INSURANCE ISSUES FOR

CONSTRUCTORS

INDEMNITY, CONTRIBUTION AND ADDITIONAL INSURED

LIABILITY OF SUBCONTRACTOR

TO THE INDEMNITEES AND ADDITIONAL INSUREDS

SELECTED ISSUES

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Indemnity, Contribution and Additional Insured -
Liability of Subcontractor
and of Subcontractor's Carrier
to the Indemnitees and Additional Insureds
(Selected Issues)

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INDEMNITY, CONTRIBUTION AND ADDITIONAL INSURED - LIABILITY OF SUBCONTRACTOR AND OF SUBCONTRACTOR'S CARRIER TO THE INDEMNITEES AND ADDITIONAL INSUREDS (Selected Issues)

I. Indemnification Agreements

A. Generally

Construction contracts generally contain a myriad of indemnification provisions, the most common of which relates to the allocation between the parties of one or more risks of potential loss, cost and expense resulting from bodily injury or property damage. Indemnity agreements can take other forms as well, including indemnification for lien claims, copyright and patent infringements and hazardous materials.

Indemnity is an obligation to assume the payment of a loss for another party. A hold harmless provision is an agreement to defend another party against a claim.

If an indemnity provision is not limited to bodily injury and property damage claims, the indemnitor will be exposed to liability for economic losses that arise from the project such as lost income and extended financing costs (i.e, consequential damages). Those are generally considered to be breach of contract claims and not insurable.

The duty to indemnify can arise due to a statute, the common law or by virtue of contract. Common law and statutory indemnities transfer liability from a party that has little or no responsibility for a loss (generally meaning having little or no control over the factors that can caused the loss) to the party that has more or all of the responsibility. By contract, on the other hand, the parties can and often do agree to shift responsibility far differently. Under virtually all forms of contractual agreement, the indemnitor also agrees to hold the indemnitee harmless,, meaning to pay its cost to defend against the claim.

Indemnity clauses in the bodily injury or property damage context, are often categorized as taking one of three formats: (i) limited form, (ii) intermediate form and (iii) broad form. Under the *limited form*, the indemnitor (the party protecting the other against the loss) agrees to reimburse the indemnitee (the party being protected) for damages or liability caused by the indemnitor's own negligence. The *intermediate form* of indemnity goes beyond simply protecting the indemnitee from the indemnitor's negligence. The indemnitor also assumes liability if the loss is caused in part by the indemnitee's negligence. Under the *broad form,* the indemnitor assumes an unqualified obligation to reimburse the indemnitee for any and all liabilities, including those losses caused by the sole fault or negligence of the indemnified party or parties.

The Illinois Construction Contract Indemnification Act[1] makes provisions in which one party to a construction project agrees to indemnify and hold another harmless from its own negligence

void as against public policy. The mere fact that an indemnity clause provided that one was to indemnify another for the other's own negligence was for many years held to be void in the Appellate District that covers Cook County. Today, it would appear that the clause is only void where it is, in fact, the indemnitee's own negligence that causes the injury.[2]

In drafting indemnification agreements, the focus should be on which party is best able to control the risk involved, such as taking steps to protect against bodily injury or defective workmanship, or best able to procure insurance to cover the risk. In most cases, the ultimate objective of an indemnity agreement should be to shift the risk of loss to an insurance company which is the party in the business of covering the costs of bodily injury and property damage, and, in some, but not all, states, the results of defective workmanship. Two factors may impact the parties' ability to achieve this ultimate objective: (a) insistence by an upper-tier party on a broader indemnity and (b) changes in the terms, conditions and interpretations of the applicable insurance policies. The result is that lower-tier parties are often in bet-the-business situations of which they are unaware and unable to control.

Indemnity clauses sought by owners and contractors are frequently broadly written and offered on a "take it or leave it" basis, often because upper-tier parties have such an advantage in bargaining power that they can insist on their form agreement. A limiting factor to this broad reach approach is that many states have "anti-indemnity" statutes that circumscribe the parties' freedom to shift certain risks through indemnity provisions.

When indemnity provisions are forced on a take-it-or-leave-it basis, the result is often that the party which ends up contractually bearing the risk is the party least able to control the risk. And, equally concerning, a party which can neither obtain the necessary insurance coverage nor bear the loss itself.

Despite the inability of a lower-tier party to bear the risk or to obtain the necessary insurance coverage, upper-tier parties resist modification of indemnity provisions either because they have already agreed to assume an identical risk in an upstream agreement, or because they fear giving some type of right away to their detriment, no matter how amorphous and unknown. Such an approach to contract negotiation generally works to no one's advantage. If a lower tier party cannot obtain the insurance required to cover a risk, then the protection offered by an agreement to indemnify to upper-tier parties becomes illusory.

The second problem in dealing with indemnity agreements involves the industry that charges premiums for spreading the risk of financial loss in the event of a casualty - the insurance industry. This industry is continually shifting the coverages offered under its standard policies, making it difficult to comprehend the coverages obtained or available.

B. Contractual Liability Coverage for Indemnity Agreements

Drafting or reviewing indemnity agreements in construction contracts requires expertise in insurance coverage issues under the law of the state governing the contract of construction. Frequently insurance coverage questions are relegated to the client's insurance broker who,

hopefully, has sufficient knowledge of the construction industry and the client to provide informed advice.

The practitioner drafting or reviewing a construction contract should review the various indemnity provisions to determine who has control over the subject matter of the indemnity and the current insurance coverages available to the party assuming the risk. Ideally, the party covering a loss should be the insurance carrier of the party most responsible for avoiding or preventing the loss, generally under the "contractual liability" coverage generally afforded by that party's commercial general liability ("CGL") policy. This is particularly true in the case of bodily injury and property damage claims. In some states, it may also be true in the case of indemnification for defective workmanship. In other states, coverage for defective workmanship is simply not available.

CGL insurance policies are generally written in terms of coverage provided, exclusions from that coverage and exceptions to the exclusions. Standard form policies exclude coverage for "bodily injury or property damage for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement." The exclusion then contains two exceptions that leave coverage under the policy in place for (1) liability assumed in an "insured contract," and (2) liability the insured would have in the absence of a contract or agreement. An "insured contract" is defined in the policy as, among other things, "[t]hat part of any other contract or agreement pertaining to your business . . . under which you assume the tort liability of another party to pay for 'bodily injury' or 'property damage' to a third person or organization. Tort liability means a liability that would be imposed by law in absence of any contract or agreement."[3] Contractual liability coverage has been a standard component of CGL policy forms promulgated by the Insurance Services Office, Inc. ("ISO") since 1986.

Generally speaking, contractual liability CGL coverage does not cover breach of contract type damages,[4] or defects in the work itself, but the latter depends upon the jurisdiction.[1] Since this is the case, lower tier parties generally seek to eliminate the duty to indemnify for breach of contract claims. From their perspective, this is one reason the broad form indemnity clause is objectionable. Such an indemnity would have to be funded from the indemnitor's own revenues rather than from insurance proceeds.

Other limitations are stated in the policy. One such limitation, important in the construction context, is that an "insured contract" does not include indemnification of an architect, engineer or surveyor for injury or damage arising out of (1) preparing, approving or failing to prepare or approve maps, shop drawings, opinions, the preparation or approval of, or the failure to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders, or drawings and specifications; or (2) giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage. A well drafted indemnity agreement contains these exclusions.

Other policy exclusions also apply. If the indemnitor does not have coverage for the occurrence under its policy, then neither does the indemnitee under the contractual liability

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[1]. See note 3.

provision. An indemnitee would not be covered under the indemnitor's CGL policy for a hazardous waste problem if the indemnitor's policy did not provide pollution coverage, for example. The indemnitee would still have rights against the indemnitor under the indemnity agreement, in such a situation, but no insurance policy would be available to provide the financial backing to the indemnity.

Except as stated above, contractual liability coverage generally will apply to liability arising from the indemnitee's joint negligence, or contributory negligence so long as the indemnity clause is valid and enforceable, the liability arises from bodily injury or property damage, and the liability is assumed in an insured contract as defined by the policy.[5] Although it has been written that the indemnittee's sole negligence would also be covered under the contractual liability provision of the indemnitor's policy,[6] such a result would seem to be contrary to the policy language defining tort liability as that which would be imposed by law in the absence of any contract or agreement.

A policy exclusion that does not apply to the contractual liability provision is the exclusion of coverage for bodily injury to the indemnitor's own employees. This exception from the exclusion is extremely important in the construction context since the indemnitor's employer's liability policy excludes coverage for contractually assumed liabilities. As a result of this exception to the exclusion, the CGL policy covers the indemnitee for actions brought to recover for bodily injury suffered, or alleged to have been suffered, by the indemnitor's employee. That is true, even. perhaps even if the employee, in bringing his or her suit, alleges the indemnitee's own negligence.

The result in the foregoing paragraph is that for which the parties contracted. The lower-tier party, which generally has more control over the work environment than upper tier parties, indemnifies the upper tier parties, and the agreement to do so is covered by a party who charges a premium for doing so and is a position to spread the risk. Unfortunately, that result will not be the case in Illinois. Anti-indemnity statutes and cost of defense issues have created a unstable, confused environment. A number of states have adopted one form or another of anti-indemnity statutes ostensibly seeking to avoid a party with weaker bargaining power from indemnifying the stronger party despite the latter's own negligence.[7] Illinois has such a statute, the Illinois Construction Contract Indemnification Act[8] which makes provisions in which one party to a construction project agrees to indemnify and hold another harmless from its own negligence void as against public policy.

Where indemnity provisions are made void by statute, a contractual liability provision providing coverage for the indemnity provision may also violate the statute and also be void. To bring suit against an indemnified party, the plaintiff must, of course, allege the negligence of the indemnified party. Any other allegation will subject the complaint to a motion to dismiss. In a state with an anti-indemnity provision, such as Illinois, if the indemnified party tenders the defense to the indemnitor's carrier, the carrier frequently will file a motion to strike the third-party complaint for indemnity on the grounds that it violates the anti-indemnity statute. Without a third-party complaint for indemnity, the indemnitor's carrier has no obligation to defend under the contractual liability provision of the indemnitor's CGL policy. When the plaintiff is an injured worker, there is also an interplay with the employer's liability insurance carrier, discussed below.

The second issue under the contractual liability provision in CGL policies, is the cost of defending the indemnitee. ISO raised the issue of the cost of defense of indemnitees in 1991 with proposed revisions to the CGL forms. It revised the CGL forms in 1996. The result was potential problems with the duty to defend the indemnitees. Until then, the prevalent practice among liability insurers was to provide a defense for their insured's indemnitees.[9] Under the revised forms, the duty to defend arises only when the insured and the indemnitee are named in the same suit. That is not the case when the plaintiff is the insured's employee. Coverage of the indemnitee when it is named in a separate suit is a "defense costs as damages" provision in the contractual liability exclusion, leaving the indemnitor's liability for the indemnitee's defense costs covered only up to the policy limits. Second, the indemnitee is obligated to notify its own carrier of the suit and coordinate coverage with the indemnitor's insurer. Contribution from the indemnitee's carrier obviously undercuts the concept of indemnity and is contrary to the purpose of the indemnification agreement. As a result, the approach to the defense of indemnitees taken in the current ISO forms falls short of providing a reliable source of defense.

Even states that have anti-indemnity provisions do not prohibit an indemnitor from also adding the indemnitee as an additional insured on the indemnitor's policy.[10] For example, in Illinois it has been held that an agreement by a contractor to furnish public liability insurance, including insurance over the other party's own negligence, is not void as in violation of Illinois construction anti-indemnity statute.[11] Thus, in those states with broad anti-indemnity statutes, the contractually required insurance coverage may in many cases be more inclusive than legally permissible indemnity agreements.[12] As a result, additional insured status has been the most direct method of guaranteeing access to defense rights under an indemnitor's policy. It may also broaden coverage to include personal injury as opposed to only bodily injury and it may provide coverage to a particular exposure not otherwise available through contractual liability coverage.[13] This result however beneficial to the contracting parties, has not escaped the attention of the insurance industry, which has been reducing the coverage under its standard additional insured endorsements. Carriers are increasingly using more restrictive policy endorsements. See discussion of additional insured endorsements below.

It is extremely important, then, to tailor the indemnitor's contractual obligation to provide additional insured coverage so as to coordinate it with the endorsement to its policy.

B. Indemnification Under Major Published Contract Provisions

1. American Institute of Architects

The indemnity provision for bodily injury and property damage is contained in AIA A201 at Subparagraph 3.18.1 which reads:

> 3.18.1 To the fullest extent permitted by law and to the extent claims, damages, losses or expenses are not covered by Project Management Protective Liability Insurance purchased by the Contractor in accordance with Paragraph 11.3, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims,

damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 3.18.

3.18.2 In claims against any person or entity indemnified under this Paragraph 3.18 by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under Subparagraph 3.18.1 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor under workers' compensation acts, disability benefit acts or other employee benefit acts.

AIA A201 does not on its face explicitly provide indemnity to an upper-tier party for its own negligence. The language in Subparagraph 3.18.1, however, does provide that the contractor's indemnity is triggered "regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder." This language certainly suggests that the owner may be able to seek indemnity from the contractor where both the owner and the contractor are at fault for causing the injury. Depending on the applicable state law, this provision could be void under the relevant anti-indemnity statute.

Subparagraph 3.18.2 also presents problems in certain states based on the interplay between the exclusive remedy of workers' compensation statutes and contractual indemnity obligations.[14] The majority of states directly addressing this issue have held that indemnification is not affected by any workers' compensation immunity the indemnitor may otherwise possess.[15]

AIA A201 takes no chances on this matter. Subparagraph 3.18.2 provides that if the party found primarily liable for a personal injury is the injured worker's employer, the obligation to indemnify is not limited by the employer's liability under workers' compensation laws.

In Illinois, Subparagraph 13.8.2 of AIA A201 is superfluous. In Illinois, any agreement to indemnify appears to operate to waive the employer's limitation of liability under the workers' compensation statute in defense to an action for contribution, although it may not entitle the indemnitee to fully enforce the indemnity.[16]

See discussion below

2. Associated General Contractors

AGC 200 provides:

10.1.1 To the fullest extent permitted by law, the Contractor shall defend, indemnify and hold the Owner, the Owner's officers, directors, members, consultants, agents and employees, the Architect/Engineer and Others harmless from all claims for bodily injury and property damage, other than to the Work Itself and other property insured under Subparagraph 10.3.4, that may arise from the performance of the Work, but only to the extent of the negligent acts or omissions of the Contractor, Subcontractors or anyone employed directly or indirectly by any of them or by anyone for whose acts any of them may be liable. The Contractor shall not be required to defend, indemnify or hold harmless the Owner, the Architect/Engineer or Others for any negligent acts, omissions of the Owner, the Architect/Engineer or Others.

10.1.2 To the fullest extent permitted by law, the Owner shall defend, indemnify and hold harmless the Contractor, its officers, directors, members, consultants, agents, and employees, Subcontractors or-anyone employed directly or indirectly by any of them or anyone for whose acts any of them may be liable from all claims for bodily injury and property damage, other than property insured under Subparagraph 10.4.1, that may arise from the performance of work by Owner, Architect/Engineer or Others, to the extent of the negligence attributed to such acts or omissions by Owner, Architect/Engineer or Others.

The comments to AIA A201 bodily injury and property damage indemnification provision generally apply here. AGC 200, however, explicitly carves out negligent acts or omissions of the owner, the design professional and others from the contractor's duty to indemnify. Similarly, this language is sufficient in some jurisdictions to waive the limitation of liability afforded by the workers' compensation act.

3. Engineers Joint Contract Documents Committee

EJCDC C-700 provides:

6.20 Indemnification

A. To the fullest extent permitted by Laws and Regulations, Contractor shall indemnify and hold harmless Owner and Engineer, and the officers, directors, partners, employees, agents, consultants and subcontractors of each and any of them from and against all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to the performance of the Work, provided that any such claim, cost, loss, or damage is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Work itself), including the loss of use resulting therefrom but only to the extent caused by any negligent act or omission of

Contractor, any Subcontractor, any Supplier, or any individual or entity directly or indirectly employed by any of them to perform any of the Work or anyone for whose acts any of them may be liable .

B. In any and all claims against Owner or Engineer or any of their respective consultants, agents, officers, directors, partners, or employees by any employee (or the survivor or personal representative of such employee) of Contractor, any Subcontractor, any Supplier, or any individual or entity directly or indirectly employed by any of them to perform any of the Work, or anyone for whose acts any of them may be liable, the indemnification obligation under Paragraph 6.20.A shall not be limited in any way by any limitation on the amount or type of damages, compensation, or benefits payable by or for Contractor or any such Subcontractor, Supplier, or other individual or entity under workers' compensation acts, disability benefit acts, or other employee benefit acts.

C. The indemnification obligations of Contractor under Paragraph 6.20.A shall not extend to the liability of Engineer and Engineer's officers, directors, partners, employees, agents, consultants and subcontractors arising out of:

1. the preparation or approval of, or the failure to prepare or approve, maps, Drawings, opinions, reports, surveys, change orders, designs, or specifications; or

2. giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage.

EJCDC C-700 contains a similar casualty indemnification clause to that of AIA A201 and AGC 200. The comments to those documents apply here as well. The EJCDC does not extend the contractor's indemnification to professional services, which is generally consistent with the limitations of the standard CGL policy that a contractor might use to insure this risk.

C. Proprietary Indemnification Agreements

1. Example #1

To the fullest extent permitted by law, Subcontractor shall indemnify and hold harmless the Contractor, the Additional Insureds (as defined herein) and their respective directors, officers, agents and employees, successors and assigns from and against all claims, damages, losses and expenses, including, but not limited to, attorneys' fees and other litigation costs arising out of or resulting from the performance of the Work, provided that any such claim, loss or expense (i) is attributable to bodily injury, sickness, disease or death, or to injury to or the destruction of property, other than the Work itself, including the loss of use resulting therefrom, and (ii) is caused in whole or in part by any negligent act or omission of the Subcontractor, any of its sub-subcontractors or suppliers, anyone directly or

indirectly employed by them or anyone for whose acts they may be liable. Such obligation shall not be construed to negate, abridge or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person described in this clause.

2. Example #2

Subcontractor agrees to indemnify, defend and hold harmless the Contractor and the Owner and their agents and employees, from and against any claim, injury, damage, cost expense or liability (including actual attorneys' fees), whether arising before or after completion of the Subcontractor's Work caused by, arising out of, resulting from or occurring in connection with the performance of the work by the Subcontractor or its agents or employees, or from any activity of the Subcontractor or its agent or employees at the Site excepting only injury to persons or damage to property caused by the partial or sole negligence of a party indemnified hereunder. In the case of claims against the Contractor, the Owner, or their agents and employees by any employee of the Subcontractor, anyone directly or indirectly employed by it or anyone for whose acts it may be liable, the indemnification obligation under this Article XI shall not be limited in any way by any limitation on the amount or type of damages compensation or benefits payable by or for the Subcontractor under workers' compensation acts, disability benefit acts or other employee benefits acts.

3. Example #3

"If [Contractor's] work under the order involves operations by [Contractor] on the premises of [Owner] or one of its customers, [Contractor] shall take all necessary precautions to prevent the occurrence of any injury to person or damage to property during the progress of such work and, except to the extent that any such injury or damage is due solely and directly to [Owner's] or its customer's negligence, as the case may be, [Contractor] shall pay [Owner] for all loss which may result in any way from any act or omission of [Owner], its agents, employees or subcontractors[ ]"[17]

4. Example #4

If Vendor performs services * * * hereunder, Vendor agrees to indemnify and hold harmless [Owner] from all loss or the payment of all sums of money by reason of all accidents, injuries, or damages to persons or property that may happen or occur in connection therewith.[18]

II. Agreements to Insure

A. Generally

Section 3 of the Illinois Construction Contract Indemnification for Negligence Act [19]

provides that the Act does not apply to construction bonds or insurance contracts or agreements.[20] Thus, an agreement by one party to furnish public liability insurance including insurance over the other party's own negligence is not void as an indemnity provision.[21]

An agreement to provide insurance to cover an indemnity agreement has been held to be void as in violation of the construction anti-indemnification statute.[22] Illinois courts, however, appear to be leaning more toward finding an agreement to provide coverage does not violate the anti-indemnification statute. For example, an agreement that tied the indemnity agreement and the insurance agreement together was not held void where the insurance covered more than the indemnity agreement and provided that the owner would be covered as an additional insured.[23] Illinois courts have been unsettled as to whether the contract must expressly state that the insurance is to cover the other party for his own negligence.[24]

The party agreeing to provide the insurance coverage is personally liable for damages if he fails to procure and provide the coverage. The damages are, of course, what the insurance company would have paid in defending against and in paying any claim or judgment.

Once the insurance is obtained, however, it has been generally held that the party agreeing to purchase and provide the insurance bears no responsibility in the event of injury or damages, and not liable even if the insurance carrier breaches the insurance contract through no fault of the promissor.[25] Where parties to a business transaction agree to provide insurance as part of the transaction, they are mutually exculpated, meaning that they agree to seek recovery from the insurance only and not from one another.[26]

The additional insured cannot claim the right of contribution against the named insured (contractor) after the additional insured has been defended, fully protected by the insurance policy.[27] But, it has been held that the additional insured can seek contribution for any amount that is not covered by the joint policy. Where the joint insurance policy has not fully protected one of the parties against liability, there is authority to the effect that contribution should be allowed to the extent of the party's actual loss.[28]

B. Additional Insureds

1. The Purpose of Additional Insured Coverage in the Construction Context

A means by which to provide another (usually an upper tier party) with insurance coverage is to name the party as an additional insured on one's own CGL policy.

As a consequence, construction contracts generally require the general contractor to cover the owner, the owner's architect and others (such as the construction lender) as additional insureds against all claims arising from the general contractor's work. Likewise, subcontractors are generally required to cover the general contractor, the owner, the owner's architect and others as additional insureds against all claims arising from the work of the subcontractor and the subcontractor's sub-subcontractors.

Whether as part of the premium for the base policy or for an additional premium, contractor's and subcontractor's commercial general liability insurance carriers will issue an "additional insured endorsement" which may be in broad form or which may list certain classes of people or companies as additional insureds under the policy for certain types of claims if made during a certain time period. The language of the endorsement will be nowhere near as clear as this paragraph.

The agreement to make another an additional insured must be in writing if the policy so requires. *United States Fire Insurance Company v. Hartford Insurance Company.*[29] The court in *West American Insurance Company v. J.R. Construction Company,*[30] found an exception to this rule under the circumstances of that case.

There are a number of different additional insured forms used by the insurance industry and the trend by the insurance industry is toward use of the more restrictive forms in an effort to avoid coverage. This is likely to result in the classes of people listed in the additional insured endorsement as additional insureds, the types of claims required to be covered or the time in which the claims must be brought for the insurance to cover not matching the contractor's or subcontractor's obligation under the construction contract, leaving the named insured personally liable to defend and indemnify the specified additional insured party(ies) for the underlying claim.

Some of the current "standard form" additional insured endorsements are attached in Appendix A.

2. Who is Covered by the Endorsement

While the construction contract may require, say the subcontractor, to name the owner and other parties with whom the subcontractor is not in privity of contract as additional insureds, the endorsement to the subcontractor's policy may only cover any one with whom the subcontractor has contracted. That would exclude both the owner and the architect, both of whom the subcontractor is legally obligated by contract to include.

3. What is Covered

In virtually all construction contracts a party agrees to cover the additional insureds for injuries caused by the party's work. This includes injuries alleged to have been caused by the party's work after it is completed. The additional insured endorsement, however, may state that it covers the party's "ongoing operations." In that case the additional insureds are not covered by the party's insurance against claims arising after its work is completed. If such a claim arises and the carrier denies coverage, again, the party who has contracted to provide coverage will be in breach of contract and exposed to personal liability for the claim.

In the case of *Pekin Insurance Co. v. American Country Insurance Company,*[31] the roofing subcontractor agreed to provide additional insurance coverage to the general contractor, which it did. When one of the roofing subcontractors employees was injured and sued the general contractor, the general contractor tendered the claim to the roofing subcontractor's carrier, Pekin Insurance Co. It

denied coverage on the basis that it did not provide coverage for damage arising out of roofing work.

4. Whose Negligence is Covered

In *American Country Insurance Company v. Cline*[32], the additional insured endorsement stated that

> "The coverage afforded to the Additional Insured is solely limited to liability specifically resulting from the contract of the Named Insured which may be imputed to the Additional Insured."

The Plaintiff, an employee of the subcontractor, named insured, sued Pepper, the general contractor and the owner, the Additional Insureds, alleging that they were negligent. Pepper sued the subcontractor, named insured, alleging that it was negligent. The court held that the insurer had no duty to defend Pepper. The endorsement which limits liability solely to liability of the additional insured which is imputed as a result of the conduct of the named insured. It did not provide coverage where the liability may result from the negligence of both.

This left the subcontractor potentially personally liable for the cost and expenses of defending Pepper and paying the claim.

A similar result was recently obtained in *Liberty Mutual Fire Insurance Company v. Statewide Insurance Company.*[33]

5. "Other Insurance," "Primary" and "Non-Contributory"

Standard ISO CGL policies[34] read as follows:

> *If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.*
>
> *If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is abased on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all carriers.*

Where two insurance policies cover the same loss, Illinois courts will give effect to the respective "other insurance" clauses and apply them as written, but if incompatible, will pro rate coverage between the two policies.[35]

Standard construction contracts and subcontracts, however, generally provide that the lower tier party's coverage will be "primary and non-contributing with any other insurance available to the additional insureds," meaning that the lower tier party's policy will cover the claim without

contribution from other parties' policies to the extent of its policy limits.

The same thing may be accomplished by having the indemnitees (contractor, owner, A/E, etc.) request that their policies be indorsed to be excess to any other insurance furnished to them as additional insureds. It is generally considered easier to get the additional insured to request a standard endorsement reducing their carriers' exposure to liability than to get the subcontractor's carrier to agree to potentially increase its exposure to loss.

Even if the subcontractor's policy reads that it was only participatory, under Illinois law, the additional insured has the right to tender the defense solely to the lower-tier party's carrier, who then has the sole duty to defend and indemnify the general contractor without contribution from the general contractor's carrier.[36]

6. Certificates of Insurance

In American Country Insurance Company v. Cline, [37] Pepper had received an certificate of insurance from the subcontractor naming Pepper as additional insured. The subcontractor's carrier argued and the court agreed that the certificate referred to the policy, and did not create any coverage on its own. Therefore, Pepper could not rely on the certificate to determine the limits of coverage.

A similar result obtained in the case of *Pekin Insurance Co. v. American Country Insurance Company.*[38] In *Pekin,* the subcontract required a roofing subcontractor to provide the general contractor with a certificate of insurance naming the general contractor as an additional insured. The general contractor was named an additional insured on the subcontractor's policy. A disclaimer in the certificate contained the following language:

> "THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW."

The insurance policy, itself, contained the following exclusion: " 'This insurance does not apply to "bodily injury" arising out of " * * * " 'roofing- construction residential or commercial.' " The employee of a roofing subcontractor was injured on the jobsite and filed a suit against the general contractor regarding his injuries. The general contractor tendered the defense to the subcontractor's insurer. The insurer denied coverage on the basis that the policy represented by the certificate contained a policy exclusion that barred coverage.

The court in *West American Insurance Company v. J.R. Construction Company,*[39] in a liberal ruling found coverage despite the language in the certificate of insurance under the particular facts of the case.

7. Conclusion - Additional Insurance Coverage

It is important to read and try to resolve the conflicts not only between your own contracts

and additional insured endorsements, but also those of your subcontractors and sub-subcontractors upon whom you are relying for coverage.

III. The Injured Employee - the *"Kotecki* Waiver" Problem in Illinois

A. The "Typical" Fact Scenario

An employee (Able Bodie) of a subcontractor (Candoit Electric, Inc.) is injured on the job site.

Candoit Electric, Inc. is a subcontractor of Turnkey Construction on a project for International Business Solutions, Inc., the owner. Tilted, Leaning & Low, LLC is the architect.[2]

The construction contracts between International Business Solutions, Inc. and Turnkey Construction and between Turnkey Construction and Candoit Electric, Inc. contain the customary indemnity and additional insured agreements.

Able Bodie receives workers' compensation benefits from Candoit Electric's insurance carrier and brings suit against International Business Solutions, Inc., Turnkey Construction, Inc. and Tilted, Leaning & Low, LLC. to recover for his injuries.

B. Indemnity Agreements

Indemnity agreements, and the problems with finding coverage

C. Common Law

At the common law, Able Bodie may recover under the Workers Compensation Act, and he may bring suit against the contractor, owner, and maybe the architect.

Prior to 1977, the contractor, owner or architect could generally not bring a cause of action against the subcontractor, because there was no contribution among joint tortfeasors.

In 1977, the Illinois Supreme Court decided *Skinner v. Reed-Prentice Division Package Machinery Co.*, 70 Ill. 2d 1, 374 N.E.2d 437 15 Ill. Dec. 829 (1977) permitting contribution. Thereafter the contractor, owner and architect could then bring a third party action under the Illinois Contribution Act 740 ILCS 100/1 (West, 2000) against Candoit, for contribution.[40]

Section 5(b) of the Workers' Compensation Act, 820 ILCS 305/5(b) (West, 2002) provides a statutory lien whereby an employee who has received workers' compensation benefits must reimburse the employer for the full amount of the benefits from any recovery the employee retains from a third party legally liable for the employee's injuries. Accordingly, the employer had a lien

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[2] All names are intended to be fictitious.

against the common law claim by the employee against the third parties. The employer, however, could still be liable to those third parties for contribution.[41]

Historically, these claims were covered by the employer's Employer's Liability insurance carrier. They could also be covered under the contractual liability provision of the Commercial General Liability (CGL) policy.

D. *Kotecki*

In the case of *Kotecki v. Cyclops Welding Corp.*,[42] the Illinois Supreme Court decided that the employer's liability for contribution to the third parties was limited to the amount for which it was liable under the Workers' Compensation Act.

E. *Kotecki* Waiver

Then, in the cases of *Braye v. Archer-Daniels-Midland Company*,[43] and *Liccardi v. Stolt Terminals, Inc.*,[44] the Illinois Supreme Court said that the defense granted in the *Kotecki* decision could be waived.

Most construction contracts provide for a waiver of the *Kotecki* cap on liability. For example, in the Indemnity Agreement Example #2 on the first page of these notes, part of the clause reads:

> In the case of claims against the Contractor, the Owner, or their agents and employees by any employee of the Subcontractor, anyone directly or indirectly employed by it or anyone for whose acts it may be liable, the indemnification obligation under this Article XI shall not be limited in any way by any limitation on the amount or type of damages compensation or benefits payable by or for the Subcontractor under workers' compensation acts, disability benefit acts or other employee benefits acts.
>
> Likewise the AIA form A201 General Conditions contains the following provision.
>
> **3.18.2** In claims against any person or entity indemnified under this Paragraph 3.18 by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under Subparagraph 3.18.1 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor under workers' compensation acts, disability benefit acts or other employee benefit acts.

The additional language contained in the above quoted language from Example number 2 and in 3.18.2 of AIA Document A201, however, is not necessary. All the contract in *Braye v. Archer-Daniels-Midland Company* provided was

"If [the contractor's] work under the order involves operations by [the contractor]

on the premises of [the owner] or one of its customers, [the contractor] shall take all necessary precautions to prevent the occurrence of any injury to person or damage to property during the progress of such work and, except to the extent that any such injury or damage is due solely and directly to [owner's] or its customer's negligence, as the case may be, [the contractor] shall pay [the owner] for all loss which may result in any way from any act or omission of [the contractor], its agents, employees or subcontractors[ ]"

That is the language in example number 3, above.

Note, that there is nothing in the indemnity agreement about waiving the limit of liability under the Workers' Compensation Act.

The indemnity agreement at issue in *Liccardi* is just as innocuous. It read:

"If Vendor performs services * * * hereunder, Vendor agrees to indemnify and hold harmless Stolt Terminals (Chicago) Inc. from all loss or the payment of all sums of money by reason of all accidents, injuries, or damages to persons or property that may happen or occur in connection therewith."

That language was held to be a waiver of the limitation of liability for an employer.

F. A Waiver of the Kotecki Limitation of Liability as a Waiver of Insurance Coverage Under Standard Industry Policies.

1. Employer's Liability Policy

In the case of *Christy-Foltz, Inc. v. Safety Mutual Casualty Corporation n/k/a Safety National Casualty Corporation*,[45] the Illinois Appellate Court (4th District, January 7, 2000) held that a subcontractor waived the cap on liability available under *Kotecki v. Cyclops Welding Corp.* and that it was uninsured for its share of the liability to the injured employee.

In that case, an employee of Christy-Foltz was injured while working on a construction project in which Christy-Foltz was a subcontractor to Litton Industrial Services, Inc. ("LISI"). The employee filed suit against LISI which in turn, filed suit against Christy-Foltz for contribution. The appellate court held that Christy-Foltz agreed to indemnify LISI and thereby waived its *Kotecki* affirmative defense. Thus, Christy-Foltz was liable to LISI for contribution in the personal injury case brought by the employee.

Furthermore, by agreeing to waive its *Kotecki* cap on liability, the appellate court held that Christy-Foltz voluntarily assumed a loss under the subcontract, and, therefore, its excess contribution in the employee's personal injury suit is excluded from its coverage under its employer's liability insurance. Christy-Foltz was not covered for the liability.

2. Commercial General Liability (CGL) Policy

The Insurance Service Office (ISO) 1994 Commercial General Liability (CGL) policy contains two exclusions from its coverage pertaining to this issue: Workers Compensation Liability and Employer's Liability.

" This insurance does not apply to:

***

d. Workers Compensation and Similar Laws
Any obligation of the insured under a workers compensation, disability benefits or unemployment compensation law or any similar law.

e. Employer's Liability
"Bodily Injury" to:
i. An "employee" of the insured arising out of and in the course of:
(1) employment by the insured; or
(2) performing duties related to the conduct of the insured's business; or
ii. The spouse, child, parent, brother or sister of that "employee" as a consequence of paragraph (1) above.

However, the policy goes on to state: "This exclusion does not apply to liability assumed by the insured under an "insured contract." An "insured contract" is defined in the policy as, among other things, "[t]hat part of any other contract or agreement pertaining to your business ... under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in absence of any contract or agreement."

CGL carriers, however, are taking the position that by signing an indemnity agreement you are assuming the liability of another that would not be imposed by law except for the indemnity agreement, therefore, an indemnity agreement is not an "insured contract" under the definition in the policy and, therefore, the ISO CGL policy does not cover the exposure.

Some CGL carriers are also maintaining that the insured contract coverage does not apply in construction cases because it only covers the negligence of the indemnitee. Because an indemnitor's agreement to defend and hold harmless an indemnitee for its own negligence violates the Illinois Construction Contract Indemnification for Negligence Act.[46]

The cases in Illinois are in conflict.[47] For an excellent discussion on the issues of the Kotecki waiver, indemnification, and contractual liability, see *West Bend Mutual Insurance Company v. Mulligan Masonry Company*,[48] majority opinion and dissent.

Not all commercial general liability policies are on the ISO form, and you must read your own policy to determine the limits on coverage.

3. Additional insureds

Adding a party to one's policy may be means to circumvent the *Koetecki* waiver problem, provided that the additional insured endorsement meets (i) the contract terms and (ii) the circumstances surrounding the accident and ensuing litigation.

IV. Particular Contract Clauses

A. Upper Tier Party Permitted to Withhold Payment for Your Work for Insured Claims

> In the event that any such claims, loss, cost, expense, liability, damage or injury arise or are made, asserted or threatened against the Indemnitees, the Indemnitees, and each of them, shall have the right to withhold from any payments due or to become due to the Subcontractor an amount they, the Indemnitees and each of them in their sole, individual discretion, deem sufficient to protect and indemnify the Indemnitees and each of them, from and against any and all such claims, loss, cost, expense, liability, damage or injury, including legal fees and disbursements.
>
> A similar provision exists in the AIA A201.

Note, however, that AIA A201 requires the subcontractor to name the contractor and others as additional insureds. If the terms of AIA A201 are met, the contractor and other parties are covered for the contingencies set forth in the indemnity agreement. It is also in the contractor's and owner's interest that the subcontractor's sub-subcontractors and suppliers are paid. In addition the subcontractor's sub-subcontractors and suppliers have lien rights and, the general contractor has furnished a payment bond, rights against the general contractor's bond for payment. Needless to say, the subcontractor cannot pay its subcontractors and suppliers if the general contractor is holding its money pending the outcome of a personal injury claim that may not be settled for 4 to 12 years down the road.

B. Subcontractor to Provide a Bond over Personal Injury Claims

> The General Contractor, in its discretion, may require the Subcontractor to furnish a surety bond satisfactory to General Contractor guaranteeing such protection, which bond shall be furnished by the Subcontractor within five (5) days after written demand has been made therefor.

We are not aware of the existence of any commercially available bond that provides coverage against personal injury claims, but even if there is, it would cause the subcontractor to be paying two premiums for the same coverage.

C. Subcontract Provision Reads That Subcontractor's Insurance Shall be Primary and Non-Contributory

See discussion above.

D. Additional Insureds on the Umbrella Policy

In addition, Subcontractor shall maintain an umbrella liability policy providing the same coverages and with the same additional insureds as the basic policy . . .

The umbrella policy basically states that it covers risks insured by the underlying policies. It also covers risks assumed under an insured contract.. There is an employee exclusion, but this exclusion does not include "...claims covered by the scheduled underlying insurance." The form is CUP 101 (86/96).

E. Coverage for Claims Under the Scaffold Act

The insurance carrier providing the insurance required herein and hereunder, shall in no way be limited by any limitations (including statutory, judicial or common law limitations or limitations due to the sole negligence of the additional insureds). In addition, if the work or any part of it is to be performed in the State of Illinois, all such insurance shall specifically state that it covers the liability of the General Contractor, the Owner and others required in the contract documents, and their directors, officers, agents, servants and employees hereafter referred to in this Article collectively as the "Insureds") under the Structural Work Act.

This provision requires the subcontractor to insure over something that does not presently exist. It is unlikely that an insurance company will commit today to cover a statutory liability in an unknown form in the future.

F. Insure the Indemnity Clause

The insurance policies, certificates of insurance and the insurance companies providing the coverage required herein, shall be subject to the approval of the General Contractor and shall contain provisions for thirty (30) days prior written notice to the General Contractor of any material change in or cancellation of the insurance. *Subcontractor's insurance certificate shall indicate that insurance coverage for the Insureds is afforded for the Indemnification Clause.* The certificates shall be accompanied by those endorsements required in this Article or the contract documents. The Subcontractor agrees to furnish the General Contractor with the same evidence of insurance as described above for each sub-subcontractor employed by the Subcontractor. Should the Subcontractor fail to submit certificates required, the General Contractor may, but is not required to, take such steps as deemed necessary to provide proper protection and charge all costs incurred to the Subcontractor.

We have never been able to convince the insurer to issue such a certificate.

G. Subcontractor's Liability under the Indemnity Clause Shall Not be Limited by the Amount of Insurance Required to be Carried Pursuant to this Contract.

If the subcontractor's liability exceeds its policy limits, its business is at stake. And if it does, the general contractor has its own insurance for which it has already paid premiums to look to. In other words what would be a minor burden to for the general contractor, becomes a life-threatening one for the subcontractor. It is difficult to justify this type of provision.

H. Code Compliance

> The Subcontractor shall and hereby agrees to indemnify and hold harmless the General Contractor, Architect, Owner, their agents, employees or assigns (the Indemnitees) from and against all claims, loss, damage, liability, causes of action or suits, damages, judgments, awards, costs, attorney fees or any and all other expenses of any kind or nature, on account of:
>
> ... Any violation by the Subcontractor, his employees. or his agents of any law, ordinance, regulation or permit restriction applicable to the Subcontractor's performance of the Work; . . .

This is not an insurance issue, it is a contract issue and purports to impose design liability on the subcontractor. If the project is a design, bid build project, insert the words ."but only to the extent subcontractor has failed to comply with the Architects plans and specifications."

V. Obtain Insurance to Cover Obligations

It is in all parties' interest that there be insurance coverage for personal injury claims and that indemnification obligations be insured. Any other result is a bet the business alternative for the indemnitor but of little consequence to an insured indemnitee.

APPENDIX A
SELECTED ADDITIONAL INSURED ENDORSEMENTS

Liability disclaimer: The information contained herein does not constitute legal advice. The law in this area is not well settled and is constantly changing. No warranty is made of the accuracy of the information contained herein or to the availability of the coverages.

CG 20 10 (1985 edition)
To include specific persons for specific projects. (An endorsement must be issued for each project.)

ADDITIONAL INSURED - OWNERS, LESSEES OR CONTRACTORS (FORM A)

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY PART:

SCHEDULE

Name of person or organizations:

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

1. WHO IS AN INSURED (Section II) is amended to include as an additional insured the person or organization (called "additional insured") show in the Schedule but only with respect to liability arising out of:

   A. "Your work" for the additional insured(s) at the location designated above, or

   B. Acts or omissions of the additional insured(s) in connection with their general supervision of "your work" at the location shown in the Schedule.

***

The 20 09 form contains an exclusion for completed operations. If additional insured coverage over completed operations is necessary, a different endorsement will have to be used.

CG 20 10 11 (1985 edition)
To include specific persons for specific projects (An endorsement must be issued for each project.)

ADDITIONAL INSURED - OWNERS, LESSEES OR CONTRACTORS (FORM B)

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY PART:

SCHEDULE

Name of person or organizations:

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

1. WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but on ly with respect to liability arising out of "your work" for that insured by or for you.

Source: Contractual Risk Transfer, Ch. XI, International Risk Management Institute, 2004

Automatic Additional Insureds - Construction Contracts
(For use with 1986 and Later Editions of the CGL policy

The following provision is added to Section II (Who is an Insured)

5. Any person(s) or organization(s) (hereinafter called "Additional Insured" with who you agree in a written construction contract to name as an insured is an insured with respect to liability arising out of ongoing operations performed by you or on your behalf on the project specified in the construction contract, including acts or omissions of the Additional Insured in connection with the general supervision of your operations.

Source: Contractual Risk Transfer, Ch. XI, International Risk Management Institute, Oct. 2004.

If additional insured coverage over completed operations is desired or required, the following language change may effectuate the coverage.

Any person(s) or organization(s) (hereinafter called "Additional Insured" with who you agree in a written construction contract to name as an insured is an insured with respect to liability arising out of ~~ongoing operations~~ work performed by you or on your behalf on the project specified in the construction contract, including acts or omissions of the Additional Insured in connection with the general supervision of your operations.

Form AC 2030M (American Country) defined "additional insureds" as follows:
"1. 'Who is an Insured' is amended to include as an Insured the person or organization shown in the schedule as an Additional Insured. The coverage afforded to the Additional Insured is solely limited to liability specifically resulting from the conduct of the Named insured which may be imputed to the Additional Insured.
* * *
3. This endorsement provides no coverage to the Additional Insured for liability arising out of the claimed negligence of the Additional Insured, other than which may be imputed to the Additional Insured by virtue of the conduct of the Named Insured."

Endnotes - Citations

1. 740 ILCS 35/1 *et seq.* (West, 2002).

2. *Liccardi v. Stolt Terminals, Inc.*, 178 Ill. 2d 540, 687 N.E.2d 968, 227 Ill. Dec. 486 (1997).

3. *Contractual Risk Transfer,* International Risk Management Institute, Inc. *at* § X.C.

4. *Id.,* at § X.C.; *Dreis & Drump Mfg. Co. v. Phoenix Insurance Company*, 548 F.2d 681 (7th Cir. 1977).

5. *Contractual Risk Transfer,* International Risk Management Institute, Inc. *supra,* at §X.C.

6. Contractual Risk Transfer, supra, at §X.C.

7. A.H. Gwyn and P E. Davis, *Fifty State Survey of Anti-Indemnity Statutes and Related Case Law*, The Construction Lawyer, Vol. 23, No. 3, Summer, 2003.

8. 740 ILCS 35/1 *et seq.* (West, 2002).

9. *Contractual Risk Transfer, supra,* at §X.C.

10. See, Gwyn and Davis, *supra.*

11. *Lehman v. IBP*, 265 Ill. App.3d 117, 639 N.E.2d 152, 203 Ill. Dec. 113 (3rd Dist. 1994); *Duffy v. Poulos Brothers Construction Company,* 225 Ill.App.3d 38, 587 N.E.2d 1038 at 1042, 167 Ill.Dec. 423 at 427 (1st Dist. 1991).

12. E.g., *W.E. O'Neil Construction Company v. General Casualty Company of* Illinois, 321 Ill. App.3d 550, 748 N.E.2d 667, 254 Ill. Dec. 949 (1st Dist. 2001); *Juretic v. USX Corp.*, 232 Ill. App.3d 131, 596 N.E.2d 810, 173 Ill. Dec. 186 (1st Dist. 1992).

13. *Contractual Risk Transfer,* International Risk Management Institute, Inc. *supra,* at § XI. B.

14. See, Gwyn and Davis, *supra.*

15. *Id.*

16. *Braye v. Archer-Daniels-Midland Company*, 175 Ill.2d 201, 676 N.E.2d 1295, 222 Ill. Dec. 91 (1997).

17. *Braye v. Archer-Daniels-Midland Company*, 175 Ill.2d 201, 676 N.E.2d 1295, 222 Ill. Dec. 91 (1997)

18. *Liccardi v. Stolt Terminals, Inc.*, 178 Ill.2d 540, 687 N.E.2d 968, 227 Ill. Dec. 486 (1997).

19. 740 ILCS 35/1 (West, 2002).

20. 740 ILCS 35/3 (West, 2002). *Capua v. W.E. O'Neil Construction Co.,* 67 Ill.2d 255, 367 N.E.2d 669, 10 Ill. Dec. 216 (1977).

21. *Lehman v. IBP*, 265 Ill. App.3d 117, 639 N.E.2d 152, 203 Ill. Dec. 113 (3rd Dist. 1994); *Duffy V. Poulos Brothers Construction Company,* 225 Ill.App.3d 38, 587 N.E.2d 1038 at 1042, 167 Ill.Dec. 423 at 427(1st Dist. 1991); *Jokich v. Union Oil Co.* (1991), 214 Ill.App.3d 906, 158 Ill.Dec. 420, 574 N.E.2d 214 (1st Dist, 1991); *Zettel v. Paschen Construction Contractors, Inc.* (1981), 100 Ill.App.3d 614, 56 Ill.Dec. 109, 427 N.E.2d 189 + *Bosio v. Branigar Organization, Inc.* (1987), 154 Ill.App.3d 611, 107 Ill.Dec. 105, 506 N.E.2d 996 + *St. John v. City of Naperville* (1987), 155 Ill.App.3d 919, 108 Ill.Dec. 551, 508 N.E.2d 1128.

22. *GTE North, Inc. v. Henkels & McCoy, Inc.*, 245 Ill. App.3d 320, 612 N.E.2d 1375 at 1378, 184 Ill. Dec. 215 at 218 (4th Dist. 1993). See also *Shaheed v. Chicago Transit Authority*, 137 Ill. App.3d 352, 484 N.E.2d 542, 92 Ill. Dec. 27 (Dist. 1985) and *Motor Vehicle Casualty Co. v. GSF Energy, Inc.*, 193 Ill.App.3d 1, 549 N.E.2d 884, 140 Ill. Dec. 233 (Dist. 1989).

23. *W.E. O'Neil Construction Company v. General Casualty Company of* Illinois, 321 Ill. App.3d 550, 748 N.E.2d 667, 254 Ill. Dec. 949 (1st dist 2001); *Juretic v. USX Corp.*, 232 Ill. App.3d 131, 596 N.E.2d 810, 173 Ill. Dec. 186 (1st Dist. 1992). The same result obtained in *Vaughn v. Commonwealth Edison Company,* 259 Ill. App.3d 304, 632 N.E.2d 44, 197 Ill. Dec. 975 (3rd Dist. 1994) and *Lehman v. IBP, Inc.*, 265 Ill. App.3d 117, 639 N.E.2d 152, 203 Ill. Dec. 113 (3rd Dist. 1994). The issue is somewhat clouded by the appellate court decision in *Vaughn v. Commonwealth Edison Company,* 259 Ill. App.3d 304, 632 N.E.2d 44, 197 Ill. Dec. 975 (3rd Dist. 1994). In that case, the appellate court reversed the trial court and remanded the case because it found that the parties intended that the contractor's obligation to Edison would be fulfilled only if the insurance provided actually indemnified Edison in accordance with the void indemnity agreement. Thus, the court concluded that

> "Even though the indemnity clause itself is void, its inclusion in the contract is evidence of the parties' intent. Thus, viewing the contract as a whole, we cannot say that the parties intended to look solely to the insurance provided by Hunter and accept the decision of the insurer to cover the claim or not as binding upon both parties." *Id.* 259 Ill. App.3d 304 at 305, 632 N.E.2d 44 at 45, 197 Ill. Dec. 975 at 976.

In *Vaughn*, the carrier had defended with a reservation of rights and had not declared whether or not it would pay the claim (which had been settled). Thus, whether the decision is precedent for enforcing the indemnity agreement beyond the insurance which paid the claim, or only to assure that the indemnity was indemnified in the first place, is not clear. It could be cited either way.

24. Compare *Duffy v. Poulos Brothers Construction Company,* 225 Ill. App.3d 38, 587 N.E.2d 1038 at 1042, 167 Ill. Dec. 423 at 427(1st Dist. 1991) with the decision in *Tanns v. Ben A. Borenstein Company*, 293 Ill. App.3d 582, 688 N.E.2d 667, 227 Ill. Dec. 974 (1st Dist. 1997).

25. *Duffy v. Poulos Brothers Construction Company*, 225 Ill.App.3d 38, 587 N.E.2d 1038 at 1042, 167 Ill.Dec. 423 at 427(1st Dist. 1991); *West Lafayette Corporation v. Taft Contracting Company, Incorporated*, 178 F.3d 840 (7th Cir 1999). *Monical v. State Farm Insurance Company*, 211 Ill. App.3d 215 at 223, 569 N.E.2d 1230 at 1235, 155 Ill. Dec. 619 at 624 (4th Dist. 1991); *Briseno*, 197 Ill.App.3d at 905, 145 Ill.Dec. at 428, 557 N.E.2d at 198, *Vandygriff*, 87 Ill.App.3d at 378, 42 Ill.Dec. at 423, 408 N.E.2d at 1132, and *General Cigar Co.*, 323 F. Supp. at 941.)

26. *Kirincich v. Jimi Construction Company*, 267 Ill. App.3d 51, 640 N.E.2d 958, 203 Ill. Dec. 808 (2nd Dist 1994) citing *Briseno v. Chicago Union Station*, 197 I.. App.3d 902, 426 N.E.2d 196, 145 Ill. Dec. 426 (1st Dist. 1990).

27. *Monical v. State Farm Insurance Company*, 211 Ill. App.3d 215 at 223, 569 N.E.2d 1230 at 1235, 155 Ill. Dec. 619 at 624 (4th Dist. 1991); *Briseno v. Chicago Union Station*, 197 I.. App.3d 902, 426 N.E.2d 196, 145 Ill. Dec. 426 (1st Dist. 1990)..

28. Kirincich v. Jimi Construction Company, 267 Ill.App.3d 51, 640 N.E.2d 958, 203 Ill. Dec. 808 (2nd Dist. 1994).

29. 312 Ill.App.3d 153, 726 N.E.2d 126, 244 Ill.Dec. 530 (1st Dist. 2000).

30. 334 Ill.App.3d 75, 777 N.E.2d 610, 267 Ill.Dec. 807*(1st Dist. 2002)*

31. 213 Ill. App.3d 543, 572 N.E.2d 1112 (1st Dist. 1991).

32. 309 Ill. App.3d 501, 722 N.E.2d 755, 242 Ill.Dec. 971(1st Dist. 1999). A similar result was obtained in *Village of Hoffman Estates v. Cincinnati Insurance Company*, 283 Ill. App.3d 1011, 670 N.E.2d 874, 219 Ill. Dec. 196 (1st Dist. 1996).

33. 352 F.3d 1098 (7th Cir. 2003).

34. ISO CG 00 01 01 96 (1994 edition)

35. *Putnam v. New Amsterdam Casualty Co.*, 48 Ill.2d 71, 269 N.E.2d 97 (1970).

36. *John Burns Construction Company v. Indiana Insurance Company*, 189 Ill.2d 570, 727 N.E.2d 211, 244 Ill. Dec. 912 (2000).

37. 309 Ill. App.3d 501, 722 N.E.2d 755, 242 Ill.Dec. 971(1st Dist. 1999). A similar result was obtained in *Village of Hoffman Estates v. Cincinnati Insurance Company*, 283 Ill. App.3d 1011, 670 N.E.2d 874, 219 Ill. Dec. 196 (1st Dist. 1996).

38. 213 Ill. App.3d 543, 572 N.E.2d 1112 (1st Dist. 1991).

39. 334 Ill.App.3d 75, 777 N.E.2d 610, 267 Ill.Dec. 807 (1st Dist. 2002), App. Denied, 202 Ill.2d 701, 787 N.E.2d 181, 272 Ill.Dec. 366 (2003)

40. See also *Skinner v Reed-Prentice Division Package Machinery Co.* 70 Ill.2d 1, 374 N.E. 2d 437 (1977).

41. *Doyle v. Rhodes,* 101 Ill.2d 1, 461 N.E.2d 382, 77 Ill. Dc. 759 (1984).

42. 146 Ill.2d 155, 166 Ill.Dec. 1, 585 N.E.2d 1023 (1991).

43. 175 Ill.2d 201, 676 N.E.2d 1295, 222 Ill. Dec. 91 (1997).

44. 178 Ill. 2d 540, 687 N.E.2d 968, 227 Ill. Dec. 486 (1997).

45. 309 Ill.App.3d 686, 722 N.E.2d 1206, 243 Ill.Dec. 137 (4th Dist. 2000).

46. 740 ILCS 35/1 (West, 2002).

47. *Hankins v. Pekin Insurance Co.*, 305 Ill.App.3d 1088, 713 N.E.2d 1244, 239 Ill.Dec. 394 (5th Dist. 1999); *Michael Nicholas, Inc. v. Royal Insurance Company of America*, 321 Ill. App. 3d 909, 748 N.E.2d 786, 255 Ill. Dec. 82 (2nd Dist. 2001).

48. 337 Ill.App.3d 698, 786 N.E.2d 1078, 272 Ill.Dec. 244 (2nd Dist. 2003).