TECHNICAL INFORMATION PAPER SERIES: PRODUCT LIABILITY RISK TRANSFER TECHNIQUES

BEFORE QUESTIONS ARISE ABOUT PRODUCT LIABILITY, PROTECT YOURSELF WITH THESE STRATEGIES.

Questions of liability may arise when a subcontractor installs your product or performs any services on your behalf. Or when a contractor's employee is injured in your workplace.

In many instances, the liability from failure of a component in your product may be far from clear.

One way to avoid confusion and reduce liability is to employ a strategy in which your suppliers, contractors and subcontractors agree to assume the risk or indemnify you. These strategies may include:

- Adequate insurance of the other party
- Verified by Certificates of Insurance
- Waivers of Subrogation and Hold Harmless Agreements

These guidelines are meant to assist you in applying each of these risk transfer techniques. They are not, however, an appropriate substitute for adequate insurance or loss prevention on your part.

CERTIFICATES OF INSURANCE

To minimize liability arising out of the work of contractors, subcontractors or a supplier's component part, you should make sure the other party carries general liability, product liability and workers' compensation insurance.

A *Certificate of Insurance* is a document attesting to the existence and limits of coverage on the other party. Issued to you by the other party's insurer, a certificate of insurance also allows you to receive notification of a coverage lapse.

Check to be sure that:

- The policy is in force and issued by a reputable domestic insurer.
- The policy covers comprehensive general liability, product liability, and workers' compensation.
- The policy limits are equal to or greater than your own.
- You are named as the certificate holder.

WAIVER OF SUBROGATION

Even if each of your vendors, contractors or subcontractors is insured adequately, their insurers have a right to seek subrogation (i.e., to recover some or all of their costs) from you if they believe:

- You were at fault, or
- You caused the event that gave rise to the claim.

Obviously, this can result in significant legal actions and blaming between parties.

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To avoid such actions, you would need to have a waiver of subrogation from the other party's insurer prior to any loss. A *waiver of subrogation* is an endorsement to the insurance policy issued to the other party.

Mandatories and recommendations.

- A waiver should be general and encompass all hazards, locations and operations for which the other party is responsible in their work for you.
- A waiver should not contain limitations as to the specific entities, locations or work; it should cover all operations conducted by the other party for you.
- A waiver should not contain clauses requiring the consent of the named insured (the other party) for the waiver to be applicable.
- A waiver is necessary even if no specific clause in the policy of the other party expressly permits subrogation.

HOLD HARMLESS AGREEMENTS

To maximize your protection, you may wish to seek a *Hold Harmless Agreement* from your vendor, contractor or subcontractor.

This agreement is a legally binding contract by which the other party agrees to hold you harmless for any liability arising out of their work, including liability for claims that would *not* be covered by insurance (e.g., costs of recall). Note in particular that these agreements even cover situations where you are solely negligent.

Mandatories and recommendations.

- Hold harmless agreements must be in writing and must clearly state the indemnifying party's (the other party's) responsibility to indemnify you against liability or loss or damage.
- If a corporation signs the agreement, the authority of the person signing should be apparent (e.g., vice-president).
  - » Most corporate bylaws permit a vice-president to contractually bind the corporation. The same may not be true for corporate secretaries, treasurers, managers, etc.
- The preferred form of an indemnity agreement is one that indemnifies against liability, since it does not require that actual damages be shown before the agreement operates. For this reason, indemnity agreements that indemnify against "liability" are preferred and should go so far as to require the indemnitor to "defend against suits/actions" and should also include legal fees and costs incurred by the indemnitee (you) in their own defense of the claim or suit.
- The agreement should not have a term or be cancelable without sufficient notice.
- There should be no limitations on the amount of time in which to make a claim.
- There should be no limitations on the amount of the indemnitor's liability.
- The agreement should state specifically that the indemnification is provided for your own negligence.

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