
Lessor's Negligence

By: Simphi Lenover, TOIRMA Account Manager

We have recently noticed a disturbing trend in Governmental/Municipal Lease Purchase Agreements and Rental Contracts. We have always reviewed the *Insurance* portion of the agreement/contract which spells out what is required of our members (loss payee and/or additional insured). We now have to read the fine print in the *Indemnity/Hold Harmless* portion of the agreement/contract as the Lessor is asking our members to cover their negligence! Below are some examples of the verbiage we have seen under *Indemnity or Hold Harmless*:

- Lessee hereby agrees to indemnify and hold Lessor harmless (on an after-tax basis) from and against any and all claims, losses, liabilities (**including negligence, tort and strict liability**) . . .
- Lessee agrees to indemnify and reimburse Lessor for all liabilities, including attorneys fees and costs, of Lessee, his agents or third parties arising out of the use of the goods or a breach of this contract by Lessee, **including those arising from Lessor's negligence** or the negligence of third party.
- Lessee assumes all risks arising from the operation and use of the Rented Equipment by Lessee and anyone else. Lessee agrees to assume the entire responsibility for the defense of, and to pay, indemnify, and hold xxxxxx harmless from, and release Lessor from, any and all claims for damage to property or bodily injury (including death) or for the loss of time or inconvenience resulting from the use, operation or possession of the Rental Equipment, **whether or not it be claimed or found that such damage or injury resulted in whole or in part from Lessor's negligence** . . .
- You agree that we are not responsible for any losses or injuries, caused by or relating to the Equipment. You agree to indemnify us for and, at our option and your expense, defend us against any claims, suits and actions, **including negligence and strict liability**, whenever made for losses or injuries, including court costs and legal expenses, related to the Equipment.

When we see the above language, we are not able to issue an Additional Insured certificate. Please refer to your TOIRMA Program Manual; go to the sixth gray tab, and then to the tab titled Certificate of Coverage. On Page 2, there is an explanation of Additional Insured Certificate: *When an "Additional Insured" is named on a policy, coverage of the policy is extended to the named additional insured. Due to the additional exposure, specific reasons must be given for this type of a certificate and TOIRMA must have a copy of the contract or lease agreement to review before an additional insured is **considered**.*

When you talk to our staff about rentals, we will ask you if there is a written contract or agreement in place (this applies to contracting for services also, such as laying rock). Unfortunately, a gentlemen's agreement or an informal agreement is not going to protect you in the event of an incident. Please keep the following in mind (these are on Page 1 of the Certificate of Coverage section referred to above):

RISK AVOIDANCE: Can the exposure be totally eliminated or avoided?

RISK TRANSFER: Can the liability exposure be transferred to someone else?

RISK RETENTION: If the exposure cannot be avoided or transferred, then the township has chosen to retain the risk and its resultant consequences. Since your township participates in a group self-funded risk management program, every risk that you retain can have a direct effect on your future costs in the program as well as the cost of all other members. Decisions to retain the risk should be carefully thought through.

If you have any questions, please do not hesitate to contact anyone in the Customer Service unit (see the back page of this newsletter).

