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Risk Management for Subcontractors

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Preface

Any construction project involves a risk of liability for damages for either personal injury or property damage. The job of a safety director or risk manager is to take the necessary steps to avoid that risk, whether by putting in place the proper worksite procedures or putting in place the proper contractual provisions. Typically, the owner and architect will attempt to push risk to the general contractor, who will attempt to push that risk to any sub-contractors. At every step along the line, the construction contracts will include terms that impact the defense and indemnity obligations of those contractors. The goal of those contracts is always to reduce risk by using somebody else's money to satisfy any claims.

A sub-contractor is usually at the end of the line. For sub-contractors, there is rarely anyplace to push that risk. Without an easy means to push that risk to somebody else's money, the sub-contractor must develop strategies to manage that risk.

For the sub-contractor, the goal must be to contractually accept as little risk as possible, to transfer the risk to other parties where possible, and most importantly, to ensure that the proper insurance coverage is in place to satisfy the contractual obligations and to defend against any potential claims.

In order for the sub-contractor to achieve this state of claim-free nirvana, the sub-contractor must be aware of the exposure it faces and must be aware of the processes which are in place to manage the risk contractually prior to the start of the work, and then to prevent, investigate and resolve issues in the field as they arise.

Obviously, the best way to avoid risk is to reduce claims both in frequency and in severity. Therefore, the first portion of this article therefore will briefly explore risk management issues for the sub-contractor and the expanding role that is played by the safety professional, and why this subject requires the safety professional to walk a fine line in certain areas. The second half will explore the legal aspects of contractual obligations involving indemnity provisions, and finally how these two parts combine to make an effective sub-contractors risk management program.

Risk Management Through Job Specific Safety Rules and Procedures

Just as every tradesperson utilizes a set of tools to perform his or her job, safety professionals also utilize a set of tools. These tools are the programs, policies and procedures that are set in place. The role of the safety professional over the past twenty-five years has evolved, although the primary responsibility remains to prevent accidents that "harm people, property, or the environment."[1] However the tools and techniques that are employed to accomplish that primary responsibility are continuing to evolve on a daily basis. Additionally safety professionals are challenged by new responsibilities in the construction environment where the only constant is change.

One basic premise of the safety profession is to promote good will and buy-in throughout the organization, from the top ranks to the tradesman. That can be through a newly developed program, a training class or a simple message that the safety professional delivers to a field worker on an individual basis. Safety professionals are constantly balancing regulations and best practices with work deadlines to achieve a more productive and efficient work environment.

As was previously mentioned, the role of the safety professional is expanding, and like the adage ‘no man is an island unto himself,’ the safety professional must seek assistance with those issues that are beyond the degree of their expertise. As we perform our duties on a daily basis, we must keep in mind Sir Isaac Newton's third law of motion which states ‘for every action there is an equal and opposite reaction.’

It is for this very reason that safety professionals must reach out to attorneys, insurance professionals and peers for the tools and techniques that we can utilize to assist us in successfully completing our professional responsibilities.

To begin, we must first analyze our situation and identify those areas which need to be addressed. This is perhaps the easiest portion of the sub-contractors safety professionals’ role in their risk management program. To accomplish this task, simply ask yourself where are you spending the most time? Is it pre-job start-up, the construction phase, or perhaps post job completion?

Pre-job start-up includes initially establishing those policies, procedures and practices to protect all employees from harm and give them the ability to recognize foreseeable safety and health hazards. This is a basic safety philosophy, and should be the focus of all of the policies, procedures and practices that the safety professional puts into place.

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[1] What is a safety professional?, BCSP.org, 2008

During the construction phase, the safety professional must provide for the identification, evaluation and control of specific, recognized or foreseeable hazards and any potential hazards that may arise during the course of construction.

Post-job completion includes assembling the documentation created during the pre-construction, construction phases, and follow-up with requirements as the circumstances dictate. This would include on-going medical treatment management for injured employees, handling all workmen's compensation claims, and the third party lawsuits.

Of course, the safety program built with our tools becomes the groundwork from which everything else rises. With that said, the words put on paper are not as important as the successful implementation and execution of those words where it counts, in practice in the field.

Some tools used in building the safety program often have an impact on our organization's risk management. Examples of this include, by no means limited to:

Safety and Health Statement	Pre Job/Task Analysis
Corporate Safety Manual	Accident/Near Miss Investigations
Job Specific Safety Plans	Accident Trend Analysis
Return to Work Policy	Routine and Ongoing Site Inspections
Drug Policy	Safety Communication

The risk management component of the safety professionals' duties has grown exponentially over the last few years. Risk Management which, as of several years ago, was simply thought of by some as the purchasing of insurance to cover risk at the best price, has dramatically shifted in recent years. The advent of new rules, regulations and requirements, combined with recent case law, has set the once sole remedy for worker injuries -- workmen's compensation -- on its ear. This litigious climate is a reflection of the general liability litigation that has plagued the industry for years.

The question in the climate that now prevails is how best to position a contractor for the inevitable. As safety professionals are involved with nearly everything companies do, safety professionals are positioned to have the most impact on the legal position our companies are put in. The main reason for this is the fact that the primary individual to make policy in a sub contractor's organization is the safety professional. From the safety policy statement to the corporate safety manual to job specific safety plans, safety professionals are continually making policy.

The safety professional must, as a result of this current climate, be concerned about the primary caveat of risk management: Risk Assessment. This dovetails with the safety professionals' own caveat: Hazard Awareness.

Like so many areas in business, one discipline casts a shadow upon another. The safety professional must keep this in mind and be aware of what can be called 'the risk assessment shadow,' which is cast upon everything the safety professional does. This is most prevalent in the post-job completion phase.

The safety and health statement demonstrates management's commitment and employee involvement in the safety and health program. This is done through communicating goals, outlining employee involvement, and providing for accountability. To this end, it is better to be vague while still making the point than be specific and right on the point.

The same idea holds true for job specific safety plans and the corporate safety manual. Although as we all know compliance with the regulations is important, safety professionals also recognize that they are minimum requirements. Safety professionals must then incorporate established best practices into our safety manual, plans, policies and procedures. However, this is an area where the safety professional must walk a thin straight line while balancing the need for compliance with established legal requirements (OSHA Regulations), and the safety and health of employees with the current legal climate. This is where the mantra 'if you give enough rope you may end up hanging yourself' applies.

When drafting a safety manual, the safety professional must keep two goals in mind. First, the safety manual should serve as a guideline as to proper procedures and rules to avoid accidents and to respond to accidents that have occurred. ***At the same time, the safety manual must be drafted in such a way as to avoid imposing additional liability for any injuries sustained.*** In drafting a safety manual, the safety professional must keep in mind that in the event of an accident, plaintiff's personal injury lawyers will go through that manual line by line to determine whether the contractor has complied with the contractor's own policies.

Frequently, safety manuals for construction contractors include broad statements of policy. Frankly, there is no real reason to include any policy statement. Obviously, the purpose of the manual is to avoid accidents. Obviously, the company would like to avoid accidents. There is no reason to state things like "*It is the policy of this company to do everything possible to avoid accidents.*" Doing so will only open the contractor to questions at trial as to whether, in fact, ***everything possible*** was done. The law imposes certain duties on contractors. The safety manual should not take on a greater duty.

The contractor must realize that the safety manual will be used and in fact dissected at any personal injury trial. If the safety manual has investigation forms, the use or lack thereof will be questioned. If the contractor does not intend to use investigation forms on each and every accident, do not include them in the safety manual. The safety manager personally can always maintain such forms to be used on a case by case basis. They need not be included in a manual for general distribution.

Further, the safety manual should not include duties that will not be regularly fulfilled. The safety manual of one Chicago-area general contractor states "Management Will . . . 3. Require all subcontractors to abide by this policy." That contractor later denied any obligation to require sub-contractors to abide by the policy. If in fact that was the case, the phrase should not have been included in the manual. The same manual provides "Job Superintendent will 1. be completely responsible for on-site safety." That contractor, despite that language, argued that it was responsible only for the safety of its own employees. If that was the case, the safety manual should have been more specific or better yet, should not have included that line at all.

Finally, neither the safety manual nor any other document should rank violations in terms of "seriousness." It should not state things such as "a certain violation is a Grade 1 violation", others

are "Grade 3 violations," and repeating a violation makes it a "Grade 5 violation." Doing so serves no real purpose and will only open the contractor to liability at trial. If the safety manager feels that a safety violation was serious and intends to document it for the personnel department or otherwise, then the nature of the violation should be described in detail. Assuming that nobody was injured by the violation, the safety manager can personally tell the individual in question of the seriousness of the violation. Ranking violations serves no purpose other than to invite liability.

The requirements of a well thought through drug testing program are an essential component to any safety program. The idea behind the program shouldn't be to catch people using drugs illegally; rather it should be geared to assist individuals and return them to work as soon as possible, with third party intervention. The drug testing element should provide employees with direction and include a mandatory self help component. Non compliance with your own program may provide you with many problems, one of which is liability.

A comprehensive return to work program is also is a strong component of any safety program. Here it is paramount that the safety professional has knowledge of an individuals physical limitations as well as the individual themselves, *e.g*., what kind of employee are they, etc. This, combined with the knowledge about the work he or she is performing is essential to a successful program. Although it is extremely advantageous to have an aggressive return to work program, the liability associated with an individual that is not 100 percent can be very costly. You do not want an injured employee to become re-injured on the job or even worse, to injure others by failure to perform properly.

Pre-job/task analysis is an essential component of the overall hazard assessment process. This enables everyone involved to analyze the potential for hazards arising from the operation. In this situation it is imperative to include all of the key players in the process. Those individuals must take ownership of the hazard identification process, as well as the solutions provided.

Another facet of our program that warrants attention is the combined accident/near miss investigations as well as the resulting trend analysis. The importance of these items cannot be stressed enough. It provides us, of course, with indicators of what is to come, and by ignoring these warnings has the potential to come back and bite us. Additionally, a well documented accident investigation will provide you with many returns if and when the case becomes litigated, you have all of the facts and you will not have to rely on memory.

Once an accident occurs, the risk manager must understand how to properly respond to the accident and how to document that accident. A key way to manage claims is to reduce them by proper responses to accidents. Mistakes are often made in the investigation that haunt contractors at trial. Throughout the investigation, the risk manager must remember that very likely everything done will be a subject of discovery at trial. As a result, notes should be to the point and should not include guess or speculation.

Upon learning of an accident, the first step must be to make sure that proper first aid has been provided. Don't assume that an ambulance has been called. ***Have that confirmed***. If the injury is relatively minor and the individual will be transported to a medical center without use of an ambulance, make sure that a fellow employee goes along, both to make sure that the injured person does in fact go to the medical center and also to make sure that the person gets there

safely. The last thing a contractor needs is to have an injured employee get into a car accident on the way to seeking medical care.

In the event that medical care is declined, it is good practice to have the employee sign a note confirming that medical care was offered and declined.

If the accident requires a site visit, then the safety professional must be cautious to watch what is said. Under no circumstances should the safety professional, or anyone involved with the incident, speculate about what may have happened. The safety professional must remember that what is said at the scene likely will be said at trial. Guess or speculation should be avoided.

Another sensitive area during accident investigation is that of picture taking. The old saying that a picture speaks a thousand words is very true. And depending who takes them and how they are taken determine if they speak for you or against you. There are few things more dangerous to a contractor than a camera in the wrong hands. Do not allow anyone who is unqualified when it comes to safety to have a camera anywhere near the site. There have been cased litigated in which project engineers unfamiliar with safety photograph an accident scene but fail to photograph things as important as fall protection, leading to arguments at trial as to whether any fall protection existed on the project. If photographs are taken, make sure they are taken for a purpose. Understand what is being documented.

Routine and on-going site inspections provide us with the check and balance piece of our safety program. Here, an opportunity exists to see all of our work in action. Unless you are a full time safety professional dedicated to only one job, this task must be delegated. The perfect person for the execution of this task is the person running the work for your company. An easy way to accomplish this is to include a place to record inspection items on a sheet which is turned in daily to the office, such as a time sheet, etc. The safety professional along with every other management team member who goes to the job site also performs an inspection as a part of their visit.

Everything discussed so far is useless unless communicated. Effective communication is paramount to an effective safety program. The challenge for the safety professional in this area is to effectively deliver a message to the receiver and to have action taken based upon that message. This pays big dividends in defending legal actions for a sub-contractor in the post-job completion phase, or serves as documentation that you were concerned enough about a situation that you took corrective action before it became a problem during the construction phase, and finally that you were able to have the foresight to adequately prepare, through training, policies or procedures in the pre-job startup phase.

Even with the best plans and programs in place, accidents will happen. As a result, a sub-contractor must be aware of the implications of such accidents. The question "Who will pay if somebody is injured on the job?" must be addressed before the contracts are finalized. The sub-contractor must understand the nature of contractual insurance and indemnity provisions, in order to both understand the risk assumes and to obtain proper insurance coverage to protect the sub-contractor for any such claims.

Risk Management Through Contractual Indemnity and Insurance Provisions

As described above, effective worksite procedures can reduce risk. Risk can also be reduced through contractual indemnity and insurance provisions. While most subcontractors cannot transfer risk to others contractually, they should understand the risk transferred to them and the associated insurance forms which will help manage that risk.

The contracts for most large construction projects will include provisions requiring one contracting party to indemnify the other for any loss arising from personal injuries or property damage that may occur during the course of the project. Sub-contractors must understand the risk that they have assumed, including whether the law of the state in question will even allow such risk transfer. In order to analyze whether there is a duty to indemnify, there must first be a determination as to whether any contract provision required indemnity. Once such a contractual provision is identified, then the issue turns to whether that provision is enforceable. The mere presence of a contract containing an indemnity agreement will not necessarily create an indemnity obligation.

As a general matter, a party's potential defenses against an action to enforce a contractual right of indemnity include the following:

(A) There was no valid agreement to indemnify;
(B) The claim is not within the scope of the indemnification agreement because:
    (1) The plaintiff is not entitled to indemnity,
    (2) The person injured is not covered by the agreement,
    (3) The claim is not related to the subject matter of the contract,
    (4) The cause of injury is not covered by the agreement; or
    (5) The underlying claim was not within the scope of the indemnity agreement;
(C) There once was a right to indemnity, but that right has been lost because:
    (1) The plaintiff waived or is estopped from asserting a claim for indemnity; and/or
    (2) The defendant had no notice or opportunity to defend the underlying claim.

Was There a Valid Contract to Indemnify?

When presented with a claim for contractual indemnity (or when attempting to present such a claim to shift a loss) the first thing to determine is whether a written indemnity contract actually exists between the relevant parties. For instance, in a case based on an alleged written agreement, the defendant may be able to show that an indemnity agreement or provision was never finalized or reduced to writing. *Karsner v. Lechters Illinois, Inc*., 771 N.E.2d 606 (2002) (overruled on other grounds *Buenz v. Frontline Transport*, 2008 WL 217619 (IL 2008)) *See also*, *Cincinnati Ins. Co. v. Konicek*, 503 N.W.2d 420 (Iowa 1993) (*general law of indemnity under contract is that no action for indemnity may be maintained until all valid conditions precedent have been met*.).

Another matter to look at is whether the alleged contract was properly executed. An indemnity agreement, like any other contract, must be properly executed in order to be enforceable. A defending party may prevail on the basis of an invalid and unenforceable contract if it proves failure to comply with the general requirements for formation or enforcement of a contract. *See*

Burcham v Procter & Gamble Manufacturing Co., 812 F.Supp 947 (ED Mo 1993) (*Under Missouri law, the indemnity agreement was not sufficiently conspicuous on contract form to warrant its enforcement; provision was in small print on back of standard purchase form and surrounded by unrelated provisions*).

Like most states, Louisiana requires a contract in order to have a right to indemnity. Where parties entered into a "side agreement" that did not include a written indemnity agreement, the Louisiana court would not impose an indemnity obligation. *Solito v. Horseshoe Entertainment*, 834 So.2d 610 (La. 2nd Cir. 2002).

Occasionally, a party will attempt to prove an indemnity agreement through "course of dealings." As such, a claim will be made for contractual indemnity where there has been no written indemnity provision for the work in question. If a claim for indemnity is based on the parties' prior course of dealings, the defendant may be able to show that the defendant did not agree to indemnify the plaintiff respecting the particular transaction at issue. This may arise where there is a blanket indemnity agreement requiring a purchase order referencing the blanket agreement, and the actual purchase order makes no such reference. That situation is not unusual, due to casual dealings between parties. Such a defense may be established by evidence that the transaction differed from previous dealings, for example, by failure to execute customary forms or documents relating to indemnity. *See Maxon Corp v Tyler Pipe Industries Inc.*, 497 NE2d 570 (Ind App 1986) (*Defendant buyer did not accept conditions imposed by plaintiff in its shipment invoice where purchase order made conditions imposed by seller invalid and those conditions were not accepted in writing by buyer*).

Where an agreement between the parties has been reduced to writing, the details of the contract will have to be reviewed in order to determine whether it is actually an indemnity agreement. *Zantop International Airlines Inc v Eastern Airlines*, 200 Mich App 344, 503 NW2d 915 (1993) (*although sales agreement required buyer to purchase insurance to benefit seller, this requirement did not establish buyer's obligation to indemnify seller against loss*). At times, the record may not be clear as to whether certain terms are included in a contract. This may occur where a contractor solicits a bid, and then a sub-contractor responds with the bid and certain additional provisions. Indiana provides statutory guidance on the issue, although other states follow the same general rules. Ind.Code 26-1-2-207 provides in part:

> A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms. *See Wilson Fertilizer & Grain v. ADM*, 654 N.E.2d 848 (Ind.App.,1995).

As a result, in order to determine if there was an indemnity provision, a party needs to review all written contacts between the parties, including bid documents which may either add or negate indemnity provisions. However, as seen immediately below, even if it can be shown that the parties did agree to indemnity, that indemnity provision still may not be enforceable.

Is the Indemnity Provision Enforceable?

An otherwise valid contract may contain an indemnity agreement that is invalid as a matter of public policy. Several states have statutes barring indemnity agreements in construction projects.

Some of those states are discussed below. Even where there is no statute directly on point, most states still disfavor contractual indemnity provisions.

Provisions found in some indemnity agreements may require or appear to require the indemnitor to indemnify the indemnitee for the consequences of the indemnitee's own negligence or fault. As noted below, however, in the construction context, many states bar indemnity for another party's "own" or "sole" negligence. Although such a provision may be valid under appropriate circumstances in some cases, the defendant may be able to rebut the plaintiff's argument that the agreement requires a party to indemnify the other party where the agreement does not clearly and unequivocally so provide. This may be possible where the language of the agreement required indemnity for "any and all claims" but did not specifically refer to loss or damage that was the plaintiff's fault. *Maxon Corp v Tyler Pipe Industries Inc*., 497 NE2d 570 (Ind App 1986) (*indemnity clause did not clearly and unequivocally indicate that buyer was to indemnify for negligence of seller where clause required indemnity for seller for loss or damage arising out of any claim of any nature involving use or misuse of goods under contract since primary concern was for proper installation and use of unit and buyer's acts in that regard*); *Argueta v Baltimore & Ohio Chicago Terminal Railroad Co*., 224 Ill App.3d 11, 166 Ill.Dec. 428, 586 N.E.2d 386 (1991) app den 144 Ill.2d 631, 169 111 Ill.Dec. 140, 591 N.E.2d 20 (1992) (*agreement which called for operator to indemnify railroad from loss and damage in connection with injury of all persons caused by negligence of operator in performing under agreement was not construed to indemnify against railroad's own negligence*).

Generally, an agreement seeking to indemnify a party for the consequences of its own negligence raises special public policy considerations. *See Moore Heating & Plumbing Inc v Huber, Hunt & Nichols*, 583 NE2d 142 (Ind App 1991); *Herter v Ringland-Johnson-Crowley Co*, 492 NW2d 672 (Iowa 1992). In order to provide indemnity for one's own negligence, the intention must be "expressed in unequivocal terms." *Roundtree v. New Orleans Aviation Board*, 844 So.2d 1091 (La. 4th Cir. 2003), *Home Ins. Co. of Illinois v. National Tea Co*., 588 So.2d 361 (La. 1991). Louisiana law, like that of many other states, requires that the indemnity language express a clear and unequivocal intent to indemnify the indemnitee for claims arising from its own negligence.

Illinois disfavors indemnity provisions. It has been well-settled in Illinois that indemnity contracts will not be construed as providing indemnity for the indemnitee’s "own negligence" unless that result is made absolutely clear by the indemnity provision. *See Westinghouse Electric v. La Salle Monroe Bldg. Corporation*, 395 Ill. 429, 70 N.E. 604 (1947). In the construction context, Illinois also has a statutory ban discussed below.

According to Illinois courts, the intent to indemnify for one's own negligence is "unusual and extraordinary" and the contract must include such an intent in express terms. *Karsner v. Lechters Illinois, Inc.*, 331 Ill.App.3d 474, 771 N.E.2d 606, 264 Ill.Dec. 902 (3rd Dist. 2002).

Such agreements may be strictly construed against indemnity for a negligent party due to these public policy considerations. *E.g. Frederickson v Alton M. Johnson Co*, 402 NW2d 794 (Minn 1987). A defendant may be able to foil an attempt at enforcement of an indemnity agreement if it can prove that the agreement does not clearly contain the intent to indemnify a party against its own negligence. Moreover, a party may submit extrinsic evidence that the defendant did not willingly and knowingly entered into an indemnity agreement relieving the plaintiff of its negligence. *See Burcham v Procter & Gamble Manufacturing Co*, 812 F.Supp 947 (ED Mo 1993)

(*Under Missouri law; an indemnitor must have fair notice of existence of agreement indemnifying indemnitee against its own negligence*); *Maxon Corp v Tyler Pipe Industries Inc,* 497 NE2d 570 (Ind App 1986) (*imposition of broad indemnity requirement without knowledge and express assent of indemnitor may be unconscionable*).

Conversely, Texas is more inclined to enforce an indemnity provision. Under Texas law, risk-shifting clauses must satisfy two fair notice requirements before they will be enforced: The express negligence doctrine, and the conspicuousness requirement. *Douglas Cablevision IV, L.P. v. Southwestern Electric Power Company*, 992 S.W.2d 503 (Tex. App.-Texarkana 1999). The express negligence doctrine requires a party seeking indemnity from the consequences of that party's own negligence to express the intent in specific terms within the four corners of the contract. *Id.* at 506-7. The second requirement requires that the provision be conspicuous. A provision is conspicuous if a reasonable person against whom a clause is to operate ought to have noticed the clause. *Id*. at 507. The conspicuous standard can be met by a heading printed in capital letters and by text printed in larger or contrasting type. *Id.* at 509.

In the *Douglas case*, for example, the court refused to enforce an indemnity agreement which required one party to indemnify another for the second party's own negligence where the language was contained in two sentences spanning one-half page of a thirteen-page document; the court found the provision was not conspicuous and failed to meet the fair notice requirement. Compliance with the fair notice requirements is a question of law for the court. *Id*. at 507.

Texas courts have also found indemnification agreements unenforceable for failing to meet the fair notice requirement where the word "negligence" was not mentioned in the agreement. *See Gulf Coast Masonry, Inc. v. Owens-Illinois, Inc*., 739 S.W.2d 239 (Tex. 1987) (indemnity agreement did not comply with express negligence doctrine when contractor agreed to indemnify the owner for losses "arising out of or in any way connected with or attributable to the performance or non-performance of work hereunder by contractor . . . ").

Finally, the fair notice requirements are not applicable when the indemnitee establishes the indemnitor had actual notice or knowledge of the indemnity agreement. The indemnitee has the burden of establishing actual notice or knowledge. *Coastal Transport Co. v. Crown Central Petroleum Corp*., 20 S.W.3d 119 (Tex. App.-Houston 2000).

Indemnitees seeking indemnity for the consequences of their own negligence which proximately causes injury jointly and concurrently with the indemnitor's negligence must also meet the express negligence test. *Ethyl Corp. v. Daniel Construction Co*., 725 S.W.2d 705 (Tex. 1987). Parties may contract for comparative indemnity, therefore, so long as they comply with the express negligence doctrine. *Id*.

State Anti-Indemnity Laws—Construction

Illinois

Illinois law bars indemnity agreements in construction contracts where the indemnity agreement seeks to hold harmless another for that person's "own negligence." 740 ILCS 35/1 et seq. For example, where a general contractor negligently supervises a construction site causing injury to an employee of a sub-contractor, the general contractor cannot rely on an indemnity agreement to shift the loss to the sub-contractor. However, pursuant to the statute, a contract to procure

insurance is not considered an indemnity contract. 740 ILCS 35/3. To use the same example as above, the general contractor would be able to shift the loss to the sub-contractor by use of insurance, i.e by requiring the sub-contractor to name the general contractor on the sub-contractor's Commercial General Liability (CGL) policy.

The statute does not apply outside the construction context. For instance, an indemnity contract in a maintenance contract may be upheld. Further, in such circumstances, the loss may be a covered loss under the "insured contract" provisions of the CGL policy.

Depending on the work being done, there may be an issue as to whether the work was "construction work." In Liccardi v. Stolt Terminals, 283 Ill.App.3d 141, 669 N.E.2d 1192, 218 Ill.Dec. 666 (1st Dist. 1996), the plaintiff was injured while cleaning a storage tank. The plaintiff sued the owner of the premises, who then filed a Third Party Complaint against the plaintiff's employer. The Court found that the indemnity contract at issue was in violation of the Indemnity Act. Liccardi, 283 Ill.App.3d at 147-148, N.E.2d 1198, Ill.Dec. 672 (That decision did allow a contribution, rather than indemnity action based on the contract, to go forward). Likewise, in Jandrisits v. Village of River Grove, 283 Ill.App.3d 152, 669 N.E.2d 1166, 218 Ill.Dec. 640 (1st Dist. 1996), indemnity provisions in a contract to repair a sidewalk were found to violate the Indemnity Act.

However, in North River Insurance Co. v. Jones, 275 Ill.App.3d 175, 655 N.E.2d 987, 211 Ill.Dec. 604 (1st Dist. 1995), the Court found was faced with a case where a landowner sought indemnity from the installer of a fire alarm system. The installer of the fire alarm system claimed that the indemnity agreement violated the Indemnity Act. The Court looked to the alleged purpose of the Indemnity Act (to protect construction workers) as opposed to the wording of the Indemnity Act, and found that, since the fire and loss occurred after installation was complete, the Indemnity Act did not apply. North River at Ill.App.3d 180, N.E.2d 991-992, Ill.Dec. 608-609.

Michigan
Michigan has an indemnity statute that appears to be substantially similar to the Illinois statute, MCLA 691.991. However, rather than barring a shift of a contractor's "own negligence", the statute bars a shift of "sole negligence." Under that statute, loss for a contractor's "sole negligence" cannot be shifted. As noted below, there is a difference between "own negligence" and "sole negligence."

In analyzing whether an insurance contract calls for indemnity of "sole negligence" a Michigan court will look to 1) The language of the contract, 2) The situation of the parties and 3) The circumstances surrounding the contract. Vanden Bosch v. Consumers Power Co., 394 Mich. 428, 230 N.W.2d 271 (1975). Where the indemnity provision contains phrases such as "any" and "all" and "any and all", the Court will presume that the provision was for "own negligence" and as such, will assume that the provision is invalid. Pritts v. I. Case Co., 108 Mich.App. 22, 310 N.W.2d 261 (1981).

Even where the contract does not explicitly say "sole negligence", a Michigan court may still find it violates the statute. In the absence of any contracts to the contrary, Michigan bars contribution actions against the plaintiff s employer. Ordinarily, contribution is not available since the Workmen's Compensation Act provides the only basis of recovery by the plaintiff against the employer. Husted v. Consumers Power Co., 376 Mich. 41, 135 N.W.2d 370 (1965). However,

indemnification may still be available at common law, Husted v. Consumers Power Co., Indemnity Ins. Co. of North America v. Otis Elevator Co., 315 Mich. 393, 24 N.W.2d 104 (1946).

In analyzing the indemnity claim, Michigan courts will ask whether the actions of the party seeking indemnity were "active negligence" or "passive negligence." Where a party has been actively negligent, the party cannot obtain indemnity. Hardy v. Monsanto Enviro-Chem Systems, Inc. 323 N.W.2d 270 (1982).

Finally, Michigan will allow an insurer to enforce an indemnity contract by way of a subrogation action. Liberty Mutual v. Vanderbrush Sheet Metal, 512 F.Supp. 1159 (1981).

Missouri
Missouri has a construction anti-indemnity statute that provides that, with only limited exceptions, any clause in a construction contract in which a party agrees to indemnify or hold harmless another person for that other person's own negligence is void as against public policy and wholly unenforceable. VAMS Section 434.100. Two exceptions though, are particularly relevant. The first provides that the statute does not bar contracts to procure insurance. The second provides that where there is both an indemnity agreement and an insurance provision, the indemnity provision will be enforced to the extent of the relevant insurance.

Indiana
Indiana also has a construction anti-indemnity statute. Under that law, indemnity contracts are void as against public policy where they seek to provide indemnity either for sole negligence or for willful misconduct. IN Stat 26-2-5-1. Where the cause of the injury was not "solely" by the party seeking to be indemnified, the Indiana courts will allow indemnity. Moore Heating & Plumbing, Inc. v. Huber, Hunt & Nichols, App. 1 Dist.1991, 583 N.E.2d 142

Under Indiana law, a right to indemnity may be implied at common law only in favor of one whose liability to third person is solely derivative or constructive and only as against one who has by his wrongful act caused such derivative or constructive liability to be imposed upon indemnitee. McClish v. Niagara Mach. and Tool Works, S.D.Ind. 1967, 266 F.Supp. 987.

Non-Public Policy Considerations: Does the Indemnity Agreement Apply to the Loss?

As noted above, an indemnity demand can be denied because the contract was not proper in form. It can also be denied because in the state in question, the indemnity provision is found to be in violation of public policy. There is also a third potential basis to deny an indemnity obligation: Because an otherwise valid indemnity provision does not apply to the loss in question.

For a claimant to enforce a right to indemnity, the claimant will need to establish that the particular injury falls within the scope of the indemnity agreement. Indemnity agreements typically identify those persons whose injuries are to be covered by the indemnity obligation, often referring to any and all persons. *Howe v Lever Brothers Co*, 851 SW2d 769 (Mo App 1993) (*all persons*). However, where the indemnity agreement specifies particular persons as those whose injuries are covered by indemnification provisions, the defendant in an action to enforce a contractual right of indemnity may prevail by showing that the injured person was not among those for whose injuries indemnity was to be paid. Such a claim may lie outside the scope of the indemnity agreement in a number of ways, including:

The plaintiff was not a person entitled to indemnity under the agreement;

The plaintiff was not responsible for damages on the underlying claim;

The person whose injury provides the basis for the indemnity claim was not among those persons to whom the indemnity agreement applied;

The underlying personal injury claim did not bear the required relationship to the subject of the parties' contract;

The cause of the injury was not one of those specified by the agreement as subject to indemnity.

The determination whether a particular situation falls within the scope of an indemnity agreement depends, in large part, on the construction of the indemnity agreement. An indemnity agreement typically includes among its terms a description of those persons who may be indemnified in the event a covered person suffers injury or loss. *Howe v Lever Brothers Co*, 851 SW2d 769 (Mo App 1993) (*second tier subcontractor agreed to indemnify and hold harmless first tier subcontractor and property owner*). Thus, the defendant in an action to enforce a contractual right to indemnity may prevail where the plaintiff is not among those persons intended to be indemnified under the parties' agreement. *Frederickson v Alton M Johnson* Co, 402 NW2d 794 (Minn 1987) (*subcontractor's agreement to indemnify general contractor did not amount to agreement to indemnify project engineers where engineers were not mentioned and terms of general contract protecting engineers were not incorporated into subcontract*).

Similarly, a plaintiffs' claim that it is entitled to indemnity as a third party beneficiary of the contract may be overcome by evidence that the plaintiff does not hold that status. *Paul v Bogle*, 193 Mich App 479, 484 NW2d 728 (1992) (*driver's claim that he was third-party beneficiary of indemnity agreement in lease since he drove tractor on behalf of both parties was rejected, since driver was not mentioned in contract which dealt with allocation of liability between parties to lease*). In attempting to establish that the plaintiff is not among those entitled to indemnity under the parties' agreement, the defendant may benefit from a rule that indemnitee status under an indemnity agreement is to be narrowly construed.

Since the plaintiff in an action to enforce a contractual right to indemnity must establish both the plaintiff's responsibility on the underlying personal injury claim and that the injury was covered by the indemnity agreement, the defendant may defeat an indemnity claim by evidence that the plaintiff was not responsible on the underlying claim. The nature of the requisite responsibility of the plaintiff on the underlying claim depends on the terms of the indemnity agreement. Where the language of the agreement requires actual rather than merely potential liability on the part of the plaintiff, the defendant may be able to avoid liability by showing that actual liability on the underlying claim has not attached or been determined.

Another avenue to attack an indemnity claim exists when the claim is brought after the settlement of an underlying claim. Since settlements often provide the basis for the plaintiffs' claim for indemnity, the defendant may attack the validity of the settlement as a means of showing lack of the requisite responsibility on the underlying claim. Evidence that the plaintiff’s settlement of the underlying claim was not reasonable may provide a basis for such a showing.

Indemnity agreements frequently limit indemnity coverage to injuries having a specified relationship to the subject matter of the larger contract between the parties. *Burlington Northern Railroad Co v Chicago & Northwestern Transportation Co*, 851 SW2d 28 (Mo App 1993) (*agreement called for indemnity for injury or loss arising out of, resulting from, or connected with defendant's use of leased property*). In such a case, the defendant's showing that the injury on which the plaintiff's indemnity claim is based was not related to the performance of the contract will avoid liability in an action to enforce a contractual right of indemnity.

Where the indemnity agreement broadly refers to indemnity for injury or loss arising out of, resulting from, or connected to the performance of the parties' contract, the defendant may be able to establish the absence of the requisite relationship between the injury and the subject matter of the contract by evidence of a number of factors, including:

> The occurrence of the injury when the injured person was on break or off the job. *Fossum v Kraus-Anderson Construction Co*, 372 NW2d 415 (Minn App 1985) (*offsite and after-hours injury sustained by foreman of construction site did not arise out of or result from performance of contract even though foreman was on way home from work at time of injur*y); or
>
> The occurrence of the injury when the injured person was performing work other than that specified by the contract.

In certain agreements, the obligation to indemnify may be limited to injury related to the conduct required of the indemnitor, and may not include an injury involving conduct of the indemnitee which does not relate to the performance contracted for by the indemnitor. The prerequisite that the act or omission be related to the subject matter of the contract related to the conduct of the indemnitor required under the contract and not the conduct of the injured person. Thus, if the indemnitee was negligent in causing the injury but that negligence did not relate to the indemnitee's responsibilities under the contract with the indemnitor, there was no right to indemnification from the indemnitor, even if the injured person was performing his or her responsibilities under the contract at the time of injury.

Where the indemnity agreement uses specific terms in describing the required relationship between the injury and subject matter of the contract, for example, where it limits coverage to injuries occurring in a particular area or location, evidence that the injury took place outside that area may establish that the plaintiffs claim lacks the requisite relationship. *Gaines v Illinois Central Railroad*, 796 F.Supp 313 (ND Ill 1992) (*Although agreement provided for indemnity for injury on or about sidetrack, defendant shipper was not required to indemnify railroad for injury to worker on adjoining passing track since passing track had no connection to sidetrack covered by agreement*)

Where an indemnity agreement which limits indemnity to claims arising from injuries related to particular products or items, evidence that the injury did not involve the stated products or items will ordinarily be sufficient to show that the claim lacks the required relationship to the subject matter of the contract. *TLB Plastics Corp v Procter & Gamble Paper Products Co*, 542 NE2d 1373 (Ind App 1989) (*although indemnity agreement covered injury or loss from products shipped, this did not encompass machines provided by owner for manufacturer to use in fulfilling*

manufacturing contract, since machines were not products manufactured for shipment elsewhere; fact that owner could recall machines did not make them shipped products).

Indemnity agreements commonly limit covered injuries in terms of their causes or causal agents. The most frequent limitation of this type conditions the obligation to indemnify on the indemnitors' having caused or contributed to the underlying injury. *Frederickson v Alton M Johnson Co,* 402 NW2d 794 (Minn 1987) (*subcontractor agreed to indemnify general contractor for injuries to persons arising out of subcontract when cause of injury was event or act within control of subcontractor*). In such a case, the defendant may be able to show that the injury does not fall within the scope of its obligation to indemnify the plaintiff by evidence that it was not at fault or negligent in connection with the injury.

Some indemnity agreements may impose limitations relating to the indemnitee's as well as the indemnitor's role in causing the underlying injury, denying or limiting indemnity where the indemnitee was wholly or partly responsible. *Doran v Corn Products-US, Division of CPC International Inc,* 776 F.Supp 368 (ND Ill 1991) (*Illinois law; electrical worker performing maintenance on precipitator was injured by electrical shock due to malfunction of automatic safety device on precipitator and lack of proper grounding; injury was attributable to negligence of owner of precipitator who was therefore not entitled to indemnity*); *Argueta v Baltimore & Ohio Chicago Terminal Railroad Co*, 224 Ill App3d 11, 166 Ill Dec 428, 586 NE2d 386 (1991)app den 144 1112d 631, 169 Ill Dec 140, 591 NE2d 20 (1992) (*failure of railroad to repair potholes in cement surfaces on which crane travelled and failure to inspect and replace crane parts which failed was negligence which prevented railroad from recovering indemnity from crane operator*).

Apart from considerations involving the existence, validity, and application of the indemnity agreement, in some circumstances the defendant may be able to show conduct by the plaintiffs that may preclude its assertion of a contractual right to indemnity. For example, the defendant may be able to show that the plaintiff engaged in conduct amounting to a waiver of any right to indemnity under the contract. The defendant may establish the plaintiffs waiver by evidence that the plaintiff acted inconsistently with an intent to pursue indemnity. Similarly, evidence of failure to assert a right to indemnity in circumstances in which it would be natural to do so may support a defense of estoppel against the plaintiff.

In some circumstances the doctrine of acquiescence may be invoked to limit the plaintiffs' right to indemnity where the plaintiff has acquiesced in the condition which gave rise to the underlying liability. *Hader v St Louis Southwestern Railway Co*, 207 Ill App3d 1001, 152 Ill.Dec. 859, 566 N.E.2d 736 app den 139 Ill.2d 595, 159 Ill Dec 107, 575 NE2d 914 (1991). However, this doctrine may apply only where the defendant can show serious fault on the part of the plaintiff; mere knowledge of a dangerous condition may not be sufficient. Moreover, it may be argued that the defense of acquiescence should not be available at all in a case in which there is a contractual indemnity agreement, since the rights of the parties should be determined first by their contract.

A defendant should also raise the argument that the plaintiff was not responsible on the underlying claim. If the terms of the indemnity agreement require actual rather than merely potential liability on the part of the plaintiff, the defendant may be able to avoid liability by showing that actual liability on the underlying claim has not attached or been determined.

Loss Shifting Through Insurance Provisions and the Additional Insured Endorsement

As described above, a loss may be shifted through the use of an indemnity provision. The second major loss shifting method is through insurance provisions and specifically through additional insured endorsements. Subcontractors are faced with the following:

1. They must identify what insurance is required (is proof of their own insurance all that is required, must they add a party as additional insured under certain policies, and which policies are implicated are all issues that must be addressed);
2. They must obtain the insurance;
3. They must be ready to prove they have taken the necessary steps to obtain that coverage.

The construction sub-contract will typically require that a sub-contractor name the general contractor and others [often the project owner and architect] as additional insureds on the sub-contractor's Commercial General Liability policy. The subcontract will usually specify that the additional insured coverage will provide coverage to the general contractor and owner for any liabilities "arising out of" the work of the subcontractor. Finally, the insurance provision may require the subcontractor to provide the general contractor with a certificate of insurance showing that the additional insured coverage has been obtained before it can begin doing work on the project.

A determination of whether the insurance provision requires an insurer to defend and/or indemnify depends on both the language of the construction contract and the language of the additional insured endorsement.

Additional Insured provisions contain several potential pitfalls. Initially, the fact that they are common may at times lead to a lax attitude about them. As a result, the certificates are at times issued even when not required by a contract. At times, risk managers routinely request certificates on all projects or on projects of a certain size, and in doing so, potentially create claims against their policies where not required by any contract.

As a general rule, certificates of insurance are for information only and where there is a conflict between the certificate and the policy, the policy controls. *Ferguson v. Plummers's Towing*, 753 So.2d 398 (La. App. 1st Cir. 2000). However, a purported additional insured may be able to show reliance up the certificate in order to establish coverage. Further, if it can be shown that the insurer accepted a premium for the certificate, then coverage may be established. *See Ahner v. Hatfield*, 865 So.2d 205 (La.App. 4th Cir 2003). Further, the acts of one procuring insurance as an agent are imputable to the insurer. An agent has the authority to bind the insurer. *Coco v. Southern United Fire Insurance Co*., 682 So.2d 1014 (La.App.3d Cir. 1996). Therefore, subcontractors should be careful about requesting certificates only when required by contract.

However, a failure to issue a certificate or coverage when required to do so by contract would also be dangerous. In the event the general contractor or owner is sued by a subcontractor's employee, the absence of the additional insured coverage as required by the subcontract would leave the subcontractor vulnerable to a lawsuit for breach of contract for failure to procure insurance. A subcontractor's workers compensation policy would probably not provide insurance

coverage for such a lawsuit. The subcontractor, therefore, could be liable for all of the general contractor's attorney's fees in defending the employee's suit and the amount of any settlement or judgment entered against the general contractor.

Additional Insured endorsements come in two basic types. The first is a "scheduled" endorsement. Under that type of endorsement, a specific entity is added to the policy as an additional insured.

The second type of Additional Insured endorsement is a "blanket" endorsement. Under that endorsement, any entity meeting certain criteria is automatically made an additional insured. Typically, blanket endorsements confer additional insured status on any entity whom the named insured agrees in writing to name as an additional insured.

Certain contracts require coverage under specified policy forms. If the contract includes the phrase "CG2010" -- a common scheduled endorsement form -- then the contractor should be sure to contact its insurer to make sure that the necessary parties are added under that form.

Finally, it is good practice to confirm any additional insured requests in writing. A note to an insurance producer should state something along the lines of "Please add General Contractor X and Owner Y to our CGL policy under form CG2010, and please issue the corresponding certificate." In the alternative, if there is any confusion a copy of the contract's insurance provision should be sent to the producer with a request to issue the necessary certificate.

Conclusion

In order for your business to thrive, risk must be properly addressed. Solid work rules and procedures, well communicated to the field with appropriate follow up, is the most basic way to reduce risk. Where there are fewer claims, there is less risk.

At the same time, the sub-contractor must understand the risk accepted by contract, understand whether the indemnity provisions are enforceable, and shift that risk appropriately to insurers.

Through appropriate use of those methods, the subcontractor can then focus more on producing quality work with the knowledge that risk has been reduced.