

ACCIDENTS WILL HAPPEN: INSURANCE AND INDEMNIFICATION ISSUES IN LIVE PERFORMANCE AGREEMENTS

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Once the details of the financial terms of a live performance engagement have been finalized (including the sometimes extensive prerequisites of an artist's rider that have been finalized and agreed upon), perhaps the area of most negotiation, and, at the same time, the area least understood by lay persons, is the area of insurance and indemnification with regard to matters arising in connection with the presentation and promotion of a live performance. A somewhat related issue is the impact of a "force majeure" clause on such live performance contracts.

Since all live performance agreements involve and contemplate that there will be a public assemblage, which can range from hundreds of people to tens of thousands of people, all such endeavors create risk of injury and harm from interpersonal contact and relationships. The variety and circumstances of potential situations is boundless. In fifteen years of practice involving issues surrounding live performance engagements, this author has acted as counsel in a variety of such situations, i.e.: patron claims hearing loss due to alleged sound emanating from speakers; patron loses finger when two fans fight over laced shoe thrown from stage by artist into the crowd; artist's performance canceled due to failure of temporary generator powering building under reconstruction due to fire that destroyed mechanical aspects of building; patron injured while in custody of police following ejection from venue and arrest for public intoxication; patron injured in fall due to alleged defect in design of railing in public venue licensed by promoter; patron injured as a result of assault and battery by another patron on premises of venue; patron injured when artist summoned patrons to stage; patron injured in mosh pit; patron injured by contaminated food; patron injured by defective merchandise; stage worker injured when assaulted by artist. The examples go on and on.

All of these various examples invoke the nuances of responsibility and allocation of risk by and between the artists, the concert promoter, the venue, service providers (such as sound companies and lighting companies), security companies and concessionaires (such as food purveyors and merchandisers).

Additional insurance issues that are related are issues that pertain to damage or injury to equipment owned by the various participants in the live entertainment endeavor and responsibility for infringement of various intellectual property rights such as copyright, trademark and publicity.

Each of the various agreements that are executed in connection with the presentation of the live entertainment performance will include insurance and indemnity provisions of some sort and it is the duty of the practitioner representing each of the various parties to assure that each of these agreements are complementary and do not leave any gaps in coverage (or unnecessarily duplicate coverage). A related issue is the provision in an insurance policy that defines when insurance is primary, secondary or excess. Primary means that it will primarily cover the occurrence. Secondary means there is only coverage once the primary is exhausted. Excess means after all primary and secondary sources of coverage are exhausted. Some policies also

provide for contributory coverage, meaning it may only cover claims to the extent that there is other coverage available.

At the same time, indemnity provisions are typically broader than insuring obligations and the practitioner has to make certain that the covenants and promises regarding what insurance is to be provided in fact is (1) available in the market place and (2) included in the client's coverage. Often such analysis will require consultation with the client's risk manager or broker, both of whom can be invaluable sources of information. Insurance policy forms change from time to time and it is extremely important to make sure that the insurance language in the contract is consistent with what can and is being provided. Liability can develop contractually where the insurance provision in the contract differs from what is to be provided; resulting in the client becoming obligated to provide coverage which it never intended to purchase and did not anticipate being responsible for. Such a circumstance is tantamount to making the indemnitee obligated for the full extent of what coverage should have been provided.

A. **Indemnification Clauses and Commercial General Liability Insurance**

(1) **Indemnification**

Indemnification clauses define contractually the allocation of risk as between the various parties to the contract and/or the presentation of the live entertainment performance. In most states there are general equitable principles of fault (or comparative fault) that are the default clauses in the event of no agreement on such issues, however, it is almost unheard of to see a contract concerning the presentation of a live entertainment performance that fails to specify the allocation of risk at least in some fashion.

Indemnification obligations in a particular instance may mirror the clout of the various parties, as with other issues. The party with the most clout will generally ask for the greatest limitation on risk. Obviously the fairest approach is to have all parties take responsibility for their own actions. However, in pure comparative fault jurisdictions like California, that can result in some situations where all parties have to participate in the defense of a claim. Additionally, the scope of indemnification can be limited by public policy statutes. Some states have statutes that prohibit parties from attempting to exculpate themselves from fault. In analyzing requests for indemnification, all of these issues must be analyzed and the state law governing the agreement reviewed.

Indemnification clauses should broadly define' the obligation to defend and indemnify and the scope of the indemnity:

“...Producer agrees to defend, indemnify and hold harmless Venue's Indemnified Parties, from and against any and all claims, controversies, lawsuits or causes of action, of any kind whatsoever and all loss, liability, expenses, costs or damages, including reasonable attorneys' fees and costs, arising from a breach by Producer of any of the representations, warranties, and agreements of Producer under this Agreement or arising from any and all negligent, reckless, willful or intentional conduct on the part of Producer, its agents, directors, members, officers or employees in connection with the Show and its exploitation hereunder except that the obligations set forth herein shall not

include any matter that arises from any act or omission of members, and representatives of Venue's Indemnified Parties. The indemnification obligations of this Paragraph shall remain in full force and effect notwithstanding the termination of the Agreement and shall survive termination. In addition the indemnification provisions and obligations of this Agreement shall be operative and enforceable whether or not there is insurance coverage for the indemnified claim..."

Likewise it is very important to define precisely who the parties are who are intended to benefit from the indemnification, such as: "Indemnified Parties" shall mean the indemnified party and all parent, subsidiary, related or affiliated entities and all officers, directors, shareholders, partners, members, representatives, agents or employees of each. Note the breadth of the coverage, from a "controversy" which could range anywhere from a "letter" to a lawsuit. Also note the breadth of the indemnified damages. The intent is to make sure that the party will not only provide indemnity for a judgment, but that they will defend the matter until judgment as well. From a practical standpoint, the defense costs can well exceed the value of many claims. Note that the clause survives termination since the statute of limitation on personal injury and property damage claims can extend beyond the conclusion of the Show. Moreover the provision makes clear that the obligations are enforceable whether or not there is insurance.

(2) Commercial General Liability

Standard occurrence policies sold in the entertainment industry today are known as commercial general liability policies. Essentially, they provide insurance and indemnity for "covered losses". Of course with all insurance policies there are numerous definitions and exclusions that have to be reviewed to fully understand the parameters of coverage under the policy, but essentially such coverage will provide defense and indemnity to the named insured for general negligence that causes either personal injury or property damage. Of course, a review and study of these definitions and exclusions themselves could occupy volumes and it is not the intent of this article to review the detail of such clauses. As a practitioner trying to get a deal done, it is often very helpful to have the insurance broker or risk manager do a policy summary for you describing the coverage. Indeed, you will find that some insurance clauses will require that summaries of the policy be provided. Some clauses may require that copies of policies be provided. The clause on the provision of insurance should track the indemnity clause, however, keep in mind that there are events and claims that may be subject to indemnity obligations that are not at all insurable, such as intentional assault and battery claims that may accompany excessive force of security personnel claims. In those instances, for example, the Plaintiff may allege that the security company was vicariously responsible for the conduct of the employee as a result of the employees negligence in utilizing excessive force or alternatively for negligent hiring. At the same time, the employee may be named in a cause of action for assault and battery, which is an intentional tort and therefore not a covered claim. It is against public policy to insure for punitive damages and therefore such claims are not covered. Because most lawsuits plead allegations in the alternative, such claims are almost always linked to negligence claims and therefore even uncovered claims will be provided a defense. The complex issues of the distinction between the right of defense and the right of indemnification are also beyond the scope of this article, however, the practitioner should be aware of the distinction and the fact that when faced with a potentially uncovered claim, the communication with the carrier should be

handled by a practitioner who is well versed in such matters and knows that the rules vary from state to state and can be quite complex. Insurance carriers owe duties to their insured that can give rise to a variety of rights that you do not want to overlook.

A typical insurance clause follows:

1. Commencing with Producer's execution of this Agreement and throughout the Term, and any Extended Term hereof, Producer shall maintain insurance policies as follows:

1.1 A Commercial general liability insurance policy or policies, in a form to be approved by Venue, shall be maintained by Producer in a combined single limit of not less than Five Million Dollars (\$5,000,000.) for each occurrence for bodily or personal injury and property damage, with a Five Million Dollars (\$5,000,000.) aggregate. Producer shall name Venue's Indemnified Parties as additional insureds under the said policy. The liability insurance referred to in this paragraph shall provide coverage for insurable claims arising from (i) the breach of Producer of its representations, warranties and covenants under this Agreement; (ii) any matter or claim arising from the activities of Producer in the production and presentation of the Show, including the activities of all cast, crew, Show personnel or contractors or any other person connected with the Show; (iii) any advertising, promotion, broadcast or other exploitation or promotion of the Show by Producer Indemnified Parties; (iv) any other matter arising from the use or occupancy by Producer of the Licensed Premises; and (v) any other matter or claim arising from any negligent, reckless, willful or intentional conduct on the part of Producer, its agents, members, officers, employees, cast members or production personnel. The insurance to be provided hereunder shall be primary and not contributory.

Notice that the clause provides that the form will be approved. The reason is that the forms that are used are so varied that you really need to make sure that the coverage that you seek is there. Once again, the broker or risk manager can be of great assistance in making a determination on the extent of coverage. The broadest policy coverages include what is sometimes referred to as "Broad Form Coverage" which includes Advertising Injury and Personal Injury Coverage. These coverages, depending on the form, increase the coverages available and broaden the definitions. Although the forms vary widely, typical clauses may read as follows:

Advertising Injury means injury arising out of one or more of the following offenses: (a) oral or written publication of material that slanders or libels a person or organization; (b) oral or written publication of material that violates a person's right of privacy; (c) misappropriation of advertising ideas or advertising style; or (d) infringement of copyright, title or slogan.

Personal Injury means injury, other than bodily injury, arising out of one or more of the following offenses: (a) false arrest, detention or imprisonment; (b) malicious prosecution; (c) the actual wrongful eviction from, actual wrongful entry into, or actual invasion of the right of private occupancy of a room, dwelling or premises that a person legally occupies; (d) oral or written publication of material that slanders or libels a person or organization; or (e) oral or written publication of material that violates a person's right of privacy.

While some property damage coverage is afforded under general commercial liability policies, usually it is limited to coverage for damage to property of third parties who bring claims and will not provide coverage for the party providing the insurance coverage. This clause is very broad and may not be fully covered under all policies, but inserting the word “insurable” limits the obligation to provide insurance and can tame the most broadly worded clauses. In addition, having the form of policy approved solves any issue of whether the indemnitee is getting what is contracted. Approval of forms can raise trade secret issues where policy premiums are based on revenues and one party does not want to divulge such information. In those circumstances policy summaries may be useful.

B. Worker’s Compensation Coverage

All states have laws with regard to worker’s compensation coverage and indeed all performance related contracts should contain clauses assuring that each party shall take out and maintain statutory limits of coverage.

“...Workers’ Compensation insurance shall be maintained by Producer for Producer’s employees, in accordance with the statutory requirements of the State of California, with employer’s liability insurance in an amount not less than One Million Dollars (\$1,000,000.) for each accident or illness...”

C. Producer’s Liability Coverage; E&O Coverage and Other Issues Relating to Infringement of Intellectual Property and Publicity Rights

All live entertainment endeavors involve exploitation of intellectual property, including copyright, trademark and publicity. Venues, Promoters and Presenters who are in the chain of distribution want warranties and representations that the Artist owns the results and proceeds of the performance (or has obtained necessary clearances, rights and permissions). Indemnities will provide some comfort but it is not unusual for the Artist or Producer to be asked to provide Producer’s Liability Coverage or Errors and Omissions coverage on those creative elements of the Show:

Producers’ liability insurance shall be maintained by Producer to include, without limitation, errors and omissions, copyright, trademark, and patent infringement coverages in an amount not less than \$_____ [TO BE AGREED]. Such limit shall apply solely to the Show at the Licensed Premises and the advertising, promotion and publicity thereof (and all merchandising exploitation of the Show pursuant to the terms hereof). The deductible or self-insured retention on such coverage shall not exceed Ten Thousand Dollars (\$10,000.).

Often times the carrier issuing such policies will require that the various elements of the Show be scrutinized by counsel and an opinion letter given.

D. Special Form “All Risk” Property Insurance

As noted above, the commercial general liability policy may not afford coverage for

personal property of the Artist. Coverage providing such protection is called “All Risk” Property Insurance:

Special Form “All Risk” property insurance shall be maintained by Producer and shall include coverage for Producer’s property, products and merchandise in, upon, or about the Licensed Premises. Such insurance shall be in an amount equal to the full replacement cost of the property required to be insured.

Such a clause, and obtaining the requisite coverage, can replace intense negotiation over who will be responsible in the event of loss or damage to personal property.

E. **General Insurance Issues:**

General clauses applicable to the insurance to be provided typically would read as follows:

“...As to the insuring obligations of Producer under this Agreement, all of the insurance required to be maintained by Producer shall be primary as to insurance required to be provided by Venue pursuant to this Paragraph ,which insurance (i.e. Venue Policies) shall be excess thereof and non-contributing as to Producer’s insuring obligations...”

As noted earlier, often times one party will require that the insurance to be provided be “primary” insurance, even though the other party may have insurance that would be responsive.

“...All Producer Policies shall be issued by a carrier that is licensed to do business in the State of California with a current A.M. Best Company rating of at least A:VII...”

Best rates companies and the ratings are on a sliding scale. A:VII is a middle of the road requirement and usually compliance is not a problem. The rating to be used is subject to negotiation.

“...Producer shall, prior to Producer having any access to the Licenses Premises, obtain and deliver to Venue certificates of insurance for all Producer Policies evidencing that all insurance and workers’ compensation coverages required under this paragraph are in full force and effect and that Venue’s Indemnified Parties have been added as additional insureds...”

The party requesting the insurance, as a matter of good order and prudence wants evidence of coverage before the occupancy begins. A certificate is merely “evidence” and does not constitute coverage. It is only evidence of the potentiality of coverage. When a party is added as an additional insured, an endorsement to the policy is required to perfect coverage. In practical terms, the endorsement is rarely requested and so certificates are commonplace in the industry.

“...Producer shall have provided to Venue prior to the full execution of this Agreement a summary prepared by Producer’s insurance broker of the coverage, policy limits,

deductibles, self-insured retentions, and any special or non-standard policy exclusions in the Producer Policies. Producer shall provide Venue with at least thirty (30) days prior written notice of cancellation or any material modification (which Venue shall have the right to approve with such approval not to be unreasonably withheld) that lessens Producer's insurance requirements under this Agreement by materially modifying the coverage, policy limits, deductibles, self-insured retentions or special or non-standard exclusions set forth in the aforesaid summary..."

As noted the party requesting the insurance wants assurances as to the nature and extent of all coverages. This clause requires the provision of insurance summaries. The clause also contemplates that there can be changes or cancellations that may occur and provides for notice in those events.

"...If Producer does not maintain the required insurance during the Term of this Agreement, Venue may treat such failure as a breach by Producer, and/or Venue may obtain insurance to insure the Producer (provided this shall be at Venue election, without affording Producer any cure period for such breach) according to Venue's standard insurance (it being agreed, without limiting Producer's liability for such failure, that Producer shall also be liable to Venue for all costs and premium expenses incurred by Venue for such coverages, if any)..."

This clause provides for rights and remedies for failing to provide the coverage.

F. Conclusion

While the insurance and indemnity provisions are often viewed by lay persons as boilerplate that need not be dealt with, in fact, there are very substantial risk allocation, coverage and defense issues that are often times complex and should be carefully scrutinized during the negotiation and drafting of agreements pertaining to the presentation of live entertainment performances.