

PROBLEMS IN RELATION TO
CONTRACTUAL LIABILITY INSURANCE

BY

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Of late years one of the very important developments with respect to Casualty insurance is the increasing practice of the use of Contractual Agreements. Until comparatively recently, contractual or "hold harmless" agreements were found simply in railroad sidetrack agreements and in some lease agreements. The contractual agreement is an indemnifying clause or clauses forming a part of a complete contract or the agreement may be a separate contract in itself, and may now be found not only in railroad sidetrack agreements and leases but also in contracts between an owner or a general contractor and various sub-contractors for the performance of specified work. It may be found in purchase agreements where the seller is required to hold the purchaser harmless with respect to material or commodities sold, or with respect to the erection and installation of that commodity. There may also be found "hold harmless" agreements in joint use contracts such as will be found in instances where the lines of a telephone or telegraph company may be strung on the poles of an electric light and power company, or vice versa.

Such agreements vary widely according to their terms and in many instances are quite complex and give rise to conflicting opinions as to the extent of the assumed liability which in many cases may be quite beyond reason. The indemnitor very often does not realize the full extent of the obligations which he is assuming. Even if he possibly realizes the seriousness of his obligations, nevertheless, he enters into the agreement because of keen competition and the realization that unless he does follow this course, the indemnitee will place the business elsewhere. Or in the case of a lease the indemnitor or lessee cannot acquire the use of property or privileges which by the location or terms would be most advantageous for his immediate purposes in the maintenance of his business.

Naturally, the assumption of such obligations will spread when-

ever one who has been required to assume such obligations can in turn pass on similar obligations to others with the result that contractual or hold harmless agreements are becoming more and more extended in scope and are being applied to a wider field of activities as this practice progresses.

It is unfortunate that this condition exists whereby obligations assumed go beyond the scope of reason, and a principal can require those doing business with him to assume obligations which are rightfully and legally those of the principal. As an illustration of a very dangerous type of agreement, the following may be typical :

“The Contractor shall assume complete responsibility in and for all loss, for injury to persons or property resulting directly or indirectly, in whole or in part, from the performance of the work contemplated by this contract or in connection therewith and shall indemnify and hold harmless the principal from any and all loss, against damage or injury caused or occasioned directly or indirectly from the performance of work contemplated by this contract or in connection therewith.”

Upon analysis, it is revealed that there is no limitation as to bodily injuries accidentally sustained, neither is there limitation as to property in the care, custody and control of the contractor, nor is there limitation as to liability imposed upon the contractor by law because of negligence. The clause involves waiver of subrogation with respect to injured employees of the contractor whether the injury arises in whole or in part through the negligence of the principal. It also includes indemnification of the principal against suit by an injured employee of the contractor whether the injury is occasioned in whole or in part by the negligence of the principal. It involves defense of the principal against suit by employees of other contractors or the general public whether the injuries are occasioned in whole or in part by the negligence of the principal. It also may involve maintenance or defective workmanship.

To require a contractor to assume such an obligation is wholly unnecessary and unjust. It is perfectly right that the principal should require the contractor to purchase workmen's compensation insurance in accordance with the provisions of the Workmen's Compensation Act of the state in which the work is being performed. It is also reasonable that the contractor should be required to have proper and adequate public liability and property

damage protection against losses and claims for which he may be legally liable. It is also justifiable to require a contractor to purchase Contractors' Protective Liability insurance in order that there may be proper provision against liability which may arise out of the negligent acts of sub-contractors. The contractor could be required justifiably to purchase Owners' or Contractors' Protective coverage in the name of the principal to protect that principal because of any liability which might arise in connection with the negligent acts of the contractor.

All of these requirements could be introduced in the terms of the contract or agreement and should be satisfactory; however, if such a procedure is not satisfactory, the agreement in any event should be limited to justifiable terms.

Naturally, the one assuming the obligations under such a contract, if the possibilities of such obligations are realized, will seek a means of protection in the form of insurance, or very possibly the terms of the contract—in order to make certain that the assumed obligations will be lived up to—will require the purchase of insurance. The contract may very often specify definitely the limits at which insurance is to be provided. It, therefore, becomes the problem of the insurance carrier as to what part or parts of the assumed obligations are rightfully the subject matter of insurance and whether coverage can be provided at a premium commensurate with the obligations. An analysis of the indemnifying portion of the agreement may reveal a situation whereby the indemnitor has simply agreed to make provision against his direct obligations and the question may thus resolve itself into simply the provision of direct liability coverage.

On the other hand, the assumed obligations may be beyond those for which he would normally be liable but they are of such a nature as not to be particularly detrimental and they may be insurable through the indemnitor's purchase of some of the already existing forms of liability insurance in the name of the principal, thus satisfying the terms of the agreement. Other obligations assumed while not necessarily being definitely described by existing forms of insurance may, nevertheless, be insurable according to some procedure established particularly for such obligations. Other obligations assumed may be so broad and sweeping by their terms that they are not insurable and in reality are wholly unjustifiable.

It is quite possible in such circumstances that after an indemnitor has been brought to the realization of the gravity of the obligations he has assumed, he can prevail upon the principal to agree to revised terms which are within reason and justification. A notable example of this is in connection with sidetrack lease agreements as they existed in the majority of instances at one time. The railroads being in an advantageous position, imposed very sweeping and all inclusive obligations on their clients or on industry in connection with the construction, operation, maintenance and use of sidetracks or spurtracks. Such obligations were to a large measure uninsurable, or only insurable at a prohibitive premium, and industry was faced with the problem of being called upon to assume obligations against which it could not purchase insurance protection.

Out of this was evolved an agreement in a standardized form known as the National Industrial Traffic League Liability Clause. Under this clause, the industry indemnifies and holds harmless the railroad against losses arising out of the industry's sole negligence, and in the event of there being joint or contributory negligence by both parties to the contract, the loss is borne by both equally. This is an equitable agreement and is confined to the legal liability of the industry with the possible exception of a situation arising whereby both the industry and the railroad may be held jointly negligent, but distribution of negligence being greater on the part of one of the parties to the contract. This, however, works both ways and does provide a simple means of sharing the responsibility when both parties to the contract are negligent to some degree.

In view of these circumstances, the cost of insurance for such an agreement need not be substantial, and in fact could very readily not be much, if any, in excess of the actual expense of issuing the coverage. A very nominal rate has been established for coverage for this specific agreement and the rate applies per agreement covered. No adjustment of premium on the basis of the number or extent of the sidetracks to which the individual agreement applies, is made. The question has been raised by underwriters as to whether or not this is a proper procedure, and it has been contended by some, that the premium charge should vary in accordance with the physical exposure but such a procedure involving in many cases a very substantial and prolonged investigation

would not be warranted by the ultimate premium involved. A study on this basis would require a consideration of the length and the number of sidetracks under the agreements. Consideration would have to be given to the density of traffic or the frequency of use and whether other industries are serviced by the same track at some point beyond the location of the insured. These are but a few of the many factors calling for investigation. All this would require considerable time and a fair expenditure, and in most instances would probably prove impracticable. Thus, in this particular case where there is a uniform agreement which practically does not assume liability beyond the legal liability of the industry, it is quite reasonable to establish a uniform and nominal charge per agreement without regard to the physical exposure. Unfortunately, the National Industrial Traffic League Liability Clause is the only liability agreement about which there has been found a fairly widespread use and a uniformity of application; therefore, until such time as buyers, industry, contractors or any other purchasers of insurance who may be obliged to assume the role of indemnitor under various types of agreements, can influence their principals to adopt uniform practices with respect to the inclusion of liability clauses in their contracts, it is necessary that all such liability clauses other than the National Industrial Traffic League Liability Clause be individually underwritten and premium be determined on the peculiar facts of each case. This, of course, will involve a substantial amount of investigation and study for each separate agreement and in the end it is very often true that the original investigation and the issuance of an endorsement may cost more than a reasonable premium charge with the result that there is practically no premium left for possible losses.

After an agreement has been reviewed to determine the extent of liability assumed, the next problem is the determination of a just and adequate premium. This determination is based not only upon the extent of the liability assumed under the agreement but it must also recognize the extent of the exposure to which the agreement will apply. Basically, the premium charge may be some function of rates already established for forms of liability insurance which may be analogous to the assumed obligations. This may mean that a flat charge will serve the purpose, or it may be possible that the premium shall be based on each \$100. of con-

tract cost similar to the charge established for Owners' or Contractors' Protective Liability insurance, or the charge may be a percentage of the workmen's compensation premium which the indemnitor pays to cover his direct workmen's compensation obligations for the operations involved under the contract. Then again, the terms of the agreement may be of such a nature as to involve a combination of these methods of premium calculation.

Under the sidetrack agreements, it is often found that although the wording is not the same, the terms are the same as the National Industrial Traffic League Liability Clause. That is, the indemnitor is responsible for his own negligent acts, and the indemnitee (the railroad) is likewise responsible for its own negligent acts but in the event of joint negligence, the liability is shared equally, or possibly each party assumes its proportionate share of the loss. The charge for an agreement of this type would probably be the same as that for the National Industrial Traffic League Liability Clause.

A variation of this is the instance where the indemnitor is responsible for injuries to his own employees, and the indemnitee is responsible for injuries to its own employees, with each party being responsible for its own negligence in all other cases. In this particular instance, the undertaking assumed by each party is approximately equal but the hazard as determined by the employee exposure may not be equal and the nominal charge previously mentioned may not be satisfactory. To go a step further, the indemnitor may be responsible for any and all liability except that due to the sole negligence of the railroad. This contemplates assumption of complete liability on account of injuries arising out of joint or concurring negligence and, consequently, calls for a substantially greater premium charge. Then there is the case when complete liability is assumed regardless of negligence. This, of course, is a very broad and sweeping assumption and if insurance is provided, it is usually done after the actual physical conditions are known, and it is found that there is not a great probability of there being conditions which will develop losses foreign to losses for which the indemnitor would be legally liable. The carrier may feel that to insure the agreement in total would be unwise, and it is then indicated specifically just what hazards the carrier will insure. Any losses beyond this specific enumeration

even though assumed under the agreement, would not come within the provisions of the coverage provided and the indemnitor would have to carry that responsibility without insurance.

Another type of agreement is that contained in contracts pertaining to construction operations. Such contracts may involve the indemnification of the owner of the project as principal, or the general contractor may be principal under a contract with some sub-contractor. Under an agreement with owner and principal, the "hold harmless" clause may require complete indemnification of the owner. If there are no employees of the owner on or about the job, either participating in the work or working on the same premises as the contractor, the assumed liability is very closely equivalent to owners' protective insurance and the contractor has two courses. He could purchase an owners' protective insurance policy in the name of the principal. If this is not satisfactory and it is insisted that the wording of the indemnification clause of the contract be incorporated in an insurance policy, the coverage can be endorsed on the contractors' direct public liability policy but the premium should be at rates somewhat higher than the established owners' protective insurance rate. The question may be asked as to why the coverage when endorsed on the contractor's direct policy should call for a higher premium charge than if an owners' protective liability policy were issued, inasmuch as the exposure is apparently the same. This is a reasonable question and the answer is simply that when an owners' protective policy is issued, it is issued according to the terms, limitations and exclusions of an already established policy, whereas when the indemnifying clause of the agreement is covered by endorsement, the coverage is not written in accordance with prescribed procedure, terms, and limitations, but is a specific coverage written for the specific contract and, therefore, calls for a little larger premium.

If there are employees of the owner on or about the job, the exposure is broadened and the assumed liability is not only equivalent to contractors' protective insurance, but also involves coverage on account of injuries to members of the public because of the negligent operations of the owner, injuries to employees of the owner through the negligence of the owner, and also injuries to employees of the contractor through the negligence of the owner. This form of agreement would require a substantially higher pre-

mium if insured, than the previously discussed coverage. In addition it would call for a percentage of the workmen's compensation premium of the contractor to account for the waiver of subrogation, in the event of injuries to contractors' employees through the negligence of the owner. It is questionable whether the liability assumed with respect to owner's employees because of the negligence of the owner is insurable.

There may be further variations of the foregoing where the contract requires complete indemnification for the owner except with respect to the liability arising out of the owners negligence. This form would also be written at rates which are some function of the owners' protective insurance rates, but in some instances, there may be a slight waiver of subrogation with respect to injuries to employees of the contractor, such as injuries arising out of the joint and concurring negligence of the owner and contractor, the assumed obligation very possibly would not warrant additional premium based on a percentage of the contractors' workmen's compensation premium.

Then, of course, there is the simplest form of all, in which the owner requires indemnification on account of the operations of the contractor. That is, where there is no assumption of liability on account of the negligence of the owner. This is analogous to owners' protective insurance, and the most satisfactory method would be the purchase of an owners' protective policy by the contractor in the name of the owner. If, however, the coverage is required on the basis of endorsing the indemnifying clause on the contractors' public liability policy, a slightly increased charge would have to be made, as explained heretofore.

Another group of indemnifying clauses in connection with contracting operations, involves the indemnification of the general contractor as principal or indemnitee, and a subcontractor as the indemnitor. Here again as previously discussed in connection with an owner, the agreement may involve complete indemnification of the contractor and also as previously mentioned in connection with the owner, if there are no employees of the general contractor on or about the job or participating in the work, the exposure is very similar to contractors' protective insurance and the sub-contractor has either the course of buying a direct contractors' protective insurance policy in the name of the con-

tractor or if the coverage is endorsed on his own policy, it must be written at a premium slightly in excess of the contractors' protective premium.

On the other hand, if there are employees of the contractor working on the job at the same time, there is then the combination of protective insurance plus the waiver of subrogation on account of injuries of employees of the subcontractor arising out of the negligence of the contractor as well as injuries to employees of the contractor, which would call for necessary additional premium.

Another type of contract is that which will carry indemnifying clauses in connection with building lease agreements. The indemnifying clauses of these agreements require the lessee to hold the lessor harmless to a greater or lesser degree, depending upon the terms of the contract, and may also include provision for indemnification with respect to certain conditions or operations which are peculiar to the building, or to the occupancy of the building. If the direct public liability obligation of the lessee is subject to rating on an Owners, Landlords' & Tenants' basis, the premium for the assumed liability may be determined as a function of the lessee's direct liability premium. This is usually a flat premium charge rounded out to reach at least a minimum. If the agreement involves the assumption of the complete legal liability of the lessor, the terms of the agreement can be met in several ways. If it is required that the terms of the agreement be included as part of the lessee's policy by endorsement, the premium could very properly be determined on the basis of the usual additional interest charge, subject to a minimum premium. As a matter of fact, if the lessor were endorsed on the lessee's policy under the usual additional interest procedure without any mention of the terms of the lease, the liability assumed would probably be completely taken care of and this is the procedure sometimes followed. On the other hand, in order that the limits of the policy would apply in total to the lessor, and not be shared by both the lessee and the lessor as would be the case of an additional interest endorsement, a separate policy may be taken out by the lessee in the name of the lessor, providing direct public liability coverage. This, of course, would be issued at the rates which would be applicable to the lessor's direct liability

exposure. If the assumed liability does not involve the complete liability of the lessor, the terms of the agreement can be endorsed at some portion of the usual additional interest charge. This would have to be determined in accordance with the terms of the specific agreement but, in any event, the premium should at least be sufficient to offset the cost of investigation and the issuance of the required protection.

If the lessee is subject to rating for his direct obligations on a payroll basis, it would not be logical to base the premium for the indemnifying agreements on a function of the lessee's direct liability premium. In this instance where direct liability coverage is provided on the basis of payroll, the lessee will have a large number of employees on the premises and as a consequence the exposure of the lessor may be substantially greater than that of the lessee, in that such employees are public to the lessor, in addition to the general exposure which would involve members of the public other than employees of the lessee who would be public to both the lessee and the lessor. Therefore, under these circumstances, since the premium is to be a measure of the liability of the lessor, it should be determined by a method which would be analogous to the procedure which would apply if direct liability coverage were issued to the lessor. In other words, the premium should be some function of area and frontage rates which would be used if a direct liability policy were being issued to the lessor. Inasmuch as this cover is to be endorsed on the lessee's policy, whatever charge is made should be in the form of a flat premium and, therefore, it may be calculated as a percentage of the area and frontage premium rounded out to some flat figure. Of course, if the agreement is a complete "hold harmless" agreement and the lessor, if a direct liability policy were issued to him, would be subject to Landlords' Protective cover, the premium would be approximately 50% of the area and frontage premium, just as is provided for this form of coverage, subject, of course, to a minimum premium. Also, it might be possible, instead of endorsing the coverage on the lessee's policy to, here again, issue a policy for the lessee in the name of the lessor at the prescribed rates and premium for such coverage. When the coverage is endorsed on the lessee's policy, and the liability assumed is partial or incomplete, the function of the direct premium applicable to

the lessor, of course, should be smaller than would be the case where complete liability is assumed, keeping in mind nevertheless, that at least sufficient premium should be charged to justify the cost of providing the insurance.

It probably would be of advantage at this point to review a few agreements which have actually been encountered in order that we might bring out more clearly the problems which actually arise in providing this form of insurance.

A railroad, when letting out contracts for various operations requires its contractors to agree to certain indemnifying or "hold harmless" clauses and also requires that the contractors will insure such obligations.

A part of one section of the contract reads as follows:

"that he (the contractor) will not take or deposit earth or other material from or on any place or places outside the right-of-way of said railroad without the direction and consent of the Chief Engineer, and that he will hold the railroad free and harmless from all loss, cost, damage, or injury or claim therefor, to persons or property, arising from or growing out of any act or omission of any person or persons employed by or under him, or by or under his agents or subcontractors in the prosecution of said work, or any part of it."

This portion of the agreement is comparable to Owners' Protective coverage for the railroad, as liability is limited to claims arising from or growing out of any act or omission of the contractor.

Another section of the agreement contains the following provisions:

"The contractor further agrees that he will, and he does hereby assume all risk of loss and damage, to his own property, and to property in his custody and to the property of his employees, agents and servants, howsoever caused; and the contractor also assumes all risk of damage resulting from the death of or injury to himself, his agents and servants, while engaged in said work, and while traveling to and from the same; and he agrees to hold the railroad free and harmless from all loss, cost and expense on account thereof; and he agrees to indemnify and save harmless the railroad from all loss, cost and expense arising or growing out of any injury to any employee of the railroad caused by the negligence of the contractor or any of his employees, also from all loss, cost and

expense arising or growing out of any injury to any person while upon the premises of the railroad caused by the negligence of the contractor, or any of his employees, also from all loss, cost and expense arising or growing out of any injury to any property whether belonging to the railroad or not, caused by any negligence of the contractor or any of his employees."

The first portion of this agreement involves property in the care, custody and control of the assured and, therefore, since such exposure is not considered as the subject matter of insurance under the regular property damage coverage, it also is not insurable as a part of an indemnifying agreement.

In the second portion of this section, the contractor assumes liability for injuries to himself and to his employees. There is involved a complete waiver of subrogation and also an agreement on the part of the contractor to hold the railroad harmless, in the event an employee sues the railroad at common law rather than to accept compensation. This, to a certain degree, is comparable to protective coverage as respects the railroad since the liability imposed is limited to the negligence of the contractor. Here again, the liability assumed by the assured or the contractor with respect to the property in his care, custody and control is not insurable. Also, the assumption is not entirely comparable to protective liability because protective liability excludes injuries sustained by employees of the assured no matter how such injuries may be caused.

Now in determining the premium, the facts pertaining to the particular job to which the foregoing clauses apply are of importance. For example, the percentage of the compensation premium of the contractor to be charged for the waiver of subrogation or defense of a common law suit against the railroad company by employees, depends entirely upon the extent to which the employees are subjected to the operating exposures of the railroad. The particular job to which this contract applied, consisted of work away from the right-of-way of the railroad line and, therefore, there was not a great deal of exposure to the railroad operations and the waiver of subrogation was not a very outstanding obligation assumed. For public liability, a rate of 25¢ per \$100. of contract cost was established, plus 10% of the workmen's compensation premium for the waiver of subrogation. The same

rate per \$100. of contract cost applied for the property damage coverage, and a minimum premium was established for both public liability and property damage. As a matter of fact, the contract involved work which was not of substantial proportions and the premium developed on the basis of the rates established fell well within the minimum premium.

In another instance, an assured leased a building from a railroad company. In the lease there was a clause which, although not following the exact wording of the National Industrial Traffic League Liability Clause, was confined to the terms of that clause, and equivalent liability was assumed. A further clause in the agreement read as follows:

“Entering into possession of the premises by the Lessee shall constitute an admission that the leased premises, including piping, wiring and all other fixtures and appurtenances, are in good, safe and satisfactory condition, and the Lessee hereby releases and agrees to hold harmless the Improvement Company from any and all liability for damage to the property of the Lessee and personal injuries to employees of the Lessee caused or arising out of any defect or insufficiency in said building or its piping, wiring or other fixtures or appurtenances.”

Obviously, this clause involved a waiver of subrogation. Upon investigation it was found that there was a side track on the premises; therefore, it was necessary that a charge be established for this exposure. Since the liability assumed with respect to the side track, was similar to that of the National Industrial Traffic League Liability Clause, the established rate for that clause was charged insofar as the existence of the side track was concerned. There still remained, however, the liability assumed in connection with this clause with respect to the building, and also the liability with respect to the clause quoted above. Investigation revealed that this was a new building of one-story with no basement. The entire building was occupied by the assured, and they were responsible for the care of the building which was to be used as a wholesale grocery storehouse. There were no elevators in the building and the lessee was to furnish the heat. Furthermore, it was found that the waiver of subrogation was not of serious consequence. There were comparatively few employees of the assured in proportion to the size of the building. The assured was

in full possession of the building and was responsible for its upkeep. Thus, there practically would never be an opportunity for subrogation against the building owner in the event of an injury to an employee. Having this in mind, and also because of the fact that the direct public liability of the assured or lessee came within Owners', Landlords' & Tenants' Liability, a premium charge for the assumed liability in connection with the building, was established at a figure somewhat less than 25% of the assured's Owners', Landlords' & Tenants' Liability premium.

An interesting agreement which is typical of agreements entered into between public utilities relative to the joint use of poles is as follows:

"Whenever any liability is incurred by either or both of the parties hereto for damages for death of or injuries to the employees or for injury to the property of either party, or for death of or injuries to other persons or their property arising out of the joint use of poles under this agreement, or due to the proximity of the wires and fixtures of the parties hereto, attached to the poles covered by this agreement, the liability for such damages, as between the parties hereto, shall be as follows:

1. Each party shall be liable for all damages for such death of or injuries to persons or property caused by its sole negligence or by its failure to comply at any time hereafter with the specifications herein provided for.
2. Each party shall be liable for all damages for such death of or injuries to its own employees and/or its own property when caused by the concurrent negligence of both parties hereto, and/or due to causes which cannot be traced to the negligence of either party.
3. Each party shall be liable for one-half ($\frac{1}{2}$) of all such damages for such death of or injuries to persons other than employees of either party, and for one-half ($\frac{1}{2}$) of all damages for such injuries to property belonging to third persons, when caused by the concurrent negligence of both parties hereto, and/or due to causes which cannot be traced to the sole negligence of either party.
4. Where, on account of death or injuries of the character described in the preceding sections of this article, either party hereto shall make any payments to injured employees or to their relatives or representatives in conformity with the provisions of any Workmen's Compensation Act or any act creating liability in the employer to pay

compensation for death of or personal injury to an employee by accident arising out of and in the course of the employment, which act is operative whether said employer is or is not negligent, such payments shall be construed to be damages within the terms of the preceding paragraph numbered 1, and shall be paid by the parties hereto accordingly.

5. All claims for damages arising hereunder that are asserted against and/or affect both parties hereto shall be dealt with by the parties hereto jointly, provided, however, that in any case where the claimant offers to settle any such claim upon terms acceptable to one of the parties hereto, but not to the other, the party to whom said terms are acceptable, may, at its election, pay to the other party one-half ($\frac{1}{2}$) of the expense which such settlement would involve, and thereupon such other party shall be bound to protect the party making such payment from all further liability and expense on account of such claim."

There were additional paragraphs which, however, had no connection with liability assumed. The first clause is really a statement that the assured shall be liable for injuries to persons caused by its sole negligence, or by its failure to comply with any of the specifications contained in the contract. Incidentally, a review of those specifications seemed to indicate that this was merely a statement that the assured is liable for its own torts.

The second clause would involve a waiver of subrogation rights by the insurance carrier of the assured against the parties of the contract as respects compensation payments made to employees of the assured whose injuries arose out of the joint and concurrent negligence of both parties. It would also involve holding harmless the second party to the contract in the event an employee of the assured sued the second party rather than accept compensation.

The third clause is practically the same as the provisions appearing in the liability clause as adopted by the National Industrial Traffic League. Each party is liable for one-half in the event of joint or concurrent negligence on the part of both parties. There is one added point, however, that where injuries or damages are due to causes which cannot be traced to the negligence of either party, then each party is liable equally.

Clause four is simply a statement that each party will assume its legal obligations with respect to employees.

Clause five provides for expenses of adjustment and does not involve a very substantial assumption of liability.

The assured in this particular instance was a telephone company and the other party to the contract was an electric light and power company. At first glance the agreement appears to be quite formidable in its terms, and without further investigation it would be quite proper to apply a flat premium charge of some sizable proportion, plus a percentage of the compensation premium of the assured for the waiver of subrogation. It was found, however, that the application of a percentage of the workmen's compensation premium, plus the flat charge, would develop a very substantial premium, particularly when upon investigation it was learned that the assured operated 425 miles of line, but that only approximately 3 miles of this line, or less than 1% of the total were used in common with the power company. Thus, a waiver of subrogation charge would be all out of proportion to the liability assumed and the final premium determined upon was a very nominal flat charge with no percentage of the workmen's compensation premium for the waiver of subrogation.

It should be understood that the foregoing examples were selected at random and are not intended to be illustrative of any particular type of agreement which may be in common use, but they do serve for the purposes of this paper to illustrate the care which must be exercised, and the investigation which must be conducted in writing insurance to provide protection against assumed liability. They also demonstrate that very often, although the terms of an agreement may appear to be quite broad and sweeping in their scope, when the actual conditions are investigated only a very nominal premium charge is justifiable. It is not to be construed that this applies in all instances, and there are agreements which are so broad in their scope as to require a very substantial premium, and even in some cases at least parts of the agreement must be considered as uninsurable. It is unwise, however, to insure only the terms of an agreement without concurrent forms of insurance as very often it is difficult, if not possible, to differentiate under the wording of an agreement, between the liability assumed by the indemnitor and his legal liability and workmen's compensation or employers' liability obligations.

It is not the writer's intention to attempt a discussion of experience which has been actually developed under Contractual Liability insurance or of the adequacy or inadequacy of the premium charges which have been established. It may be pointed out, however, that there may not be a high frequency of losses under this form of insurance but the severity of loss may be substantial. Also, since it is sometimes rather difficult to differentiate between losses which may properly be considered as direct liability losses of the indemnitor, and assumed liability losses, claims which are thought to be Contractual Liability claims should be carefully scrutinized, in order that the experience may not be distorted by a misassignment of losses.

It is recognized that Contractual Liability involves many and varied possibilities and it is not the purpose to discuss all the ramifications of the subject here. Much could be written on its numerous phases covering the legal, the underwriting and the actuarial fields. An endeavor has been made to bring out the salient points and to demonstrate some of the difficulties encountered. It is hoped that this discussion will stimulate further study aiming toward the elimination or modification of abuses now extant with the result that more uniformity and simplification in the writing of this line of casualty insurance may be possible.