


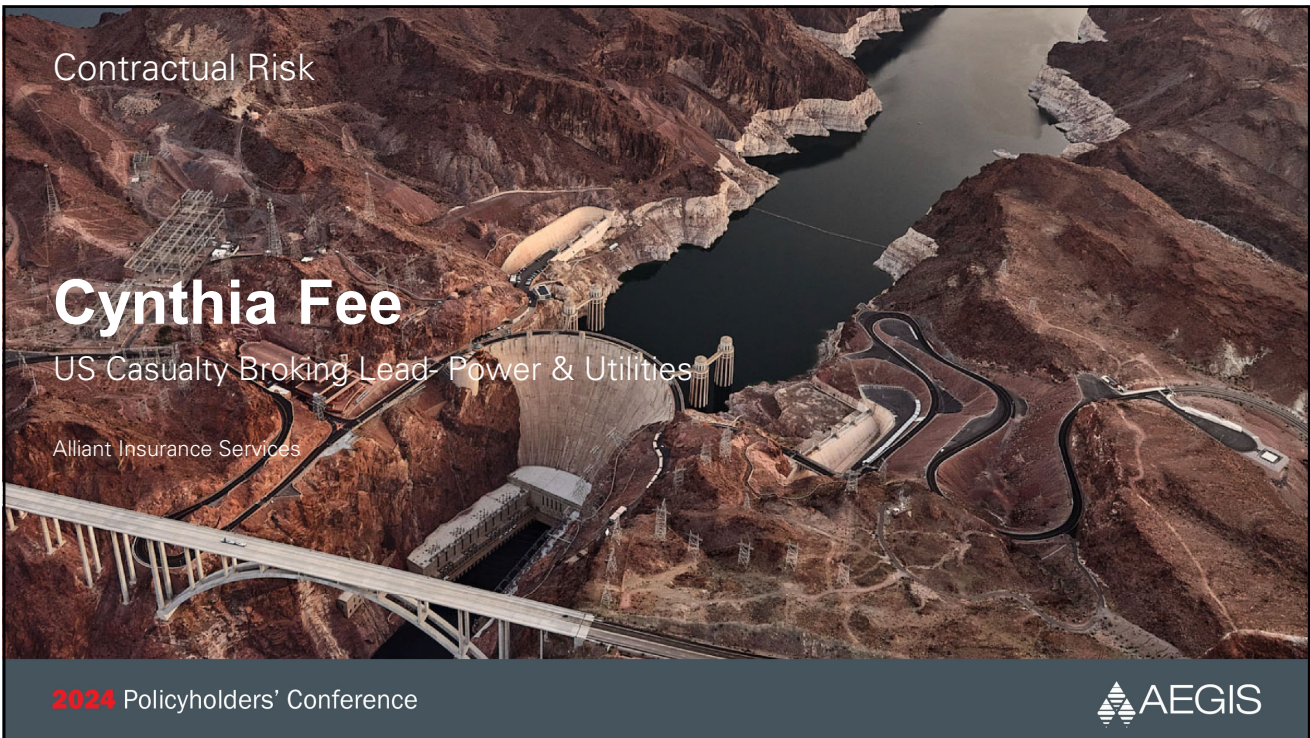
Breakout Session

Moderator
Smitha Viswambharan
VP, Excess Liability
AEGIS Insurance Services, Inc.

Contractual Risk


Cynthia Fee US Casualty Broking Lead- Power & Utilities Alliant Insurance Services	Kyle Gibbs Corporate Risk Supervisor Colorado Springs Utilities	Bill Kost SVP, Energy & Power Industry Advisory Leader Marsh USA	Denise Straka Vice President Insurance Calpine Corporation
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2024 Policyholders' Conference 



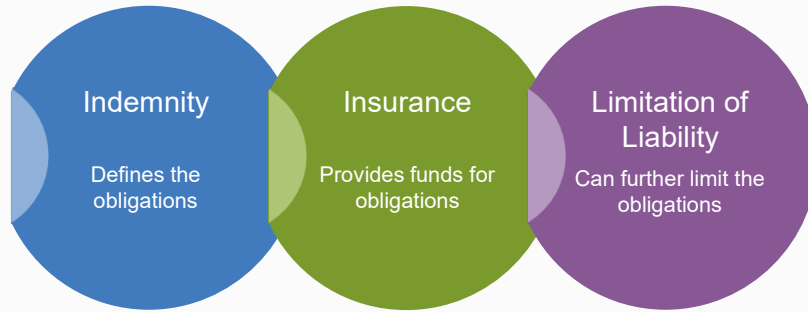
Contractual Risk

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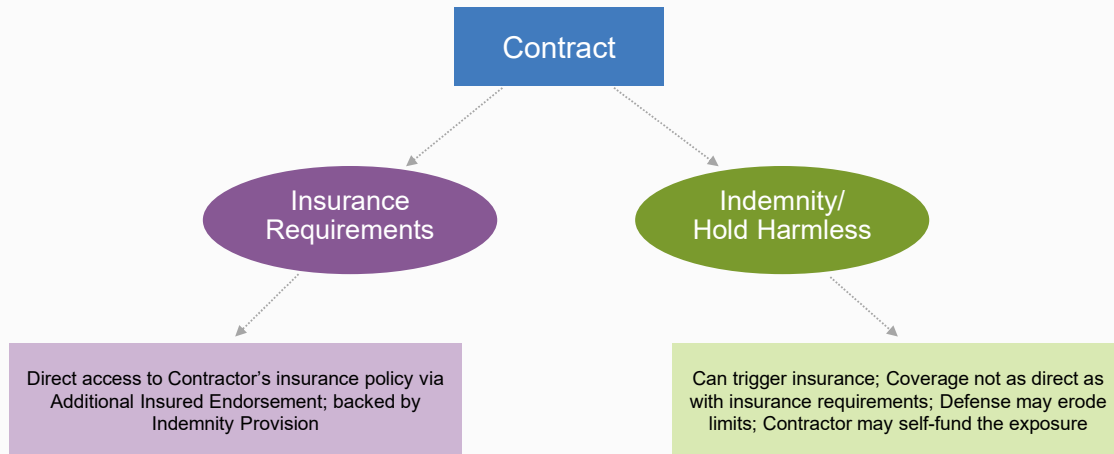
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Breakout Session

The “Basics”



Triggering Insurance



INDEMNIFICATION CAVEATS & CONSIDERATIONS

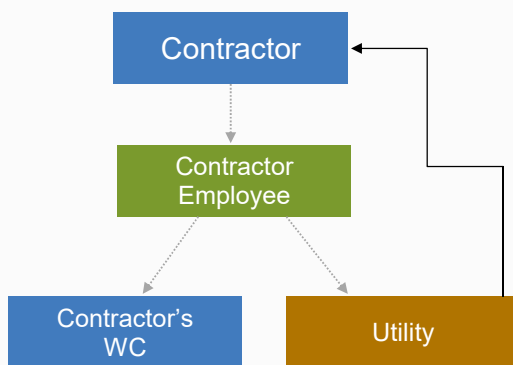
Indemnity

- To the fullest extent permitted by law...
 - Defend, protect, indemnify, hold harmless against...
 - Third party bodily injury, including death, and property damage
 - May specify indemnity includes claims related to wages/benefits, breach of confidentiality, environmental, action over
 - Breadth may be constrained by anti-indemnity statutes, state laws, etc.

Mutual Indemnity

- Each party agrees to indemnify the other to its own degree of fault
 - Can add complexity in a litigated claim
 - Potentially no indemnification in an action-over claim circumstance

Action Over Claims



- WC Exclusivity Rule
- Additional Insured & Waiver of Subrogation Considerations
- Indemnity Considerations



Indemnity vs. Insurance

Additional Insured Protection May be Broader than Indemnity

- Insurance may not be limited by anti-indemnity statutes
- “Step into the shoes of the Named Insured”
- Direct access to the insurer
- Right to immediate defense, and defense typically outside the insurance limits
- Helps prevent subrogation against the Utility

Indemnity May be Broader than Insurance

- Contractor may still be financially responsible for damages not covered by insurance

Avoid Tying Insurance to Indemnity

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Insurance Requirements

- Insurance does not typically limit Contractor's other contractual obligations
- Flow down requirement to subcontractors
- Limits and requirements may vary greatly depending on risk
- Savings Clause – “To the fullest extent permitted by law”
 - Additional Insured
 - Waiver of Subrogation
 - Punitive Damages
- Affirmative Coverage Requirements:
 - Wildfire- No exclusion and continuous coverage through liability tower
 - Action-over claims
- Clarifications
 - Insurance limits are a minimum, not a limitation of liability; no assertion limits required are adequate
 - Failure to identify a deficiency in a certificate does not constitute a waiver of the insurance requirements

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Limitation of Liability



- Limits the Liability of the Contractor to the Utility
 - Third Party Injury
- Common Asks by Contractor
 - Cap to contract amount
 - Cap to amounts paid/amounts received
 - Cap to insurance payments
 - No liability for consequential or indirect damages
 - No liability for business interruption, failure to supply or loss of use
- Emerging Asks
 - Cap for gross negligence for Hail Stow Services
 - Cap for wildfire liability
- Utility Required Limitations of Liability

Limitations of Liability

Suggested Carve-Outs for Utilities

- Indemnity Obligations
- Breach of Confidentiality
- Insurance Recoverables
- Insurance Deductibles
- Warranty Obligations
- Liquidated Damages
- Gross Negligence / Willful Misconduct / Punitive Damages



Tips & Trends

- Waiver of Subrogation
 - Limiting to indemnity, extent of contractor's negligence
- Additional Insured Endorsements
 - Most recent ISO versions
- Umbrella / Excess Limits
 - Limits required
- Landowner Contracts - ROW's, Easements, Crossing Agreements
 - Pre-set damage amount per acre
 - Specifying short timeframe from date of loss to payment
 - Permitting Concerns - Australian Farmers

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Certificates of Insurance

- Not a legally binding document
 - Request Additional Insured, Waiver of Subrogation, Primary / Non-contributory endorsements
- Review
 - Insurers for each line of coverage
 - Policy period
 - Additional Insured & Waiver of Subrogation boxes checked
 - Utility as the certificate holder
 - Language in the Description box
- Audience Poll
 - Who requires certificates from Contractors?
 - Supporting Endorsements?

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Do's and Don'ts



- Include a “savings clause”
- Seek the broadest indemnification permitted by your state
- Be cognizant of interplay of indemnity, insurance and limitations of liability



- Tie indemnity to insurance
- Allow indemnity to be limited to gross negligence / willful misconduct
- Use mutual indemnity only if necessary

Contractual Risk

Bill Kost

Energy & Power Advisory Leader

Marsh USA LLC

Challenges to successful contract risk transfer

The Nexus between Claims and Contract Review

An insurance policy is a contract that transfers risk to an insurer.

Coverage Terms and Conditions:

- Understand when coverage is conditional
- Understand when coverage is limited

Policy Exclusions:

- It's equally important to understand what is **not covered** as it is to understand what is covered
- Exclusions can apply to causes of loss, operations, conditions, or even the mere existence of something

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Challenges to successful contract risk transfer

The Nexus between Claims and Contract Review

How well did you allocate risk and insurance requirements?

Contractual Indemnity: To what extent will the contract counterparty indemnify you?

Additional Insured Status: To what extent can you rely on the counterparty's insurance?

Primary and Non-Contributory: To what extent will your insurance apply?

Any Gotchas? Limit of liability, subrogation, carve-outs, etc.?

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Challenges to successful contract risk transfer

The Nexus between Claims and Contract Review

When do we see problems with claims and contractual risk transfer?

Claim notification: You begin reviewing applicable contracts for the first time after a loss occurs.

Closing an acquisition: Begin contract review (of the acquisition target) after closing.

Executing a contract: Reviewing insurance requirements and certifying compliance after execution.

Any Gotchas? Contract is silent or unclear with certain insurance provisions.

PFAS

Pollution

Case Study – PFAS Liability Claim

Optimizing Insurance Recovery



A company faced a lawsuit for PFAS contamination in local surface and groundwater

Case Study – PFAS Liability Claim

Optimizing Insurance Recovery



A company faced a lawsuit for PFAS contamination in local surface and groundwater

Coverage &
Contract
Archaeology

Case Study – PFAS Liability Claim

Optimizing Insurance Recovery



A company faced a lawsuit for PFAS contamination in local surface and groundwater

Pollution Occurrence / Persistence

Case Study – PFAS Liability Claim

Optimizing Insurance Recovery



A company faced a lawsuit for PFAS contamination in local surface and groundwater

Identify Contract Remedies

Case Study – PFAS Liability Claim

Optimizing Insurance Recovery



A company faced a lawsuit for PFAS contamination in local surface and groundwater

Identify Coverage Remedies

Case Study – PFAS Liability Claim

Optimizing Insurance Recovery



A company faced a lawsuit for PFAS contamination in local surface and groundwater

>\$20MM legal and indemnity recovery across multiple policies

Case Study – Coverage Deficiency Leads to Insurer vs. Insurer

A battle between primary and excess markets

Catastrophic Flood, which led to...

Exhaustion of Flood aggregate limits, which led to...

Errors & Omissions claim by placing broker.

2 years after the flood, E&O suit went to mediation.

Despite interim partial payments from the Property insurer and multiple final settlement offers, the primary E&O carrier continued to reject those offers.

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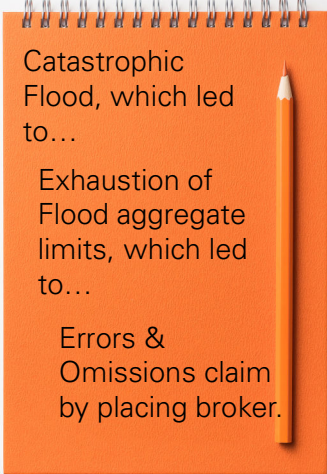
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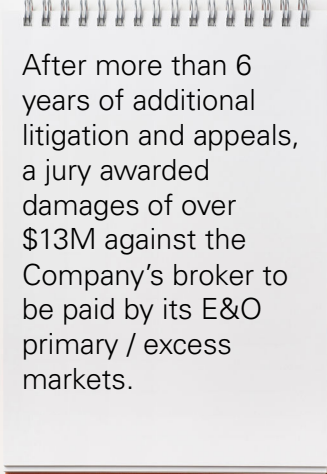
Each settlement offer would have been well within the primary market's layer.

Case Study – Coverage Deficiency Leads to Insurer vs. Insurer

A battle between primary and excess markets



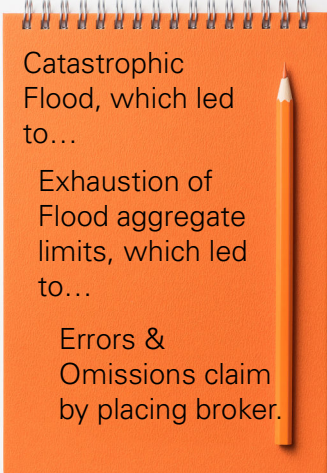
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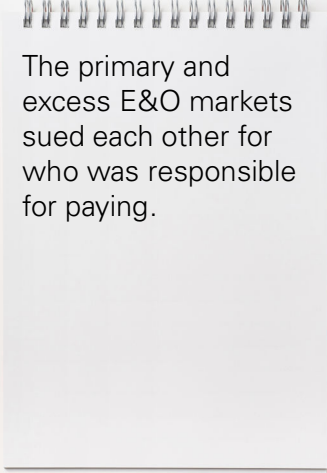
After more than 6 years of additional litigation and appeals, a jury awarded damages of over \$13M against the Company's broker to be paid by its E&O primary / excess markets.

Case Study – Coverage Deficiency Leads to Insurer vs. Insurer

A battle between primary and excess markets



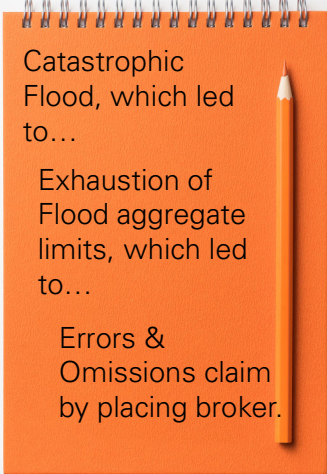
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The primary and excess E&O markets sued each other for who was responsible for paying.

Case Study – Coverage Deficiency Leads to Insurer vs. Insurer

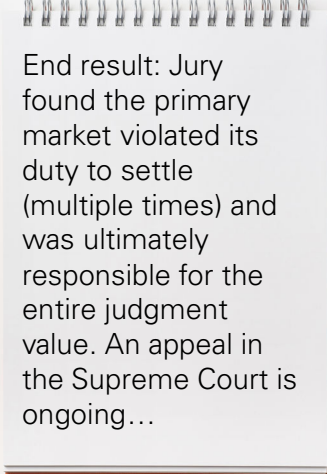
A battle between primary and excess markets



Catastrophic Flood, which led to...

Exhaustion of Flood aggregate limits, which led to...

Errors & Omissions claim by placing broker.



End result: Jury found the primary market violated its duty to settle (multiple times) and was ultimately responsible for the entire judgment value. An appeal in the Supreme Court is ongoing...



Questions?



Types of Indemnity

Type	Indemnitor/ Contractor Negligence	Indemnitee/ Utility Contributory Negligence	Indemnitee/ Utility Sole Negligence	Language "Tells"	Comments
Broad Form	✓	✓	✓	Including caused in whole or in part by Utility	Prohibited by most states
Intermediate Form	✓	✓		Only if caused in whole or in part by Contractor	If Indemnitor's negligence was a contributory cause, Indemnitee's degree of negligence doesn't matter
Comparative Form	✓			But only to the extent caused by the negligent acts of Contractor	Contractor responsible only to the extent a loss arises from its negligence

