

# Insurance Issues from an In-House Counsel Perspective

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# TOPICS

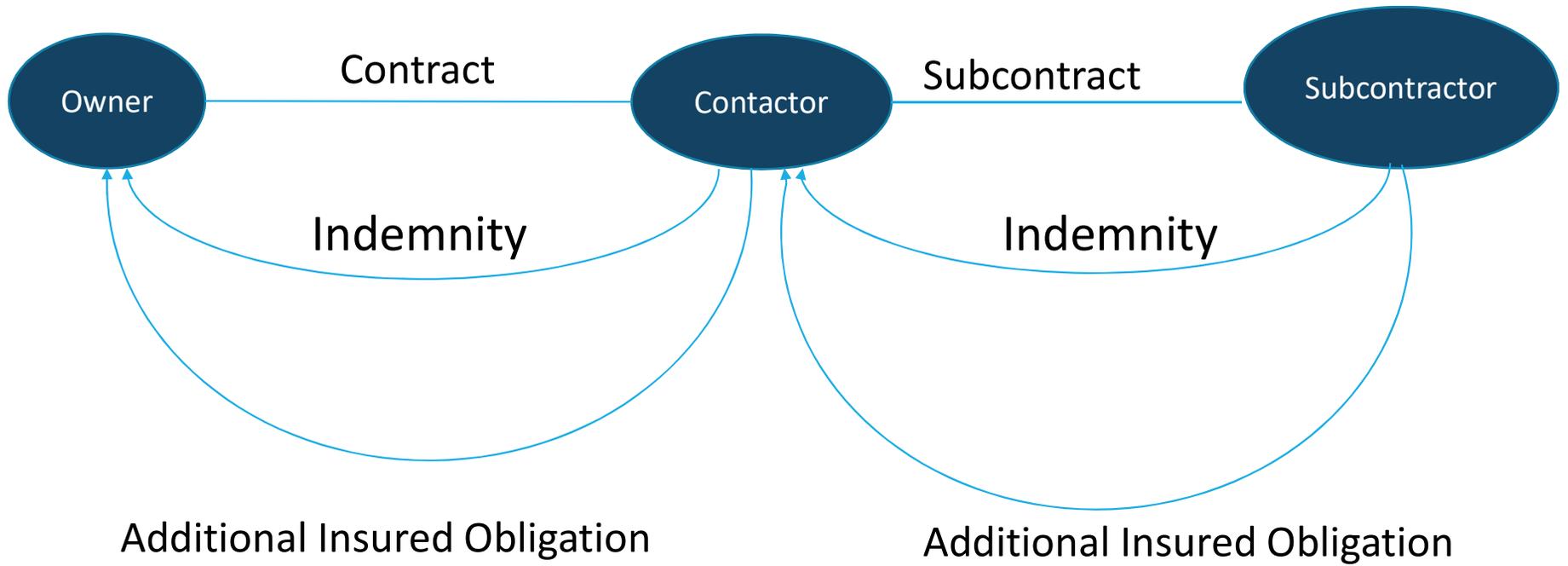
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Indemnification

Additional Insured Obligations

Duty to Defend

Limitation of Liability



# Areas of Concern

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## Construction Industry Example

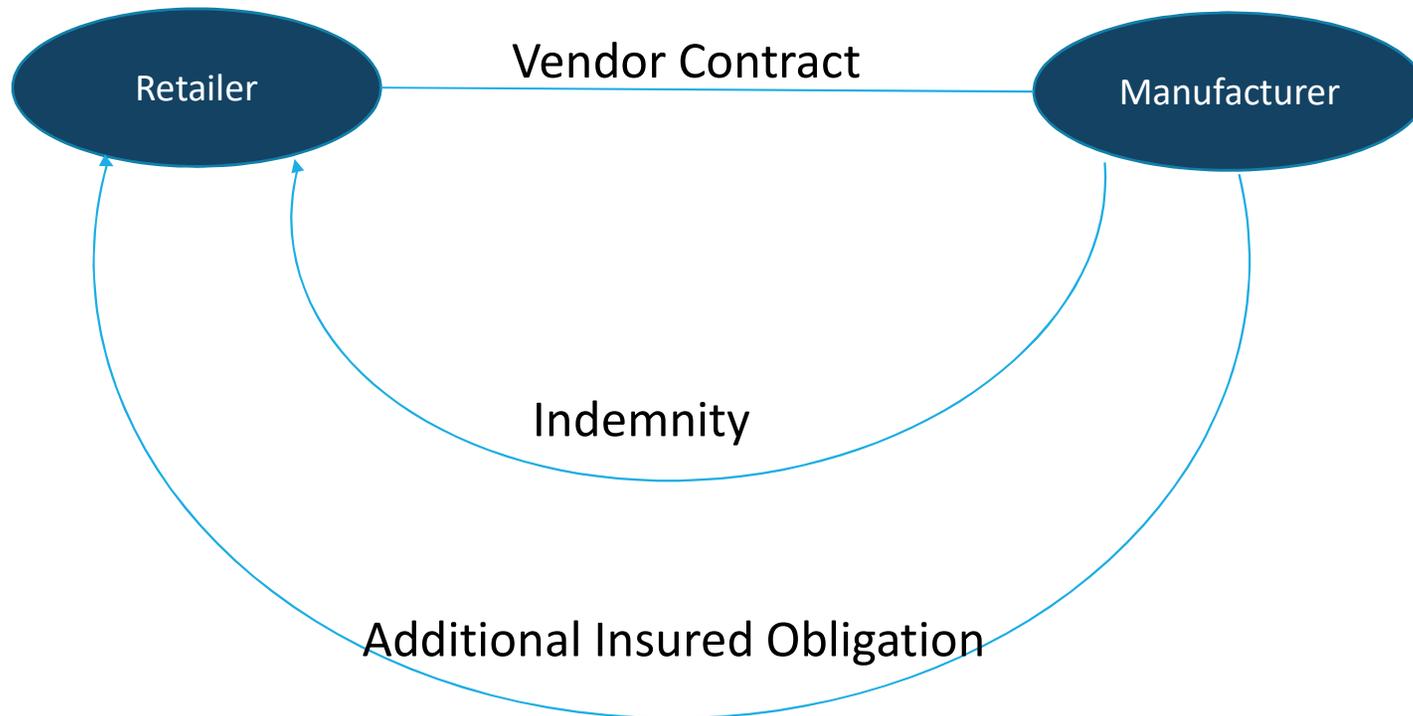
Am I protected from liabilities created by my Subcontractor.

Are the potential liabilities of my Subcontractor fully insured.

What are my responsibilities to the Owner.

Are my obligations to the Owner fully Insured.

What is the impact of coverage under the additional insured obligation.



# Areas of Concern

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## Retailer-Manufacturer Example

Retailer: Am I protected from liabilities created by the Manufacturer.

Retailer: Are the potential liabilities created by the Manufacturer fully insured.

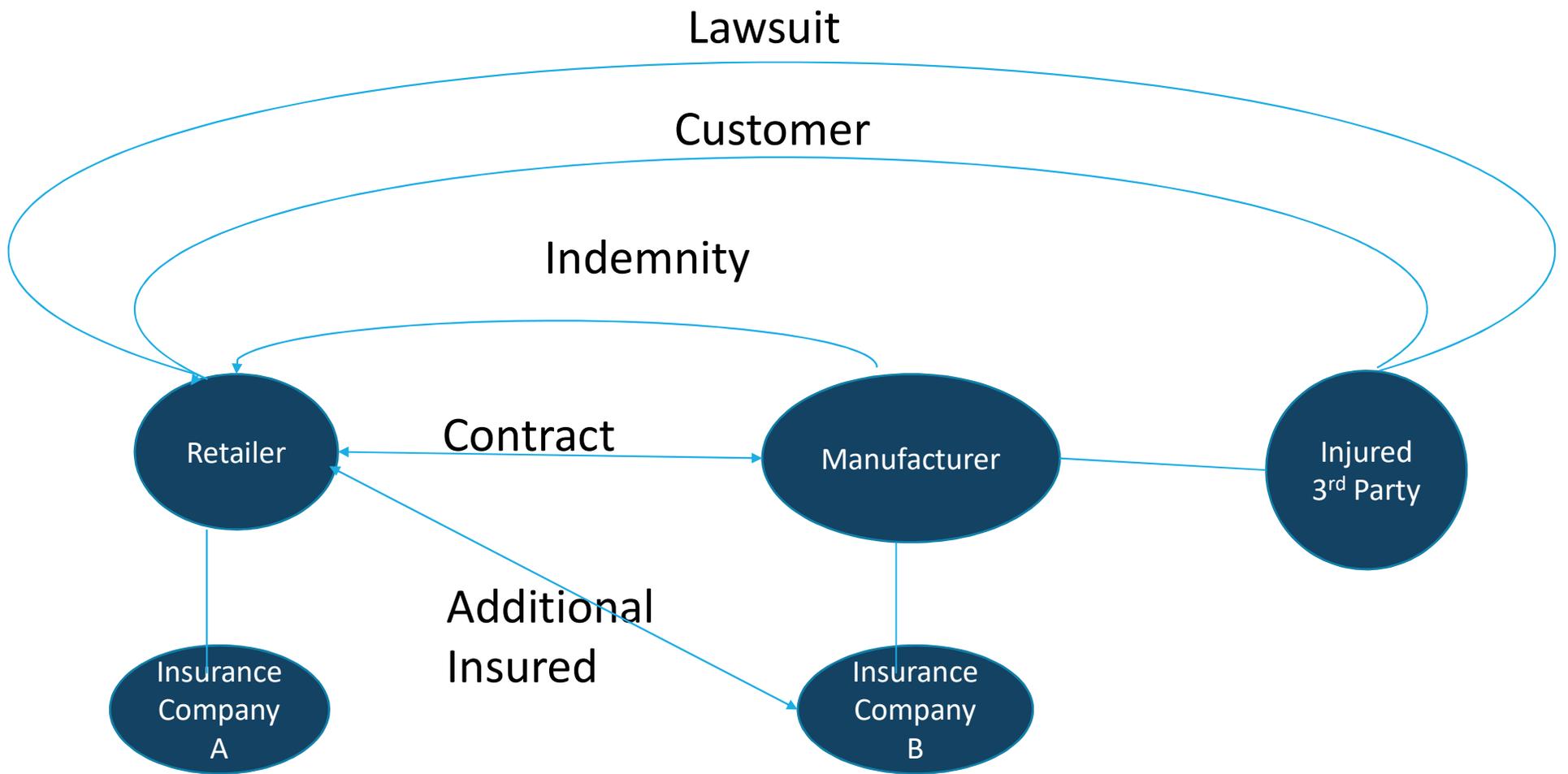
Retailer: Will the Manufacturer be required to defend the Retailer at Manufacturer's cost.

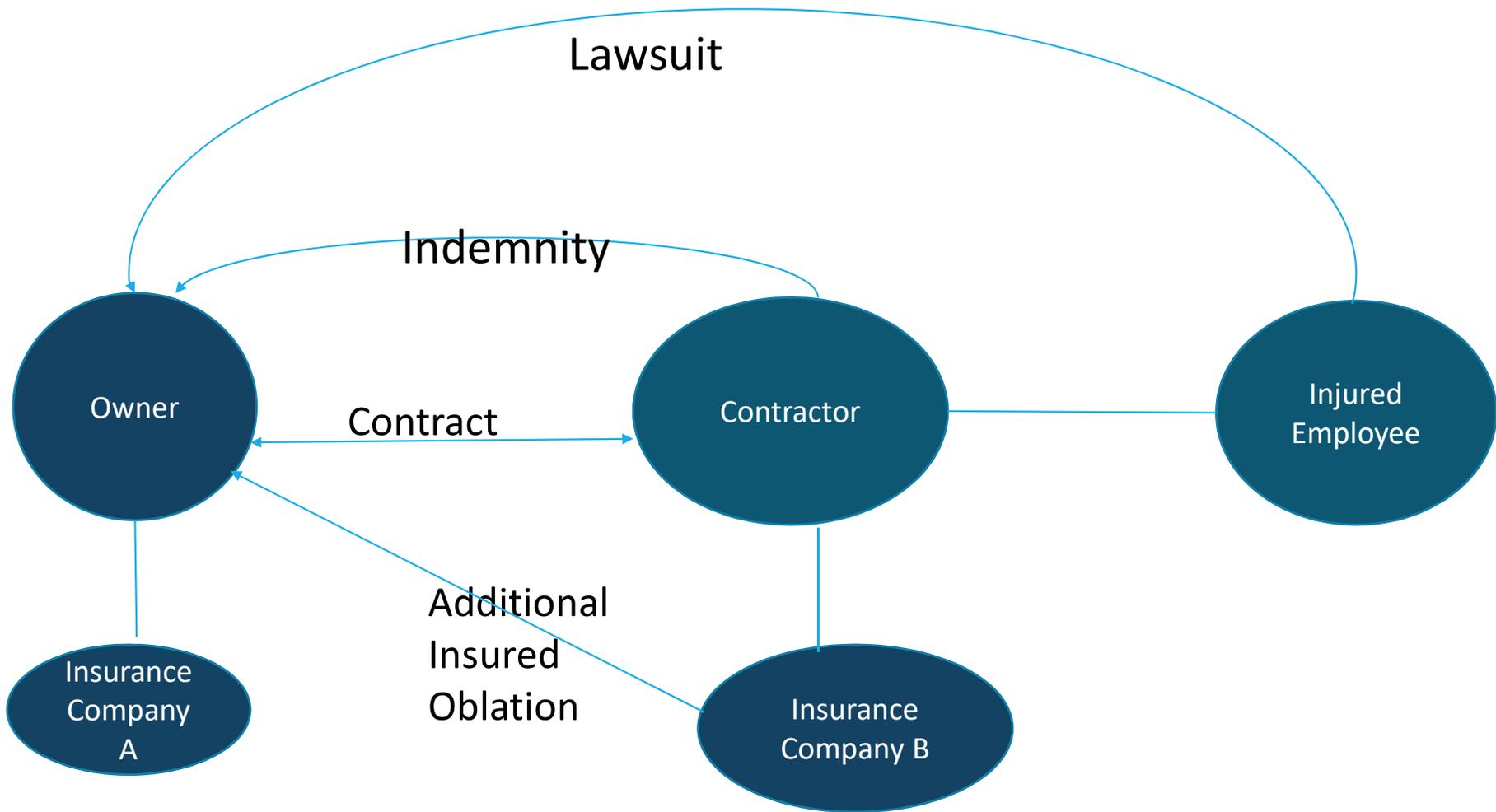
Manufacturer: What liabilities to the Retailer are the Manufacturer's responsibility.

Manufacturer: Are my obligations to the Retailer fully Insured.

Manufacturer: What is the impact of coverage under the additional insured obligation.

Manufacturer: What is the impact of Manufacturer's duty to defend obligations.





# What is the Contractor Providing to the Owner

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## **Indemnity**

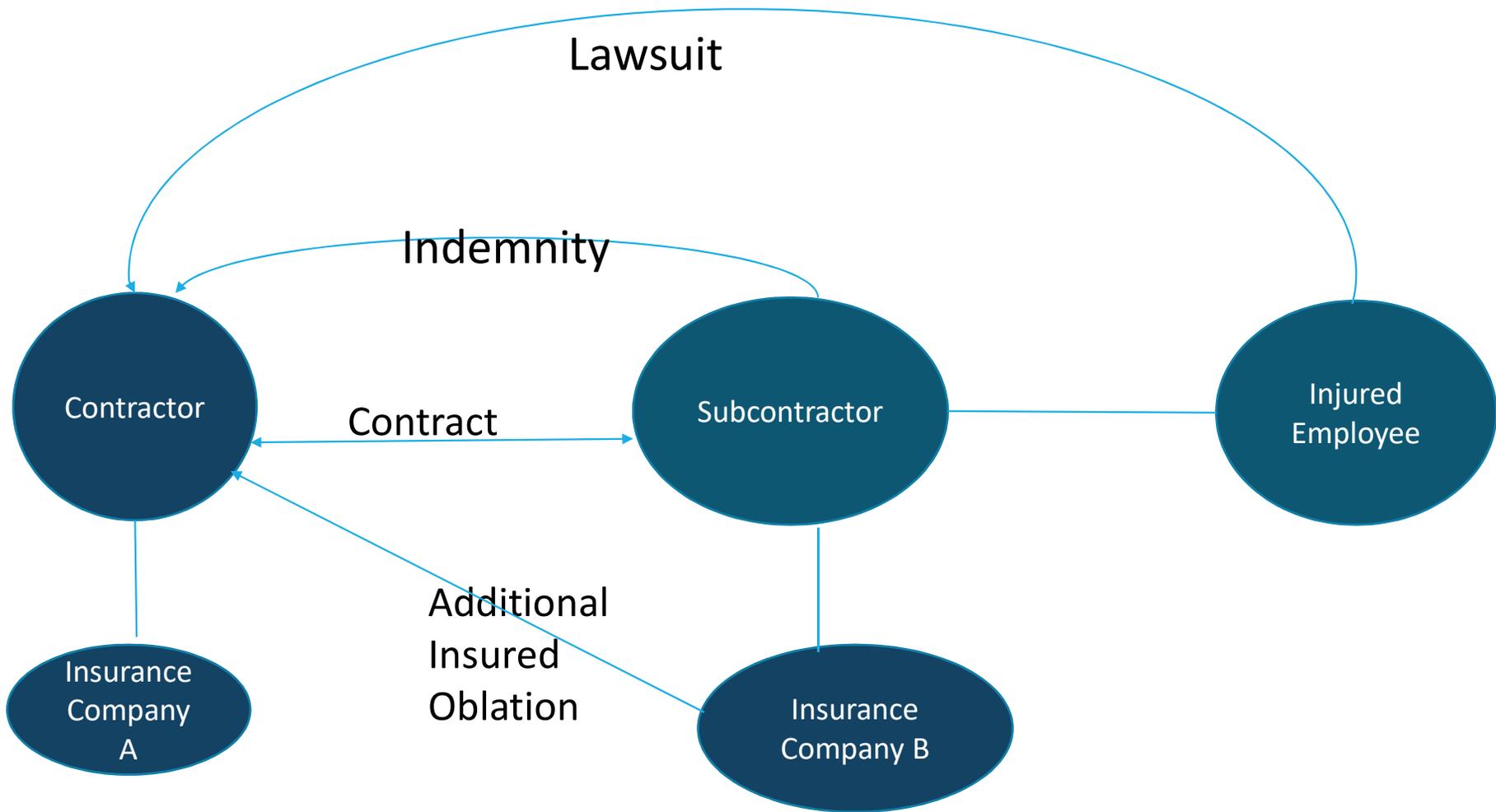
Indemnity to the Owner for \_\_\_\_\_?

Contractor's Duty to Defend Owner

## **Additional Insured Obligations**

Insurance Coverage for \_\_\_\_\_?

Contractor's Duty to Defend Owner



# What does the Contractor Get From the Subcontractor

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## **Indemnity**

Indemnity from the Subcontract for \_\_\_\_\_?

Subcontractor's Duty to Defend Contractor

## **Additional Insured Obligations**

Insurance Coverage for \_\_\_\_\_?

Subcontractor's Duty to Defend Contractor

# Indemnification

To the extent permitted by law, Contractor shall indemnify, defend at its expense, and save Owner, its affiliates, agents, employees, contractors, subcontractors and suppliers, (the “Indemnified Parties”), harmless from, any liabilities, costs and claims, including judgments rendered against, and fines and penalties imposed upon, owner, its affiliates, agents, employees, contractors, subcontractors and suppliers and reasonable attorneys' fees and all other costs of litigation (collectively, “liabilities”), arising out of the contract, including injuries, disease or death to persons, or damage to property, and environmental claims and liabilities, caused by, its employees, agents or subcontractors, or in any way attributable to the Contractor, regardless of whether the such liabilities were cause by the negligence of the Indemnified Parties.

# Indemnity

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Black's Law Dictionary defines "indemnity clause" as "[a] contractual provision in which one party agrees to answer for any specified or unspecified liability or harm that the other party might incur."

**Indemnity** may be defined as the obligation resting on one party to make good a loss or damage another party has incurred. [Oltmans Construction Co. v. Bayside Interiors, Inc.](#)

**Indemnity** is a contractual obligation of one party (indemnifier) to compensate the loss occurred to the other party (indemnity holder) due to the act of the indemnitor or any other party. [Wikipedia](#).

**Indemnity** is the obligation resting on one party to make good a loss or damage another has incurred. [Crawford v. Weather Shield Mfg.](#)

(1) In policies written on an indemnification basis, the insurer reimburses the insured for claims and claim costs already paid by the insured. Technically, the insured must not only suffer a loss but must also pay the loss before being indemnified by the insurer. (2) The agreement of one party to assume financial responsibility for the liability of another party. Hold harmless agreements are typically used to impose this transfer of risk. [IRMI](#).

# Indemnity Concepts

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Indemnity agreements are not favored in the law.

Indemnity agreements are generally construed against the party seeking to be held harmless, (the indemnitee), and against the party providing the hold harmless, (the indemnitor).

## Enforceability:

Indemnification to the extent of the Indemnitee's negligence.

Indemnification for Indemnitee's own negligence.

Indemnification for Indemnitee's sole negligence.

- Anti-indemnity statutes.
- Construction Industry anti-indemnity statutes.
- Oil Field Industry anti-indemnity statutes.

Public Policy Considerations.

Conspicuous Clause Requirements.

# Duty to Defend

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- An Insurer's Duty to Defend is broader than its duty to indemnify.
- An Additional Insured is generally owed a Duty to Defend.
- The Policy must provide coverage for the claim/damage alleged. (Defined by the Policy)
- Duty is determined by comparison of the policy language with the allegations of the underlying complaint.
- It is the alleged conduct rather than the labelling of the claim that is considered.
  - There must be a potential for finding the Named Insured negligent.
  - There must be a potential for holding the Additional Insured vicariously liable for that negligence. (Policy Provision)

*Pekin Ins. v. Centex Homes*

# Duty to Defend

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“Instead of requiring explicit allegations of negligence by the named insured, we found it sufficient that the underlying complaint contained facts to support a theory of recovery for the underlying plaintiff based on the negligence of the named insured.”

*Pekin Ins v. Centex Homes*, 72 N.E.3d 831 (2017 Ill. App 2nd).

# Additional Insured

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A person or organization not automatically included as an insured under an insurance policy who is included or added as an insured under the policy at the request of the named insured. *IRMI.*

Additional insured is a type of status associated with general liability insurance policies that provides coverage to other individuals/groups that were not initially named. *Investopedia.*

# Additional Insured Concepts

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## Fundamental Issues

1. Who is entitled to a defense, (Duty to Defend)
2. Who is an Additional Insured
3. What is covered, (Scope of Coverage)

## What Applicable Policy Construction Principles Apply to This Determination?

- A. Does the Policy Control.
- B. Does the Contract Language Control.
- C. Should the Contract be read in Conjunction with the Policy.

# Policy Construction Principles

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1. Look to the four corners of the policy.
2. If the policy itself incorporates other documents/contracts those documents must be considered.

## Policy Construction Principles

*In re Horizon, 470 S.W.3d 452, Supreme Court of Texas, 2015.*

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- Transocean is the owner of a drilling rig, the Deepwater Horizon.
- BP, an oil field developer, enters into a drilling contract with Transocean.
- The drilling contract requires Transocean to indemnify BP for all surface pollution regardless of fault.
- The drilling contract requires BP to indemnify Transocean for all other pollution, (subsurface pollution).

# Policy Construction Principles

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- Catastrophic accident occurs resulting in a massive crude oil spill in the Gulf of Mexico.
- BP seeks coverage as an additional insured under Transocean's insurance policy.
- Transocean contends that pursuant to the drilling contract, Transocean is only liable for surface pollution and that BP assumed liability for subsurface pollution

# Policy Construction Principles

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## Coverage Determination:

“We rely on the policy's language in determining the extent to which, if any, we must look to an underlying service contract to ascertain the existence and scope of additional-insured coverage.”

*In Re: Horizon.*

Is there an incorporation by Reference?

# ISSUE #1: Is BP an additional insured under Transocean's policy?

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POLICY: Nothing in the Policy or any endorsements specifically named BP as an additional insured.

"The policies extend 'Insured' status to '[a]ny person or entity to whom the 'Insured' is obliged by oral or written 'Insured Contract' . . . to provide insurance such as afforded by [the] Policy."

"An 'Insured Contract' is defined as "any written or oral contract or agreement entered into by the 'Insured' . . . and pertaining to business under which the 'Insured' assumes the tort liability of another party to pay for 'Bodily Injury' [or] 'Property Damage' . . . to a 'Third Party' or organization." *In Re: Horizon*.

# Issue #1

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“Under the express terms of the policies, additional-insured status hinges on

- (1) the existence of an oral or written contract,
- (2) pertaining to the business of an ‘Insured’, and
- (3) under which an ‘Insured’ assumes the tort-liability of another party and is ‘obliged’ to provide insurance to such other party.

The policy further specifies that ‘where required by written contract, bid or work order, additional insureds are automatically included hereunder . . . .’”

*In Re: Horizon.*

## ISSUE #2: Do Transocean's policies incorporate any liability limitations from the drilling contract?

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### Drilling Contract

"[BP], its subsidiaries and affiliated companies, co-owners, and joint venturers, if any, and their employees, officers, and agents shall be named as additional insureds in each of [Transocean's] policies, *except Workers' Compensation for liabilities assumed by [Transocean] under the terms of this contract.*" (Emphasis added.) *In Re: Horizon.*

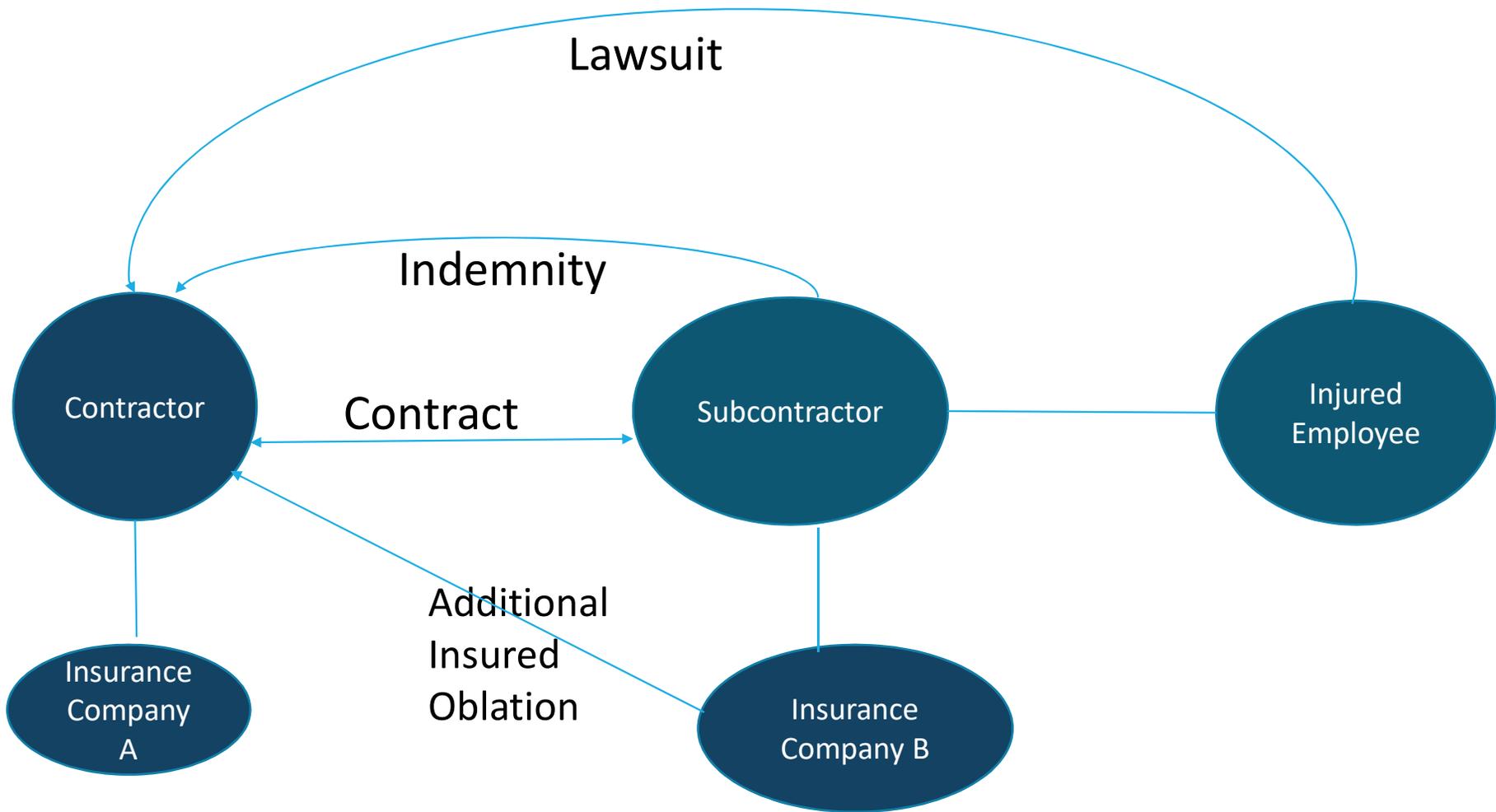
Interpretation: BP is an additional insured for liabilities assumed by Transocean under the terms of this contract.

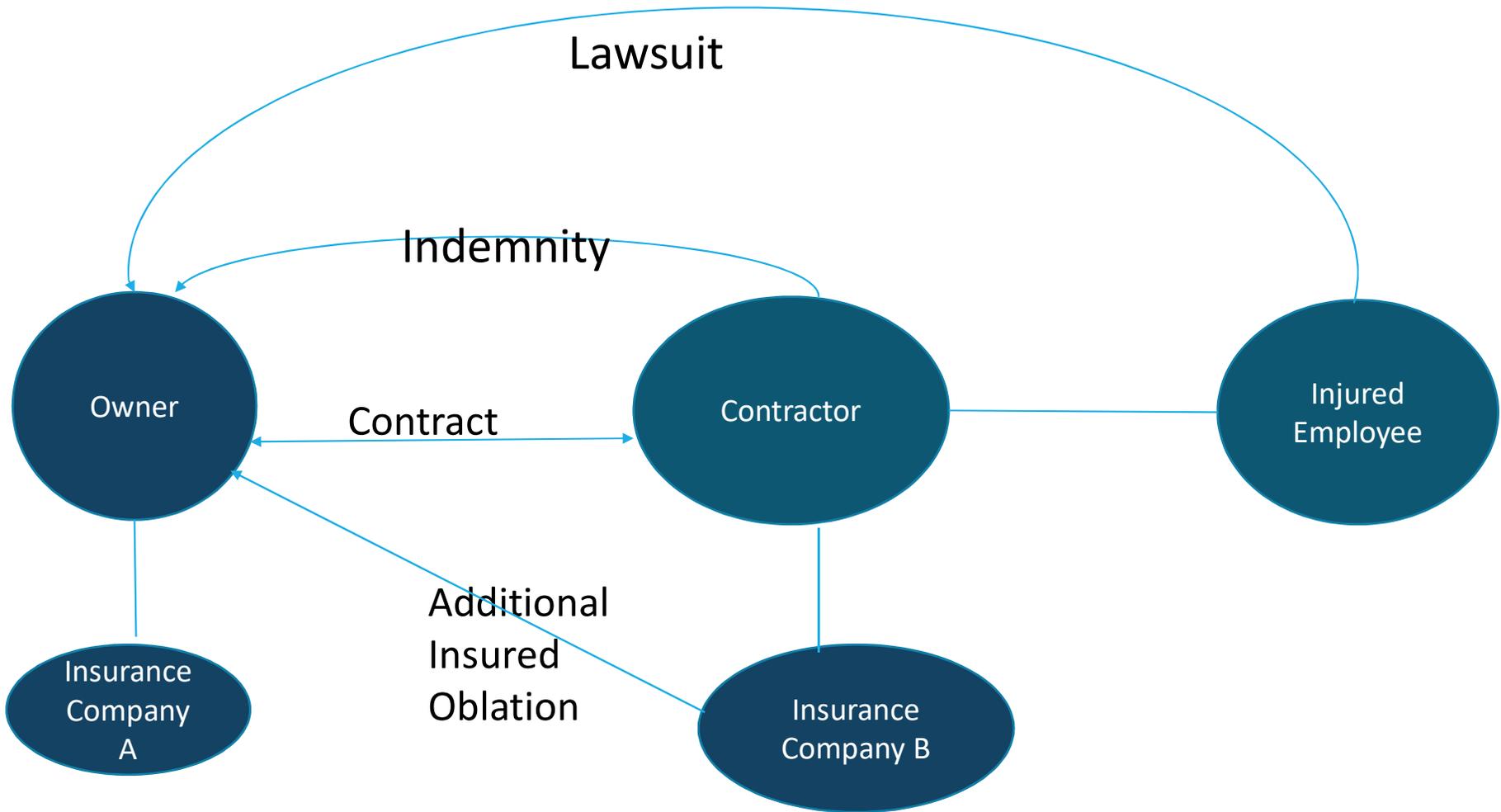
## Issue #2

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“[W]e conclude that BP is an additional insured only as to liabilities assumed by Transocean under the Drilling Contract and no others. Because Transocean did not assume liability for subsurface pollution, Transocean was not "obliged" to name BP as an additional insured as to that risk. Because there is no obligation to provide insurance for that risk, BP lacks status as an "Insured" for the same.”

*In Re: Horizon*





## Limitation of Liability

**NOTWITHSTANDING ANYTHING ELSE CONTAINED HEREIN TO THE CONTRARY, SUBCONTRACTOR'S MAXIMUM LIABILITY, WHETHER SUCH LIABILITY IS CLAIMED AS A RESULT OF BREACH OF CONTRACT, INDEMNITY, WARRANTY, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, OR OTHERWISE, PAYABLE BY SUBCONTRACTOR PURSUANT TO OR IN CONNECTION WITH ANY AND ALL CLAIMS ARISING UNDER THIS SUBCONTRACT SHALL NOT EXCEED THE VALUE OF THIS SUBCONTRACT OR \$30,000, WHICHEVER IS LESS.**

# Limitation of Liability

Only covers first party claims between contracting parties.

## Enforceability

Bargaining Power of the respective parties.

Does this impact insurance limits?

Does this impact indemnity obligations?

Enforceability - Public Policy-Anti Indemnity Statutes Conspicuous Clauses

## Exculpatory Clause vs. Limitation of Liability

# Limitation of Liability Concepts

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