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Insurance With Assurance

Hold Harmless, Indemnity and Waiver of Subrogation Requirements

by Rick Janis

The past three columns covered the Request to be named as an Additional Insured. The Hold Harmless, Indemnity and Waiver of Subrogation Requirements often come along with that request.

The Waiver of Subrogation says to the dealer, "I want you to wave your rights of recovery against me in case there is a claim." Depending upon how it is phrased, it usually adds "for any and all losses."

Why would you want to wave your rights of subrogation? It doesn't make any sense. If there is a claim, the dealer's insurance policy will pay it. Then, the dealer's insurance company upon investigating will note that there was contributory negligence on the part of the subscriber. The dealer's insurance company paid \$5,000 to remedy this situation but they want to collect \$3,000 from the subscriber. They can't if there is a waiver of subrogation.

In that type of situation, I tend to say no. The subscriber is presenting the request in a liability situation with the wording any and all losses. Anytime you see those words, run for shelter. It means exactly what it says.

Now, remember that your policy is a contract. It only covers bodily injury and property damage for which you are negligent. A lot of other things can happen other than bodily injury and property damage. There is a very real question under your liability policy whether you even have the right to wave those rights.

On the other hand, we do sometimes suggest that you sign a waiver of subrogation. In those instances, the waivers are usually mutual and it makes good business sense. Let's say you are a tenant in the building leasing space. It makes a lot of sense for the tenant and the landlord to sign waiver of subrogation letters as applied to property loss. The reason is that fire, vandalism and theft insurance are first party insurance coverage. It applies to no one else except the person buying that insurance to cover the loss of their property, building contents, tools and equipment. By signing a waiver of subrogation mutually with the landlord, each of you waves your rights of subrogation against each other for the loss due to property on the premises. The policy, and this is true of all standard property policies, says in writing, "If you wave your right of subrogation prior to the loss, we'll abide by it." The insurance company and claims adjusters don't care because you paid to insure your property with them. You transferred risk. Even though they could subrogate, the rates are already based actuarially on the fact that you paid money to insure the contents of that building.

There's really no downside. The upside is the landlord and the tenants avoid a situation where one of them is responsible for starting the fire. For example, the tenant did some wiring in the building. Because the wiring job was faulty, the building burned down. In that case, the insurance company would pay the landlord for the \$100,000 building. We'd pay the tenant for \$10,000 of loss contents. Then, the landlord's insurance company would turn around and sue the dealer for

the \$100,000 because the Fire Marshals said it was his wiring that started the fire. With the waver, you don't sue each other. Everyone was paid. It's very similar to no fault insurance.

The Hold Harmless and Indemnity Clauses basically say the same thing. It's a similar concept to the third party indemnity clause in your contracts. In that case, the dealer or monitoring station is holding the subscriber harmless.

Doesn't it make you a little bit nervous when attorneys want you to sign a contract that states, "any and all?" It involves any and all losses, costs and expenses, including attorney's fees arising directly or indirectly with the work contemplated and or performed. Why don't you just take over my company?

Again, keep in mind that you are not a specialty trade contractor. You are not in and out. As an alarm dealer, you are constantly there because you are providing the monitoring.

So now you've held them harmless and a loss occurs. The factory burns down and for some reason the fire alarm didn't work properly. At least that's what is alleged. Their attorney walks over to you with a summons and says "Remember that agreement you signed? It's the one that is on the certificate of insurance. Our \$1.5 million dollar factory burned to the ground. You agreed to hold us harmless. We know you have insurance because you gave us a certificate. And you put that wording on the certificate so we know that your company now has to abide by indemnifying us for our loss."

What's the point of the contract? The contract says you're not an insurance company. But by signing this you are making yourself an insurance company. In fact, you're more than an insurance company and you are beholden to them for anything that happens. You don't have to name them an additional insured, just wave your rights. Might as well go to work for them.

Let's say it's a commercial account. You signed a waver of subrogation that could cost you dearly for \$100 monitoring income a month? That's completely nuts.

This is an indemnity clause that holds someone else harmless for anything that happens while you are working. Because you are there working, and you're always there working because your system is in there 24-hours a day, 365 days a year, your answer should be "No, never, I don't want the job." It makes a lot more sense to me that you choose to lose the job rather than lose your shirt and your company as well.

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