

# ***Community Partnerships***

***Minimizing your Risk***

***Maximizing the Benefits***

***2022 Midwest Facility Masters Conference***

***Monday, October 31, 2022***

***3:30 – 4:20 p.m.***

***Brian Bean, J.D.***

**Executive Claims Consultant**

**R&R Insurance Services, Inc.**

**262-953-7176**

**Brian.bean@rrins.com**





**Brian Bean, J.D.**

## **28+ years of claims experience**

### ✓ **Litigation and Claims Management**

- ❑ Liability Claims & Traffic Accidents
- ❑ Coverage Disputes
- ❑ Workers' Compensation
- ❑ Construction Defect & Product Liability

### ✓ **Contractual Indemnification**

### ✓ **Property Claims**

- ❑ Building Losses
- ❑ Inland Marine
- ❑ Business Income & Extra Expense
- ❑ Vehicle & Heavy Equipment losses

### ✓ **Workers' Compensation – *multi-state***

### ✓ **Field Claim Investigations**

- ❑ Auto liability
- ❑ Premises Liability
- ❑ Construction Accidents
- ❑ Property losses of all sizes

# Topics

- 1. Partnerships**
- 2. Insurance questions you should be asking**
- 3. Insurance requirements in your contracts**
- 4. Liability Waivers**
- 5. Resources**

# ***Introduction- Community Partnerships***

- ***An important part of your District's role in the community***
  - *Educational, community services, health services*
- ❖ ***However, opening up facilities and engaging in programs with outside organizations and businesses opens you up to additional liabilities***

***If we decide to engage in this partnership...***

***Can we be sued ?***

***Are we going to be found liable?***

# The Reality

- ✓ **Yes**, you could be sued
- ✓ **Found Liable?** - No idea - depends on the circumstances...

## **Choice:**

- 1. Don't engage** - probably not possible or a good idea
- 2. Learn how to protect your District better**

***Balance the Risks and Benefits***

# The real questions...

- ❑ ***What are the risks?***
  - ✓ Actual physical risks
  - ✓ **Legal risks** - Our focus
  
- ❑ ***How do we minimize those risks?***
  - ✓ Our focus is the legal risks
  
- ❑ ***Who will defend us in the event of a claim or lawsuit?***

# What are they?

## *Types of Community Partnerships*

- 1. *Non-profit Partners:*** Nonprofits, charities, and religious establishments, PTO's, PTA's, clubs
- 2. *For-Profit Partners:*** Small and large businesses, corporations. NOT vendors or contractors who provide services
- 3. *Government-Led Bodies & Community Support Organizations:***  
Local and state officials, schools, police, libraries

*Each type has different analysis on risk transfer*

# What is the activity?

## Wide Range of possibilities

- ✓ **Child care/learning**
- ✓ **Outdoor activities**
- ✓ **Internships**
  - Manufacturing, Medical, Construction, Service industry
  - What are minors allowed to do?

**Examples: Motorcycle dealership & Airplane ride**

***Does the activity pose any unusual or hazardous risk?***



# Is the activity excluded on insurance?

- ✓ Trampolines
- ✓ Racing events
- ✓ Climbing walls
- ✓ High diving boards
- ✓ Rope climbing
- ✓ Bungee jumping
- ✓ Sky diving
- ✓ Aircraft
- ✓ Zip lines



***Check with your insurance to see if there are special exclusions***

## Is the Partner already an “insured” on the District’s policy?

- The policy may define the entity as an insured?
- Always a Non-Profit organization, but not all non-profits will meet this definition
- *Does the organization have...?*
  - ✓ FEIN – Federal Employer Identification Number
  - ✓ 501(3)(c) – tax exempt - *(from the IRS website)*
    - The exempt purposes in section 501(c)(3) are charitable, religious, educational, scientific, literary, testing for public safety, fostering national or international amateur sports competition, and preventing cruelty to children or animals. The term **charitable** is used in its generally accepted legal sense and includes relief of the poor, the distressed, or the underprivileged; advancement of religion; advancement of education or science; erecting or maintaining public buildings, monuments, or works; lessening the burdens of government; lessening neighborhood tensions; eliminating prejudice and discrimination; defending human and civil rights secured by law; and combating community deterioration and juvenile delinquency

***If yes, then they are probably NOT an “insured” under the District’s policy***

## Example


### CIC – “Who is an Insured” by definition

**Your** past or present employees or elected or appointed officials while acting within the scope of their employment or authority, authorized volunteers while acting for **you** or on **your** behalf, including your students, and all commissions, agencies, boards, districts, authorities, **PTAs, PTOs, Booster Clubs or similar entities when you retain the right to control the details of the work of these individuals or entities**, except this insurance shall be excess of any insurance maintained by **your** past or present employees or elected or appointed officials, or authorized volunteers, including students for the ownership, maintenance, or use of any **automobiles** owned by the employee, official, volunteer, or student, regardless of whether such **automobiles** are also hired or borrowed by **you**.

- **You** = the named insured = the District
- “**you** retain the right to control”

## Example

### Liberty – “Who is an Insured” by definition

 **b.** Any club or organization, if they have been specifically authorized by you, and only with respect to their use of your premises and their activities elsewhere that are within the scope of the authorized purpose of such organization. Clubs or organizations include, but are not limited to:

(1) Parent support groups or booster clubs;

(2) Student groups; or

(3) Alumni groups.

A club's or organization's directors, officers or members are also insureds, while acting within the scope of their duties for such club or organization.

 **c.** Any affiliated subsidiary, organization, board, commission, foundation or endowment that you own or control more than 50% of such entity.

The insurance provided by this provision does not apply if there is available to the insured any other valid and collectible insurance, whether primary, excess (other than insurance written to apply specifically in excess of this Policy), contingent or on any other basis that would apply to the insurance provided under this provision.

## Practice Tips

### **Check your insurance on this issue to see the language**

- ✓ What is the definition of “Who is an Insured”

### **What groups and their activities meet that definition?**

- ✓ Check with your agent and insurance carrier

### **Should they get their own insurance?**

- ✓ Does the partner work with multiple Districts, or is involved in activities outside the District?

***What are we signing??***



# Working with “Outside” Partners

Often involves signing an agreement or contract

What can you do before anything happens to limit your district’s exposure

➤ Pay attention to the insurance requirements in your contracts

❑ ***What type of insurance requirements should the district require in contracts with...?***

• Partners, Construction companies, vendors, service providers of all types

❑ ***What type of insurance requirements should the district avoid?***

• Don’t take on unnecessary contractual obligations – it happens often

• Watch what you sign!

# Contracts – 1<sup>st</sup> Question

## **Who is authorized to sign contracts at your District?**

- Centralized?
- De-centralized, so anyone is allowed to sign?

## **Whoever signs contracts needs to be aware of insurance requirements, and how they may impact the District**

- Who can legally bind your school district?



# Understanding the Basics: Core Concepts

## Freedom to Contract

*U.S. Constitution - Article I, section 10, clause 1*

- Parties have the right and ability to transfer the risk of a “loss”
  - ✓ Business-to business contracts, not consumer contracts
- Sometimes these do not seem to be “fair”
  - ✓ Fair ≠ Your legally enforceable Contractual Obligation
- Often, these insurance terms are negotiable just like other terms
- Bargaining Power between the Parties
  - ✓ Not always equal and how many competitors are out there?
  - ✓ How badly do you want the deal?

***Understanding these terms and obligations when you contract  
can prevent a lot of fighting when a loss occurs***

# It's Complicated

- ✓ There is no “boilerplate” language
- ✓ How does this apply in real world situations?
- ✓ *If you are confused and feel like you are in way over your head, you are definitely not alone*

## The Truth:

**Nobody is 100% certain how enforceable these provisions are once you get to court**

- Different States
- Unique situations
- New case law

## *An Example...in plain English*

Building Owner



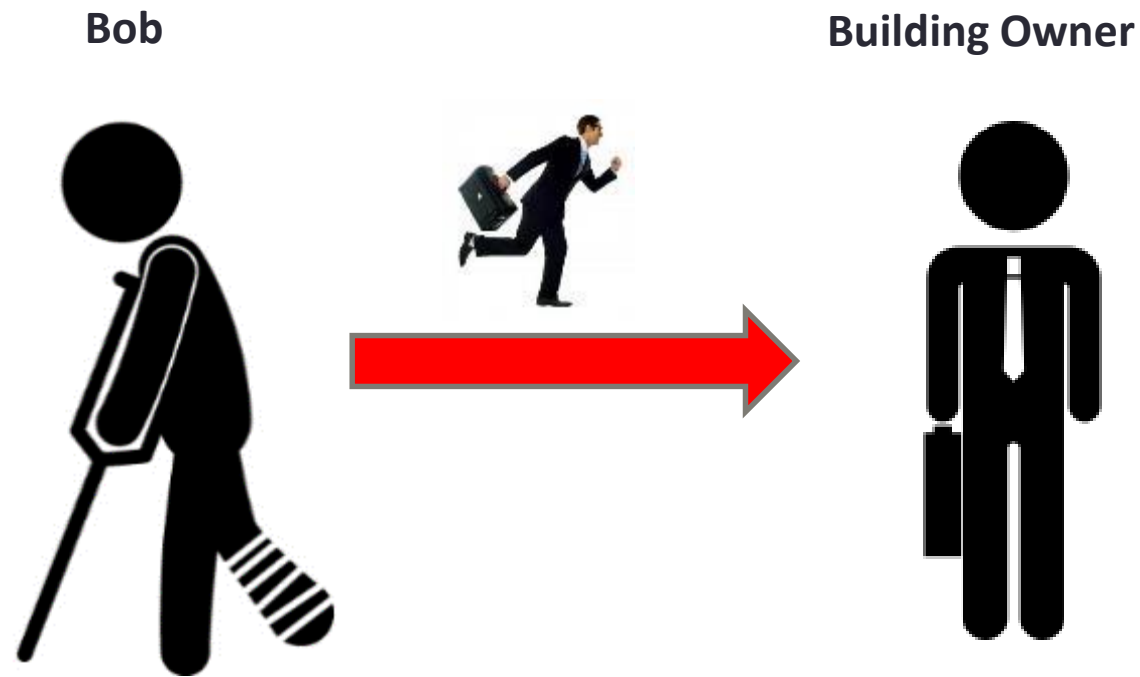
Construction Company



The Building Owner hires the Construction Company  
to remodel part of the commercial building  
with a number of business tenants

The contract has language which says:

*"If I get sued by someone who gets hurt because of your construction,  
you will pay for the damages and my attorney."*



- **Bob is visiting a business located in the building**
- **He trips over something that the construction company left out**
- **He sustains injuries, hires an attorney, and sues the building owner**

**Building Owner**



**Construction Company**



- **Building Owner sends a letter to the Construction Company**
- **“I am being sued because of you, and based on our contract, you now have to defend me and pay for the damages, if any.”**
- **If everything is set up properly, the Construction Company, through its insurance carrier will pay to defend and indemnify the Building Owner**

## How do you go about transferring risk in a contract?

### ✓ *Indemnification Clauses*

- Long, wordy paragraphs with unfamiliar terminology

### ✓ *Additional Insured Requirements*

- Fewer words, but insurance terms to learn

*These are separate & distinct contractual obligations*

*Insurance coverage is also analyzed separately*

# Indemnification Agreement Types

<h2>Basic or Limited Form</h2>	<p>Insured holds Indemnified Party(s), Owner and/or other Contractor harmless and agrees to defend and indemnify them from allegations arising out of:</p> <p><b><i>Insured's negligence or negligence of any subcontractor to whom Insured subcontracts work</i></b></p> <p>in conjunction with the work performed by Insured under the written contract</p>
<h2>Intermediate Form</h2>	<p>Insured holds Indemnified Party(s), Owner and/or other Contractor harmless and agrees to defend and indemnify them from allegations arising out of:</p> <p><b><i>Insured's negligence or negligence of any subcontractor to whom Insured subcontracts work</i></b></p> <p><b><i>Joint negligence of Insured and that of an Indemnified Party(s)</i></b></p> <p>in conjunction with the work performed by Insured under the written contract</p>
<h2>Broad Form (Sole Negligence)</h2>	<p>Insured holds Indemnified Party(s), Owner and/or other Contractor harmless and agrees to defend and indemnify them from allegations arising out of:</p> <p><b><i>Insured's negligence or negligence of any subcontractor to whom Insured subcontracts work</i></b></p> <p><b><i>Joint negligence of Insured and that of an Indemnified Party(s)</i></b></p> <p><b><i>Sole negligence of an Indemnified Party(s)</i></b></p> <p>in conjunction with the work performed by Insured under the written contract</p>

## Basic Indemnification

...Contractor shall defend, indemnify and hold harmless the District, it's agents, officers, directors, partners, representatives, and employees from and against any and all claims, suits, liens, judgments, damages, losses and expenses, including reasonable attorneys' fees, resulting from injury or damages **...to the extent of and on account of any negligent act or omission of Contractor in performing the work under this contract...In the event of concurrent negligence or legal culpability of a party indemnified hereunder, such party shall bear any liability, claims, damages, losses and expenses in proportion to such negligence or legal culpability...**

- *Requires Contractor to indemnify the District for Contractor's negligence only, not subcontractors. Usually*
- *Requires District to pay for their own negligence*

*If contractor is 80% at fault, they pay 80%  
of the damages and defense costs  
-not for your subcontractor's negligence (usually)*



## Sole Negligence Indemnification



...To the fullest extent permitted by law, Contractor shall defend, indemnify and hold harmless the District, it's agents, officers, directors, partners, representatives, and employees from and against any and all claims, suits, liens, judgments, damages, losses and expenses, including reasonable attorneys' fees, resulting from injury or damages ... **arising out of the work of the Contractor, any subcontractor, any person or organization directly or indirectly employed by any of them to perform or furnish any work or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in whole or in part by a party indemnified hereunder or arises by or is imposed by law and regulations **regardless of the negligence of any such party****

➤ *Requires Contractor to indemnify the District for negligence of everyone on the project.*

➤ *Requires Contractor to indemnify the District whether or not the Contractor was negligent. "Sole Negligence"*



***If contractor is 0% at fault, they pay 100% of damages and defense costs including your subcontractor's negligence***





## ***Additional Insured Requirements***

- Separate and distinct from Contractual Indemnification
- Seeks to transfer risk from one party to another
- The language is much easier to understand

Building Owner



Construction Company



The Building Owner hires the Construction Company to remodel part of the commercial building with a number of business tenants.

The contract has language which says:

*“Construction Company shall name Building Owner as an additional insured On Construction Company’s general liability policy on a primary, non-contributory basis”*

# What does this mean?

- ❑ **Construction Company has to make sure that its general liability policy is endorsed to add the Building Owner as an additional insured on its policy.**
  
- ❑ **Effectively you are now insured on their insurance policy.**
  - ✓ Subject to the same policy terms, exclusions, conditions
  - ✓ Especially Policy limits
    - Different than indemnification which usually has no dollar limits

# Primary, non-contributory

- **The party obligated to name someone as an additional insured, has to have their policy pay first-dollar defense and damages.**
- **Other Insurance clause** makes requiring “primary, non-contributory” important

*Examples...*

## Primary, Non-Contributory – Scenario 1

Building Owner



General Liability  
\$1,000,000

Construction Company



General Liability  
\$1,000,000



Bob

**Bob successfully sues both and gets a \$750,000 jury verdict.**

- **Construction Company's insurer pays \$750,000 + defense costs**
- **Building Owner's insurer pays \$0**

## Primary, Non-Contributory – *Scenario 2*

Building Owner

Construction Company



Bob

General Liability  
\$1,000,000

General Liability  
\$1,000,000

Bob successfully sues both and gets a \$1,500,000 jury verdict.

- Construction Company's insurer pays \$1,000,000 + defense costs
- Building Owner's insurer pays \$500,000

## Primary, Non-Contributory - *Not Specified*

Building Owner



General Liability  
\$1,000,000

Construction Company



General Liability  
\$1,000,000



Bob

Bob successfully sues both and gets a \$750,000 jury verdict.

- Building Owner's insurer pays \$750,000
- "Other Insurance Clause" applies
- Construction Company's insurer pays \$0 and no defense costs
  - "Let me know when you exhaust your limits"
  - *You're an additional insured, but on an excess basis.*



# Defense Costs in Both Cases

**Construction Company's insurance is paying to defend both the Building Owner and the Construction Company.**

**The Building Owner's insurer should still be made aware of the claim.**

May have to initially defend

Help to make sure that the claim is tendered properly

There may be an excess verdict

# Wisconsin Public Schools Immunities

Wisconsin Statute §893.80, etc.

- **Caps on damages**

*\$50,000 per claimant – parents and student \$50,000 each*

- **Qualified immunities**

- **Recreational Immunities, Open Gym Act, and Others**

- **Discretionary vs. Ministerial Duties**

Plaintiffs will allege that the situation was so dangerous that failure to warn, or correct, is a violation of a ministerial duty

***These protections are not absolute, so all incidents need to be investigated***

***Investigations are also about risk control to reduce future accidents***

# Immunities and Damage Caps

By agreeing to indemnify or name as additional insured the District is potentially giving up these protections

Add the following to preserve, as best as you are able, these protections

*No provision of this agreement is intended as, or shall be construed to be, a waiver for any purpose by the School District of \_\_\_\_\_ of the provisions of Wis. Stats. § 893.80, 895.52, and 345.05 or any other applicable limitations on public entity liability.*

*The School District of \_\_\_\_\_ shall not be liable to the \_\_\_\_\_ in indemnification or contribution for an amount greater than the recoverable limits for claims against municipalities established by Wisconsin law.*

- ***When you partner with other governmental bodies, they also have immunities and damage caps***
- ***Try to preserve these immunities***

# Practice Tips

- **Don't provide unless you have to**
- **These requirements need to be in writing BEFORE a loss or the work begins**
  - ✓ Handshake agreements are not advisable
  - ✓ Probably not enforceable because there is no consideration for the new terms
- **Ask for additional insured on a primary, non-contributory basis**
  - General Liability
  - Auto
  - Umbrella / Excess liability

# Choice of Law & Venue Clauses

- **Choice of Law / Jurisdiction**

*“This contract will be interpreted by the substantive laws of the State of \_\_\_\_\_.”*

- **Choice of Venue**

“The parties agree to suit filed in \_\_\_\_\_ County,  
State of \_\_\_\_\_.”

# Practice Tips

## Waivers of Subrogation

### □ ***Waivers of subrogation***

- ✓ Your insurance company pays, and then agrees NOT to seek recovery from the other party
- ✓ Seen on Property, General Liability & Auto Insurance requirements
- ✓ Workers Compensation insurance requirements
  - *“Contractor will provide a waiver of workers compensation subrogation and/or any rights of recovery or reimbursement allowed under any worker’s compensation law in favor of District.” – Wisconsin-specific*

# Other insurance requirements

- ❑ **Workers Compensation**
- ❑ **Physical abuse and sexual molestation**
  - ❑ Typically for child care and teaching partners
- ❑ **Cyber liability**
- ❑ **Automobile Insurance**
  - ❑ Commercial lines versus personal lines
  - ❑ Coverage limits
  - ❑ Hire and non-owned coverage

A brass scale of justice is the central focus, with two pans hanging from a horizontal beam. To the left is a wooden gavel with a fluted head and a handle with rings. To the right is a wooden sound block. All items are on a black case with brass hinges. The background is a plain, light-colored surface.

# Liability Waivers

*"Sign this and don't sue me"*



***Liability waivers are often used as a way  
to protect organizations from liability and litigation***

*(But how good are they really?)*

- ❑ ***Are liability waivers enforceable in Wisconsin?***
  - ✓ What is required for a liability waiver to be potentially enforceable?
  
- ❑ ***Other legal protections and solutions***
  - ✓ Recreational Immunity Statutes
  - ✓ Risk Control Practices
  - ✓ Incident Investigations

## What the Wisconsin Supreme Court Says:



- ✓ *“Wisconsin case law does not favor such agreements”*
- ✓ Although these agreements are not invalid *per se*, these provisions must be construed **strictly** against the party seeking to rely on it
  - ✓ Struck down 9 times in a row by WI Supreme Court
- ✓ **3 considerations when reviewing these agreements to determine if they are enforceable**

# Consideration # 1

***Does the waiver clearly, unambiguously and unmistakably inform the signer what is being waived?***

- Is it overly broad? Is there “...any and all...” type of language?
- Does it release only negligent acts, or does it also release intentional and reckless acts? (Most fail here)
  - ❑ If they do not exclude reckless/intentional, they will not be enforced
- What risks did the parties contemplate on waiving?

## A question of fact for the jury

- ❑ *Arnold v Shawano County Ag. Society*, WI S.Ct., 1983 – racing injuries caused by flame retardants. Loss of Consortium proceeds no matter what
- ❑ *Yauger v. Skiing Enterprises*, WI S.Ct., 1996 “...inherent risks of skiing.” She struck the concrete base of a chair lift

## Consideration # 2

***Does the form alert the signer to the nature and significance of what is being signed?***

1. Does the form have two purposes such as guest registration and waiver? (Many fail here)
2. Is the clause “hidden” among other clauses?
  - In *Yauger*, it was the first of 5 paragraphs, but was not distinctive
3. Were the terms highlighted in some way, such as...
  - Bold?**
  - Different colors?
  - ALL CAPS?
  - Different FONTS?**

## Consideration # 3

***Did the signer have an opportunity to bargain for different terms?***

❖ ***Atkins*** clearly added this consideration to the analysis of exculpatory contracts in Wisconsin

➤ **Justice Roggensack's concurring opinion** points out a serious practical problem

❑ Who has authority to negotiate? Front office, principal, main office?

➤ **What is sufficient consideration?**

✓ Different rates depending on whether they sign?

✓ Being allowed to participate at all?

➤ **What about charity events or free events?**

# Total Risk Management - Conclusion

- **Work with your liability insurance carrier**
  - ❑ Understand who your policy covers
  - ❑ Understand what your policy covers
  
- **Watch your contracts**
  - ❑ Shift your risk
  - ❑ Avoid taking on other's risks - sometimes you have to...
  
- **Investigate incidents as soon as possible**
  - ❑ Preserve evidence
  - ❑ Lock down the facts

***THANK YOU!***  
***ANY QUESTIONS OR COMMENTS?***

# Resources

## ***Contractual Risk Transfer***

<https://www.myknowledgebroker.com/contractual-risk-transfer-additional-insureds>

## ***Liability Waivers and the Open Gym Act***

<https://www.myknowledgebroker.com/sign-this-and-dont-sue-me-liability-waivers-and-the-open-gym-act>

## ***Investigating Liability Incidents – School Districts***

<https://www.myknowledgebroker.com/schools-slips-trips-falls-webinar-download>

## ***Employing Minors Information***

<https://dwd.wisconsin.gov/er/laborstandards/workpermit/minoremployment.htm>

<https://dpi.wi.gov/sites/default/files/imce/sped/pdf/tran-child-labor-laws.pdf>

# ***Community Partnerships***

***Minimizing your Risk  
Maximizing the Benefits***

***2022 Midwest Facility Masters Conference  
Monday, October 31, 2022  
3:30 – 4:20 p.m.***

***Brian Bean, J.D.***

**Executive Claims Consultant**

**R&R Insurance Services, Inc.**

**262-953-7176**

**Brian.bean@rrins.com**

**R&R**  
**INSURANCE**