Resolution Opposing Anti-Indemnity And Anti-Additional Insured Legislation

PURPOSE: Urging state legislatures not to adopt legislation that would prohibit or require the inclusion of indemnity and additional insured provisions in commercial contracts

WHEREAS, a number of state legislatures have passed laws prohibiting standard indemnity and additional insured contract provisions that have been in use for decades

WHEREAS, the freedom of contract is among the fundamental liberties guaranteed by the United States Constitution and is an essential element of a free-market economy

WHEREAS, the ability for businesses to contract freely and to consent voluntarily to commercial terms promotes prosperity and commerce by giving businesses tremendous flexibility in ordering their commercial relations with one another, including the ability to allocate risk appropriately to fit a particular transaction

WHEREAS, businesses are always free to decline contracts that contain commercial terms (including risk allocation and insurance requirements) they do not want to accept, and to negotiate alternative terms.

WHEREAS, government should be cognizant of leverage that may be exerted by larger entities against smaller entities with respect to risk allocation and insurance requirement

WHEREAS, contract terms should be bargained for during contract negotiations

WHEREAS, indemnity clauses and additional insured provisions are a legitimate means to allocate risk between contracting parties and customers have good reasons to seek risk allocation as part of the package of services they contract to obtain

WHEREAS, numerous contract terms involve contracting around the background tort rules and setting alternative arrangements for the assignment of liability, including contract provisions limiting punitive damages or excluding consequential damages

WHEREAS, blanket prohibition against indemnity and additional insured provisions penalizes companies who have a strong safety record, because safe contractors/operators/indemnitees will no longer be able to enjoy the benefits of being named as an additional insured at relatively little cost

WHEREAS, indemnity clauses and additional insured provisions allow parties to allocate liability between them in advance, thereby avoiding needless litigation over fault and who will defend liability claims when they arise

WHEREAS, the insurance market developed “additional insured” coverage (extending coverage to someone other than the named policyholder) in response to an identified need in the marketplace, and the cost (premium) of the coverage is generally known and can be included in the cost of a legitimately negotiated contract

WHEREAS, the common law has always permitted these provisions and courts have traditionally upheld them so long as there is no breach of duty to the public.

WHEREAS, there are other sound public policy reasons to permit both indemnity provisions and additional insured provisions in commercial contracts, including provisions that allow one party to indemnify or insure against another party’s negligence. Inappropriate clauses, where a responsible party’s sole fault and liability are shifted to a non-negligent party, should be discouraged as against public policy

THEREFORE, BE IT RESOLVED, that the American Legislative Exchange Council opposes legislation that would prohibit or require the inclusion of indemnity provisions in commercial contracts

BE IT FURTHER RESOLVED, that the American Legislative Exchange Council opposes legislation that would prohibit or require the inclusion of additional insured provisions in commercial contracts


Did you know that Victor Schwartz—a lawyer who represents companies in product litigation—was the corporate co-chair in 2011?