CHAPTER 7

Risk Allocation: How to Interpret Insurance and Indemnification Provisions in Mining Contracts

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Synopsis

[2]--Liability or Indemnity Policy.

§ 7.05. Conclusion.

§ 7A. Appendix -- Sample Indemnity and Insurance Clause to Coal Mining Contract.

§ 7.01. Introduction.

A well drafted indemnification clause in a mineral lease or contract does not, in and of itself, guarantee the indemnified party protection from liability. To protect itself fully, the indemnified party must further require the indemnitor to demonstrate proof of adequate funds to pay the potential liability. The primary method of funding this potential liability is through insurance. A prospective approach to risk allocation incorporates both indemnification and insurance in the written mineral contract. The terminology and issues in insurance and indemnity can be confusing. Nevertheless, a basic understanding of their interrelationship can prevent unanticipated liability and costly delays in settling claims.

[1]--Indemnity Defined.

To indemnify means to save harmless or to secure against loss or damage.(1) Indemnity arises by operation of express contract or under principles of equity. It represents the shifting of losses from one who otherwise would have to bear liability or damage to another.(2)

Contracts of indemnity are generally classified as those that indemnify against (1) loss or damage to property or (2) liability arising from law.(3) A contract that simply indemnifies, and nothing more, protects against loss or damage only.(4) A contract that binds the indemnitor to pay certain sums of money or to perform other acts that will prevent harm or injury to the indemnitee protects against liability.(5)

Contracts of indemnity are interpreted under the general rules governing formation, validity, and construction of contracts. An indemnity clause within a mineral contract is interpreted in accordance with the plain meaning of the language used.(6) However, courts interpret ambiguous contract provisions to provide indemnity.(7) Unlike contracts of insurance, in which ambiguous provisions are generally interpreted against the insurer, an ambiguous indemnity provision may be construed against either the indemnitee or the indemnitor.

In addition to contractual indemnity, courts also recognize recovery under principles of equity.(8) Equitable or non-contractual indemnity is based on the theory that a non-negligent or passively negligent party should not have to pay the liability of a substantially more negligent party. These rights may be waived, however, by an express agreement abrogating a party's rights to equitable indemnification. Finally, most jurisdictions allow parties to enter into a contract of indemnity to protect the indemnitee from liability arising from its sole negligence.(9)

[2]--Insurance Defined.

Insurance is an agreement whereby one party, for consideration, undertakes to compensate the other for loss of a specified subject from a specified peril.(10) The insurance contract is commonly divided into six parts:

1. *Insurance Agreement* states the risks covered by the insurance contract. Risks not specifically identified in the insurance agreement are not covered by the policy.