Contract Mistakes to Avoid

Careful attention to contract indemnification provisions and other insurance requirements can help institutions avoid liability for injuries that they do not cause. However, if a misstep occurs during the process of allocating the risk of loss to the other contracting party, the repercussions for an institution can be both unexpected and serious. The following summary of claims from different institutions show the type of problems that can arise.

I. Mistakes When Using Contracts to Allocate Risk

No written contract

Example A. A college entered into a joint venture with a local resort to provide ski instruction to its students. While participating in a skiing course, a student collided with a snowmobile and sustained severe injuries. The student sued the college for more than $2 million. Because there was no written contract between the college and the ski resort, a court will determine each party’s responsibility for the student’s injuries.

Example B. A minor suffered an injury while participating in a bungee-jump game operated by an amusement company at a university-hosted festival. The child’s parents sued the university and the company. The university and the company did not have a written contract, so it is unclear who will be responsible for the minor’s injuries.

Example C. A school allowed a local football league to play a scrimmage on one its fields. A minor participant was severely injured during the game and sued the school for his injuries. The school did not require the league to enter into a written contract that would clarify each party’s responsibility for players’ injuries. The school is the lone defendant in a lawsuit that will determine whether or not the school is responsible.

Unenforceable or unfavorable indemnification provision

Example A. An employee of a food service company slipped and fell while working at an event at the university. The food service employee sued the university for her injuries. The contract between the university and the food service company had expired two years earlier, so the language addressing risk allocation was no longer enforceable. The university spent tens of thousands of dollars to settle the claim.

Example B. A school and a local company entered into a contract to move furniture. One of the company’s employees suffered a severe injury in a fall and sued the school and his employer. Because the contract between the school and the moving company was silent about the risk allocation arrangement between the parties, the school must continue to defend the lawsuit.

Example C. A college allowed a local high school girls’ basketball team to use its gymnasium. One of the players fell during a practice and suffered a traumatic brain injury. The player filed a lawsuit against the college. While the college’s contract with the high school contained a provision
allocating responsibility for third-party claims, the provision was ambiguous. The college incurred costs of more than $1 million to defend against and resolve the high school player’s claim.

**Example D.** An institution hired a company to provide security services on its campus. A security guard employed by the company molested a female student, and the student’s parents filed suit against the institution. The contract between the institution and the security company was a form agreement that required the institution to indemnify the company from any claims and losses arising out of the agreement. Because the contract clearly placed responsibility on the institution, it incurred expenses over $150,000 to defend and ultimately settle the lawsuit.

## II. Mistakes When Using Other Insurance to Allocate Risk

**Defective certificate of insurance**

**Example.** A college allowed a local league to host a basketball tournament at its facility. One of the players slipped on the court, severely injured his leg, and sued the college for his injuries. The college had required and obtained from the local league a certificate of insurance that named the college as an additional insured under the league’s insurance policy. Unfortunately, the certificate failed to identify an actual insurance policy, stating only that the policy was “to be determined.” Because of the certificate’s shortcomings, the college must continue to defend against the player’s claim.

**Defective additional insured status**

**Example.** A university retained three different contractors to renovate a campus building. After one of the contractors’ employees fell from scaffolding at the project site and sustained severe injuries, he sued the university in its capacity as the premises owner as well as the three contractors. The institution did not use consistent approaches with each contractor in obtaining additional insured status to protect itself against the risk of third-party injuries. In one contract, the university required the contractor to indemnify for third-party injuries and also obtained an appropriate certificate of insurance and additional insured endorsement. In another arrangement, the university and the contractor agreed to a mutual indemnification provision, and the contractor provided a certificate of insurance, but named the university as an additional insured only on its excess policy. In yet another, the institution had neither a written contract nor any proof of insurance or additional insured status. Because of the confusion about each defendant’s responsibility for the employee’s injuries, the case was tried and resulted in a jury verdict exceeding $6 million. The court determined that the university was responsible for nearly a third of the verdict.

**Deficient other insurance coverage**

**Example A.** An employee of an electrical contractor suffered second- and third-degree burns over half of his body when he was electrocuted while performing work under a contract with the college. The institution and the electrical contractor had a written contract that contained an indemnification provision transferring liability for third-party claims to the contractor. Also, the institution had obtained a certificate of insurance and an additional insured endorsement. However, the limit of the
contractor’s insurance policy, $1 million, was insufficient to cover the contractor’s extensive injuries, and the college had to contribute more than $1 million more.

**Example B.** A local group used a school’s swimming pool for an event at which one of its participants drowned. The school’s contract required the local group to indemnify the institution from all claims or losses arising from its use of the pool. The school also obtained a certificate of insurance and an additional insured endorsement. However, the policy listed in the certificate excluded coverage for bodily injury claims and, therefore, did not provide the school with any insurance coverage for the loss.

**Example C.** An educational institution contracted with a management company to maintain the apartment buildings it owned. While the management company was cleaning the common areas, an elderly tenant fell on a wet walkway and later sued the institution for her injuries. The contract between the institution and the company contained an indemnification provision, and the institution required a certificate of insurance. Yet, the policies listed on the certificate had expired in the middle of the contract’s term. The institution is defending the claim, but expects it will incur six figures to defend or resolve the claim.