So what's in these contracts clients are asking their agents about?

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Have you ever been frustrated when your insured is being denied defense coverage while named as an additional insured on a commercial general liability policy, particularly when that named insured has agreed to defend and indemnify the additional insured in writing? Don't confuse a contractual risk transfer and an insurance risk transfer. A contractual risk transfer is based on hold harmless language found in a contract or agreement and the other is based on whether a named insured's commercial general liability policy provides additional insured status as required.

Withhold harmless language, one party will often assume the responsibilities to pay for defense costs and litigation expenses as well as to provide payment for adverse judgments or settlements. Frequently, when two parties enter into a contract, one or the other or both agree to indemnify and defend the other party in the event they are sued as a co-defendant. It is not uncommon to provide additional insured status and agree to indemnify and defend the third party for bodily injury. This provides the named insured's legal counsel the option of utilizing the additional insured status or enforcing the hold harmless agreement to respond, indemnify and defend. It is becoming more customary in the larger general contractors to forego additional insured status and sue to enforce the hold harmless agreement. Doing so allows the promisee (the one receiving the promise to be indemnified and defended) to choose their own legal counsel when seeking defense and indemnification as an additional insured. It triggers the insuring agreement's duty to defend provision, thus allowing the insurance carrier to choose and control legal counsel.

The ongoing issue with ISO additional insured endorsements since the 2004 ISO revisions is that sole negligence of a promisee/indemnitee would no longer provide defense for the additional insured. The most current editions of ISO's additional insured endorsements have continued to depend upon the named insured wrongfully contributing to the bodily injury or property damage. However, there have been significant court decisions that have disagreed with the policy authors' intent (e.g., Burlington Insurance Company v. New York City Transit Authority). Courts have decided that earlier endorsement editions with an "arising out of" wording did include coverage for a solely negligent additional insured. The result in 2004 was to amend the additional insured endorsements by changing from "arising out of" to "caused in whole or in part." The change now requires the named insured (or those acting on the named insured's behalf) to wrongfully contribute to the bodily injury or property damage in order for the additional insured to have coverage. The concept is to distinguish an "active" wrongdoer from a "passive" wrongdoer. The passive wrongdoer perhaps did not actually commit the wrongful act but was in some way responsible for the conduct of the active wrongdoer. The passive wrongdoers are referred to as being vicariously liable. Hold harmless wording will commonly ask to be indemnified and defended in "any and all" liabilities. It is important to note that the CGL policy's contractual liability coverage only responds to indemnify and defend a third party for bodily injury/property damage. While "any and all" is an extremely broad spectrum, bodily injury/property damage coverage is very narrow.

It has therefore become imperative for the agent to advise their insureds that should they agree to defend and indemnify a third party against "any and all" liability in a contract, the CGL policy will only respond to claims for bodily injury/property damage. When parties engage in contracts, disputes often arise when one party damages the property of the other. Exclusion j.: Damage To Property, specifically excludes damage to property the insured owns, rents or occupies. This could be a tenant damaging the property of the property owner, perhaps by negligently causing a fire when the tenant's restaurant equipment caught fire and damaged the landlord's building. Assuming that the landlord carries first-party property insurance for the peril of fire on his or her owned building, it is very likely that the owner will collect the proceeds that, if correctly valued, would pay to replace the building. The insurer that made the owner whole will now assume the rights of recovery from the named insured property owner and bring a lawsuit or civil action via subrogation against the tenant. A mutual waiver of subrogation acts to preserve the relationships between the parties in the contract to remedy the numerous shortcomings of the CGL policy by barring either party's insurance company from suing the other via subrogation. Absence of a mutual waiver of subrogation could necessitate utilizing the tenant's CGL fire damage liability coverage that shares the $100,000 sublimit for "Damage To Premises Rented To You" or require attaching CP 00 40 Legal Liability Coverage Form to the tenant's commercial property policy coverage part.

Similar issues arise when a subcontractor does damage to the work of a general contractor. The CGL has a damage to your work exclusion that excludes damage to the named insured's own work, but makes an exception for damage to the named insured's work by a subcontractor. Agents should be aware of their CGL insurers attaching CG 22 94 Exclusion – Damage to Work Performed by Subcontractors on Your Behalf. Including this exclusionary endorsement will significantly curtail the named insured's coverage should a subcontractor damage the work.