The End of the Handshake

Contractor and Property Owners Best Practices

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The handshake has existed in some form or another for thousands of years. Some historians claim the gesture began as a way of showing peaceful intentions — a way of showing that their hands were empty and not holding any weapons. Others suggest it was just a symbol of good faith when making a promise.

It is widely believed that in the 17th Century, the handshake began as an everyday greeting and became so commonplace that etiquette manuals included guidelines for the proper techniques.[i]

In modern times, the handshake has many meanings, such as a friendly greeting or an offer to seal the deal. However, with the emergence of Covid-19, one unfortunate reality in the business world, is the demise of the handshake.

The downfall of the metaphorical handshake agreement is, on the other hand, a welcomed change for the those of us who review contracts and analyze contractual liability risk on a regular basis.

The necessity for a written, signed contract, before commencement of any work for a business or landowner, is the bare minimum needed for protection. Proceeding without the proper hold harmless agreements or insurance procurement requirements could leave your company or client at tremendous financial risk.

Whether you are a property owner, general contractor (GC), construction manager (CM), subcontractor (Sub), or other business owner, risk assessment, management, and insurance compliance review by a qualified individual has become an inescapable part of the business.

Making sure that your contracts have the proper hold harmless agreements and contain the necessary and very specific additional insured requirements, is just the beginning.

Many business owners and landowners think that securing a Certificate of Insurance from a contractor or subcontractor is sufficient to cover the business in the event of an accident, but that is far from the truth.

In most circumstances, under New York law, Certificates of Insurance have no binding effect on an insurance company. Merely getting a copy of a Certificate of Insurance from the Subs or from your GC or CM and relying upon that document for the necessary coverage to protect your company is not only bad practice, but extremely risky.

The New York Department of Financial Services has permitted "non-standard" insurance companies to write insurance policies in New York State, in an effort to reduce premiums. This has left many owners, GCs, CMs, and Subs without insurance or facing exclusions they never even knew existed in their policies.

"Non-standard" insurance companies are companies that issue policies with provisions, exclusions, and amendments that do not appear in standard Commercial General Liability policies with the well known Insurance Services Office, Inc. (ISO) copyright policy forms. For an excellent explanation of what a "non-standard" insurance company is, see IRMI.com's article, "Nonstandard Policies Deceptively Similar to Standard Policies."[ii]

Many business owners do not even know they have one of these policies, despite the warning being posted on the declarations page of the policy. But who reads their insurance policy anyway?

As an insurance lawyer with nearly thirty years of experience, I have reviewed countless insurance policies that eliminate the common Contractual Liability Coverage or contain, for example, an exclusion if employees of any contractor or subcontractor are injured on the construction site. In other words, no insurance coverage for your business, even if it was not your employee that was injured.

This type of exclusion often leaves the Sub without insurance and therefore, consequently the GC, CM, and owner.

Here is a common scenario:

- **Landowner** Prime Contract → **General Contractor**

- **General Contractor** Subcontract → **Subcontractor**

- All contracts contain hold harmless agreements and the prime contract contains a requirement that the **General Contractor** secure insurance naming **Landowner** as an Additional Insured.

- **General Contractor's** insurance company, **AAA Insurance,** will provide coverage to **Landowner** and **General Contractor**, but if they enter into a Subcontract, the Subcontractor's insurance must include additional insured coverage for both **Landowner and General Contractor**.

This is common so far, however, there is a catch. Unbeknownst to the owner and GC, the **AAA Insurance** policy contains an endorsement that excludes coverage if the Subcontractor's insurance policy does not provide coverage for an accident.

Subcontractor provides a Certificate of Insurance to the **General Contractor**. The Certificate lists **BBB Insurance** as the insurer and it contains all the required limits. All looks well on the surface.

An employee of the **Subcontractor** falls from a height and is injured on the site and the **General Contractor** turns to the **Subcontractor's** insurance company, **BBB Insurance,** for coverage. **BBB Insurance** disclaims coverage relying on an exclusion in that insurance policy for injury to any employees of any entity.

But **General Contractor** has coverage with **AAA Insurance,** so it should be protected, right?

Wrong. **AAA Insurance responds** and disclaims coverage because the **Subcontractor** did not secure the proper insurance for the **Landowner and General Contractor** as Additional Insureds.

Now let's add to the scenario that the **Subcontractor** doesn't have any discernable assets. Even though the GC has a breach of contract claim against the Sub, the end result is that the GC and Owner will be left holding the bag because of New York's Labor Laws, which place the nondelegable duty on the owner and GC.

This is what I call "Trickle Up Liability." Rather than the liability running downstream, with the proper insurance procurement and risk transfer tools in place, it has trickled back up because of poor risk management.

These types of scenarios have become common place in the construction industry. A way to avoid these types of scenarios is to have proper risk assessment, risk management, and insurance compliance review in place, including a review of not only the Certificates of Insurance but the insurance policies themselves.

There are Best Practices that can be followed to minimize the risk:

- Written Contracts: as obvious as this seems there are many out there that still rely on the handshake to have work performed. This is not only a risk on the level of performance, this may be a violation of your own insurance policy.

- Hold Harmless Agreements: a proper Hold Harmless is not only critical to manage your risk, it is often required by your own insurance policy for you to be covered.

- Insurance Procurement Requirements: require additional insured status for on-going operations and completed operations on your subcontractors' general liability and umbrella policy on a primary and noncontributory basis.

- Insurance Policy Review: make sure the policies actually cover the risk. This requirement should be a part of every contract.

- Proper amounts and kinds of insurance: should be required in the written contract and copies of the insurance policies in addition to the Certificates of Insurance, should be reviewed to confirm the same.

Over the last several years, these Best Practices have become increasingly critical to businesses and landowners and hiring a professional to guide you through the maze of documents and available insurance coverage is critical to success.

Rosa M. Feeney, Esq, has nearly 30 years of experience handling complex insurance coverage litigation matters, ranging from first and third-party commercial lines disputes to personal lines insurance litigation. Her experience includes construction, Labor Law and commercial, insurance litigation, with a focus on risk assessment and management and the most effective means of risk allocation through contract review and insurance coverage analysis.
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[i] https://www.history.com/news/what-is-the-origin-of-the-handshake

[ii] https://www.irmi.com/articles/expert-commentary/nonstandard-policies-similar-to-standard