are hesitant to discuss or sometimes even acknowledge
- Typically, knowledge and facts of the situation are trusted to only a closely-held “need to know” group – which often does not include the risk manager



AEGIS 2017 **PHC**

Beware the Dirty Laundry

Problem: because of the confidential and potentially embarrassing subject matter, existence of insurance and conditions as pre-requisite for coverage are poorly understood or ignored

- Key strategies
 - Assure that appropriate levels of senior management, legal and human resources are aware that insurance coverage may exist to respond to defense, settlement and / or judgment costs
 - Policy requirements and other conditions of the policy need to be understood and addressed up front
 - Time frame in which notice is to be given
 - Who controls claim handling
 - Selection of counsel – is panel counsel required?
 - Cooperation conditions

AEGIS 2017 **PHC**

Beware the Dirty Laundry

Case study

- Utility safety representative was terminated for not advocating that employees follow certain established safety rules – safety rep argued that variance was permitted; utility HR & legal determined termination was justified
- Safety rep filed EEOC complaint, resulting in eventual “no further action” (aka “right to sue”); letter from the agency. Fact that EEOC declined to take agency action further emboldened utility that termination was justified
- Terminated employee filed civil suit nearly a year after termination – outside counsel also opined that termination was justified, and provided utility with a \$30,000 nuisance value defense budget. Utility adopted a no-settlement strategy

AEGIS 2017 **PHC**

Beware the Dirty Laundry

Case study

- Nine more months of discovery, depositions and pre-trial motion practice. On the day night before commencement of trial, utility risk manager was asked “do we have insurance to cover this?”
- Utility had EPLI coverage with substantial limits, subject to a \$250,000 SIR – risk manager had to provide notice to the insurer as jury was being seated
- Trial concluded with a plaintiff’s jury verdict of \$750,000 + costs + pre-judgment interest; convinced of an obvious miscarriage of justice, utility successful in getting a new trial based on erroneous instructions to the jury;
- After second jury trial, and after plaintiff declined several settlement offers, a second verdict was reached

AEGIS 2017 **PHC**

Beware the Dirty Laundry

Resulting in jury awarding plaintiff
\$975,000 + costs + interest to date original suit was filed!

AEGIS 2017 **PHC**

Beware the Dirty Laundry

Lessons learned

- Utility did not include risk manager in the “need to know” chain
- Risk manager did not pro-actively identify and communicate to key senior management, legal and HR professionals the extent of its insurance portfolio, including its “dirty laundry” coverages, and therefore did not reinforce policy conditions relating to prompt notice, cooperation and defense strategy;
- Utility legal & HR professionals relied too much on EEOC determination of NFA as “confirmation” they were in the right

AEGIS 2017 **PHC**

Beware the Dirty Laundry

Lessons learned

- Utility legal, HR and outside counsel did not sufficiently appreciate unpredictability of employment practices litigation, and critical “he said / she said” issues
- Because of late notice, insurer could not assist utility by recommending advisory counsel specializing in EPLI defense – relied on local “generalist” firm

AEGIS 2017 **PHC**

If You Have Reasonable Terms, Then It's All About Leverage

- Target what is reasonable and achievable – not scorched earth
- Avoid absolute terms in drafting insurance requirements, e.g., “any and all”, “however occurring”, “without exception”, etc.
- Be prepared to justify insurance requirements in common language examples if necessary
- Identify priority needs and prepare to concede less important requirements

AEGIS 2017 **PHC**

If You Have Reasonable Terms, Then It's All About Leverage

- Understand your negotiating position and that of the contractor / vendor or counterparty – and thus who has the best leverage
 - If the transaction competitively bid / numerous qualified potential counterparties – utility typically has greatest leverage
 - If the transaction sole-sourced, unique elements or very limited qualified potential counterparties – utility typically has least leverage

AEGIS 2017 **PHC**



David P. Abernathy

Vice President & Deputy General Counsel Spire, Inc.
700 Market Street, 6th floor St. Louis, MO 63101
Phone: 314-342-0536
Fax: 314-421-1979
david.abernathy@spireenergy.com



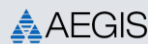
Steve Verbeski

Executive Vice President
Managing Director – Power & Utility
Hays Companies
666 Grand Ave. – Suite 1717 Des Moines, IA 50309
Tel: (515) 802-3006
Fax: (515) 802-3032
Cell: (515) 418-3090
sverbeski@hayscompanies.com



Bryony Bowers Hodges

Assistant General Counsel
SCANA Corporation
Mail Code C-222
220 Operation Way Cayce, SC 29033-3701
Tel: (803) 217-7315
Fax: (803) 733-4197
Cell: (803) 360-8385
bryony.hodges@scana.com



Garrett Finnegan

Senior Litigation Counsel
AEGIS Insurance Services, Inc.
1 Meadowlands Plaza East Rutherford, NJ 07073
Tel: (201) 508-2644
Fax: (201) 508-1275
Cell: (201) 208-5455
garrettfinnegan@aegislimited.com

AEGIS 2017 **PHC**



AEGIS 2017 **PHC**