

Publications - Coverage Considerations

COVERAGE CONSIDERATIONS

INDEMNITY & HOLD HARMLESS PROVISIONS BUSINESS RISK EXCLUSIONS

RISK ASSESSMENT & CLAIMS EVALUATION

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I. COVERAGE EXAMINATION

- Coverage Analysis

In order to determine whether coverage is afforded under an insurance policy for the costs of a defense or indemnity, it is necessary to consider: The terms, conditions and provisions of the coverage set forth in the insurance policy which is implicated; together with the claims asserted against the insured in the underlying action; the extrinsic evidence revealed during the course of a good faith investigation, the evidence presented during the course of a trial, as well as the judgment rendered against the insured.^[1]

In order to perform a coverage analysis of the indemnity obligation of the insurer to pay a final judgment against the insured, it is necessary to compare the ultimate liability assessed against the insured, predicated upon the actual causes of action which are alleged in the Complaint, with the coverages set forth in the insurance policy.

1.Duty to Defend

Under current Maryland law, the insurer's duty to defend is determined by the allegations brought against the insured and any *extrinsic facts* known to the insurer which may raise the potentiality of coverage under the policy. If the allegations of the Complaint state any cause of action potentially within the coverage afforded by the insurance policy, or if any **extrinsic facts** made known to the insurer could potentially bring the claim within the coverage afforded by the insurance contract, the insurer must defend the claim.^[2] Prior to relatively recent developments in Maryland insurance law, the scope of the insurer's duty to defend was defined as follows:

The obligation of an insurer to defend its insured under a contract provision such as here involved is determined by the allegations in the tort action. If the plaintiffs in the tort suits allege a claim covered by the policy, the insurer has a duty to defend. Even if a tort plaintiff does not allege facts which clearly bring the claim within or without the policy coverage, the insurer still must defend if there is a **potentiality** that the claim could be covered by the policy.^[3]

Under the *four corners doctrine*, in order to determine whether a liability insurer owed a duty to provide its insured with a defense to a tort action, the insurer was only obligated to analyze the provisions of the policy in conjunction with the allegations contained in the Complaint.^[4] If the allegations stated any claim within the policy coverage, the insurer was obligated to provide a defense; but in making the coverage determination, the insurer was not required to look beyond the four corners of the Complaint.

However, the obligation of the insurer with regard to the duty to defend was significantly broadened by the Maryland Court of Appeals in the decision of *Aetna v. Cochran*.^[5] The *Cochran* Court held that the allegations of the Complaint and the specific terms and provisions of the insurance policy are **not** the only

means of establishing a potentiality of coverage. “The insurer must defend its insured if it appears from a suit **or other sources available at the time** that there is a potential of liability under the policy.”^[6] The Court specifically held that **an insured may use extrinsic evidence to establish a potentiality of coverage under the policy and trigger the insurer’s duty to defend.**^[7]

In permitting an insured to establish a potentiality of coverage by reference to sources beyond the policy and the Complaint, however, the Court further held that the use of such extrinsic evidence is not unlimited, and imposed the following conditions:

Only if an insured demonstrates that there is a **reasonable potential** that the issue triggering coverage will be generated at trial can evidence to support the insured’s assertion be used to establish a potentiality of coverage under an insurance policy.^[8]

As a result, the Court placed the initial burden of raising any extrinsic evidence relevant to coverage with the insured, premised upon the requirement that any such evidence be reasonably likely to be generated at trial.^[9] Once extrinsic evidence has been raised, the burden shifts to the insurer to fully investigate the nature and legal significance of the extrinsic evidence in order to make a proper determination with regard to coverage.^[10] In making the determination of coverage, any ambiguity must still be resolved in favor of the insured.^[11] Although the duty to defend is broader than the duty to indemnify, nothing requires the duty to defend to be larger than the scope of the terms and provisions of the policy.^[12]

In order to determine whether the insurer owes any duty to provide a defense to its insured under an insurance policy, the specific terms and provisions of the policies issued to the insured must be analyzed in comparison with the allegations contained within the underlying action together with any **extrinsic facts** made known to the insurer which could potentially bring the claim within the coverages afforded by the insurance contract

2. Duty to Indemnify

In Maryland, the indemnity obligation of the insurer is dependent upon the **legal obligation** of the insured as determined by the ultimate liability of the insured predicated upon the **causes of action** set forth in the Complaint. The law in the State of Maryland is crystalline that the legal obligation of the insured, as determined by the **jury verdict** on the **asserted causes of action against the assured**, is determinative of the issue of whether there is a duty to indemnify. In Maryland, the duty of an insurer to pay a final judgment against the insured depends upon a comparison of the **ultimate liability assessed** against the insured predicated upon the actual causes of action which are alleged in the Complaint with the coverage provisions set forth in the policy.¹³ The Maryland Court of Appeals recently has given clear indication that the cause of action which is **legally alleged** is the determinative issue in adjudicating coverage issues presented under an insurance policy.¹⁴ In *Lititz*,¹⁵ the court rejected the efforts of a tort plaintiff to convert an intentional tort into a negligence action in order to seek coverage under an insurance policy.

Under the terms of the liability policy, Lititz Mutual Insurance Company's "Lititz" liability coverage under the policy "do[es] not apply to bodily injury or property damage...which is expected or intended by the insured[.]"

In view of this provision, the Court of Appeals of Maryland noted that:

This case presents another effort by a tort plaintiff to avoid the operation of an exclusion for bodily injury that is expected or intended by the insured. Here the plaintiff's submission is that, due to a psychiatric disorder, the alleged insured had no intent to injure the plaintiff when the former struck the latter with his fist. As we explain below, this attempt to convert a battery into negligence fails on the fact and the law.¹⁶

In Lititz, the plaintiff unsuccessfully attempted to apply the Sheets¹⁷ ruling beyond its intended scope. The Court of Appeals, in rejecting an extension of Sheets to cases beyond the limited application to negligence causes of action, stated:

The plaintiff relied on Sheets v. Brethren Mutual Insurance Co. for the similar proposition that "an act of negligence constitutes an 'accident' under a liability insurance policy when the resulting damage was 'an event that takes place without [the insured's] foresight or expectations.'"¹⁸

The Court stated that the plaintiff's reliance on the Sheets rationale "ignores the concept that where the facts indicated a battery, the harm is the contact itself."¹⁹ The Court of Appeals declined to apply the Sheets ruling, and instead ruled that the law of battery was predicated upon the facts of the case, and not negligence, and thus battery controlled the coverage determination.

Therefore, in Maryland, the indemnity obligation of the insured to pay a final judgment depends upon a comparison of the ultimate liability assessed against the insured, predicated upon the actual causes of which are alleged in the underlying complaint, with the coverages set forth in the policy.²⁰ The Court of Appeals of Maryland has given clear indication that the cause of action which is *legally alleged* in the complaint is the determinative issue in adjudicating coverage issues presented under an insurance policy and *not that which could have been alleged*.²¹

- **Business Risk Exclusions**

The interpretation that the majority of courts have made regarding the extent of coverage afforded under a CGL policy is premised upon the concept that an insured's contractor's work gives rise to two (2) different types of risk. The *first type of risk* involves the typical situation, where a contractor holds itself out as being capable of completing the bargained-for contractual performance in a workmanlike manner. In these instances, the property owner relies upon the *representation(s)* of the contractor with respect to the quality of the goods, services and materials and the ability of the contractor to provide them, and anticipates the receipt of the goods, services and materials as warranted. When the contractor's work does not measure up to the quality and character of that which was represented, either express or implied warranties and representations of the quality of goods, services and materials are breached, and the dissatisfied customer may recover the costs of *repair or replacement* of the faulty work from the contractor as the standard measure of damages for the breach of warranty. This consequence of not performing well is part of every business venture, and the repair or replacement of faulty goods and work is a business expense, to be borne by the contractor in order to honor the warranty or representation(s) as to the quality of work promised.²²

The *second type of risk* inherent in a contractor's line of work is the risk of injury to people and physical damage to property of third parties caused by *accidental* injuries to persons or property which can expose

the contractor to unlimited liability. While the same neglectful craftsmanship can result in both a business expense of repair or replacement and a loss represented by damage to persons or property, the two results are vastly different in relation to sharing the costs of such risks as a matter of insurance underwriting and are vastly different in connection with the coverage afforded under the basic coverage provisions of the standard CGL policy of insurance.

The Weedo court initially best articulated the distinction between “business risks” and “occurrence” which give rise to insurable liability.²³ The Weedo analysis remains as valid today as it was when first articulated and serves currently as the foundation for the modern day “business risk” analysis, notwithstanding the modifications which have taken place in the standard ISO policy since it was first articulated, and has been recently quoted as espousing principles of insurance coverage which are wholly consistent with Maryland law.²⁴ In Weedo, the Court stated:

When a craftsman applies stucco to an exterior wall of a home in a faulty manner and discoloration, peeling and chipping result, the poorly-performed work will perforce have to be replaced or repaired by the tradesman or by a surety. On the other hand, should the stucco peel and fall from the wall, and thereby cause injury to the homeowner or his neighbor standing below or to a passing automobile, an occurrence of harm arises which is the proper subject of risk-sharing as provided by the type of policy before us in this case. The happenstance and extent of the latter liability is entirely unpredictable[;] the neighbor could suffer a scratched arm or a fatal blow to the skull from the peeling stonework injury to persons and damage to other property constitute the risks intended to be covered under the CGL.²⁵

- **Recent Decisions**

ISN v. Federal Insurance Company, No. 1874 (Md. App. June 24, 2002). In this case, the Court of Special Appeals of Maryland held that there is no duty to defend nor indemnify Bethesda Airport Security Contractor for Violations of the False Claims Act. The case involved a Chubb insured and Federal Insurance Company was represented by Jeffrey R. Schmieler of Saunders & Schmieler, P.C.

A copy of an article in S&S Recent Developments in the Law profiling the case, as well as a copy of the Summary of the Oral Argument presented on behalf of Federal are attached hereto as **EXHIBITS #1 & 2** respectively.

Perdue Farms Incorporated v. National Union Fire Insurance Company & Federal Insurance Company, Civil No. L-99-2818, 2002, 2002 WL 537643 (D. Md. April 8, 2002). The United States District Court for the District of Maryland granted summary judgment in favor of Federal finding that it did not owe a duty to indemnify Perdue Farms for a claimed advertising injury claim under the Federal policy. Perdue had brought suit against National Union and Federal seeking coverage for damages of \$48,000,000.00 awarded by a Florida jury to Dennis Hook for misappropriating his trade secret process for making cook in the bag chicken by creating and advertising its own Perdue product known as “TenderReady” chicken. The case involved a Chubb insured and Federal Insurance Company was represented by Jeffrey R. Schmieler of Saunders & Schmieler, P.C.

A copy an article in S&S Recent Developments in the Law profiling the case is attached hereto as **EXHIBIT #3**.

II. CONTRACTUAL RISK TRANSFER & INSURANCE COVERAGE

The basic concept of Contractual Risk Transfer is the allocation of the risks of accidental loss between the parties to a business contract differently than that which would otherwise occur under the law. The legal significance of such a risk transfer is the creation of a contract between the parties which establishes the governing liability and law applicable to the transaction. It is, therefore, important to consider carefully the terms and provisions of such **commercial contracts** when underwriting a policy of insurance to one of the parties to such a contract. Although the parties to a contract can create their own “law” which will govern a relationship or transaction, the “public policy” as enunciated in State laws, as enforced by the judiciary, often limit the amount of risk that can be transferred by means of a contractual agreement.

- Risk Management Theory

Contractual Risk Transfer is, in essence, a risk transfer technique the effect of which is to transfer a risk to another party. The transfer of a risk may be to an insurance company in the form of an insurance policy, the terms of which are set forth in the insurance contract, or the transfer may be to a third party in the form of a contractual provision.

- Common Contractual Risk Transfer Provisions

A number of contract provisions can affect the allocation risk in a transaction or commercial relationship, and in order to determine the specific allocation of an accidental risk, it is necessary to completely read the entire contract to determine the nature, extent and meaning of a contractual risk transfer provision. The most common contractual risk transfer provisions in use is the use of contractual ***indemnity or hold harmless provisions***.

- Indemnity and Hold Harmless Agreements

Indemnity provisions alter the risk allocation between the contracting policies by requiring one of the parties (Indemnitor) to indemnify the other (Indemnitee) for certain types of liability to third parties. In the past 30 years, indemnification clauses have become a common method used to allocate accidental risks in a wide range of contracts. In order for such clauses to be effective, they must be unambiguous and must take into consideration applicable statutes and common law.

- Insurance Requirements Provisions

Specific coverage requirements are imposed on one or both contracting parties by means of Insurance Requirement Provisions, which further generally provide for a requirement that evidence that the insurance coverage which is required by the terms of the contract has been obtained and kept in full force and effect for the specified contract period. Frequently such contractual requirements provide that the indemnitor name the indemnitee as an additional named insured.

INDEMNITY PROVISIONS

The purpose of an indemnity provision is to transfer the risk of loss to another party. Under an indemnity provision, one of the parties to the agreement agrees to assume the liability of the other in the event of loss. If an indemnity provision is valid and unambiguous, it is an effective means of risk transfer. **An insurance contract itself is a contract of indemnity whereby the insurance carrier provides insurance coverage and indemnification under certain clearly defined provisions set forth in the insurance agreement.**

Indemnification agreements, which are also known as hold harmless agreements, are basic contractual devices which are used to **transfer risk** from one party to another. Indemnity agreements are commonplace in nearly every modern day commercial transaction due to the prevalence of liability claims in our litigious society, and are encountered in contracts governing relationships wherein one party is performing services for another. Due to the risks which are inherent in the construction industry and the number of parties involved, indemnity agreements are prevalent in contracts by and between owners, architects, engineers, general contractors, subcontractors, suppliers, and materialmen. Such agreements are also commonplace in the housing provider industry, property management industry and property maintenance industry, and are frequently included in maintenance contracts, elevator service contracts, security services, swimming pool maintenance and service contracts, leases, and other service provider contracts.

Under a standard indemnity or hold harmless agreement, one party (“the indemnitor”) contractually agrees to indemnify and hold harmless the other party to the contract (“the indemnitee”) from any and all liability associated with the hazards of the business venture. Under and by virtue of the terms and provisions of the indemnity and hold harmless agreement, the indemnitor assumes the liability of the indemnitee.²⁶ By means of the contractual risk transfer device in the form of an indemnity and hold harmless agreement, the ultimate liability for a risk which is within the scope of the agreement is transferred from one party, the indemnitee, to another party, the indemnitor.

It is important to realize that the transfer of risk which is effectuated by a contractual risk transfer in the form of an indemnity or hold harmless agreement is completely independent of insurance coverage.²⁷ By virtue of the terms and provisions of the indemnity or hold harmless agreement, the indemnitor is **contractually bound** to bear the ultimate risk of loss contemplated by the agreement, irrespective of whether the indemnitor has insurance coverage for the loss or not. The existence and scope of any insurance coverage does not govern the extent of liability transferred unless the contract so provides.

In view of the liability and the risk hazards facing an indemnitor under an indemnification or hold harmless agreement, indemnitor, in order to assure their solvency in the face of a loss contemplated under an indemnification or hold harmless agreement, must either finance the contingent loss by means of self-retention or obtain liability insurance coverage for such risks.²⁸

There are **three (3) types of Indemnification and Hold Harmless agreements** in common use in commercial contracts which are characterized by the nature and extent of the indemnification obligations contemplated by the parties. The agreements are characterized according to the degree to which the indemnitor assumes liability for the negligence of the indemnitee and are referred to as: 1) The **Broad Form** Indemnification Agreement; 2) The **Intermediate Form** of Indemnification Agreement; and 3) **Limited Form** of Indemnification Agreement.²⁹

- **The Broad Form Indemnification Agreement**

The terms and provisions of a Broad Form Indemnification and Hold Harmless Agreement provide that the Indemnitor assumes an unqualified obligation to hold the indemnitee harmless and to indemnify the indemnitee for all liability and risk which is contemplated in the agreement, **irrespective of which party was actually at fault or was the culpable party**. The legal effect of a broad form indemnity or hold harmless agreement transfers the **entire risk of loss from the indemnitee to the indemnitor**.³⁰

- **The Intermediate Form Indemnification Agreement**

The terms and provisions of an Intermediate Form Indemnification Agreement provide that the indemnitor assumes all of the liabilities of the indemnitee within the scope of the agreement, except where the injury or damage is caused by the indemnitee's sole negligence. Under such an agreement, it is important to consider that *any amount of culpability* on the part of the indemnitor under an intermediate indemnification and hold harmless agreement obligates the indemnitor to indemnify the indemnitee for the total amount of damages. Under such an agreement, the only instance wherein the indemnitor is relieved of contractual obligation to indemnify is when the loss is due solely to the fault of the indemnitee.³¹ Other intermediate forms of Indemnity and Hold Harmless Agreements which are identical in their intent are phrased in such a manner that the only instance in which the indemnitor will not owe indemnification is where the liability arises out of the sole negligence of the indemnitee, i.e. in instances in which the indemnitor was not culpable to any degree.

- **The Limited Form of Indemnification and Hold Harmless Agreement**

The Limited Indemnification and hold harmless agreement provides that the indemnitor assumes the obligation of indemnifying the indemnity only to the extent of the fault or culpability of the indemnitor.

- **Implied Indemnity and Contribution**

Under the common law, liability may also be assessed and transferred under the doctrine of common law indemnity, which is also known as implied or equitable indemnity. In addition to Common law principles, most states have adopted one form or another of the "Joint Tort-feasors" statutes by virtue of which liability is shared by the joint tort-feasors according to their culpability. Under the statutory provisions, liability is partially transferred to another person, the other joint tort-feasor, who, under law, shares liability with his fellow joint tort-feasor. An indemnity obligation may be expressly provided for by contract, it may be implied from a contract not specifically mentioning indemnity, or it may arise from the equities of the particular circumstances which exist. The circumstances under which indemnity or contribution has been available are as follows:

1. Where the one seeking indemnity ("the indemnitee") has only a derivative or vicarious liability for damage caused by the one from whom recovery is sought ("the indemnitor");
2. Where the Indemnitee has incurred liability by action at the direction, in the interest of, and in reliance upon, the indemnitor;
3. Where the Indemnitee has incurred liability because of a breach of duty owed by the Indemnitor;
4. Where the Indemnitee has incurred liability merely because of failure, even though negligent, to discover or prevent the misconduct of the Indemnitor; and
5. Where there is an express contract between the parties containing an explicit undertaking to indemnify or hold harmless.

- **Anti-Indemnity Statutes**

Under the Judicially imposed concept of “public policy,” the Courts have not looked with favor upon the Broad Form Indemnity and Hold Harmless Agreement, the intent of which is to shift liability for an Indemnitee’s own negligence to the Indemnitor. According to the judicial logic, such clauses conflict with the principle that each party should be responsible for its own negligence, under the rationale that holding each party responsible for its own negligence deters negligent conduct in the future. In a large number of states, the legislature has codified the “public policy,” by the enactment of “anti-indemnity” statutes which prohibit a party from obtaining indemnification for its own negligence in a hazardous industry, such as the construction industry. Most of the “anti-indemnity” statutes apply only to *construction-related* indemnity clauses. Irrespective of the existence, *vel non*, of such “anti-indemnity” statutes, the judiciary has traditionally interpreted the validity of the broad form indemnity agreements very strictly, and require *expressed language* or *clear intention* to be expressed within an agreement before finding an intention of an indemnity contract to indemnify a person against his own negligence.³²

Anti-indemnity statutes are sometimes interpreted and applied by Courts in an unusual fashion. In Heat & Power Corporation v. Air Products & Chemicals, Inc., 320 Md. 584, 578 A.2d 1202 (1990), the contractor-indemnitor’s employee brought an action against the property owner-indemnitee, claiming that he was injured as a result of the owner’s negligence. The owner sought a defense and indemnification from the contractor’s commercial general liability policy (CGL) insurer pursuant to an indemnity clause and an additional insured clause in the contract.

The Maryland Court of Appeals observed, in interpreting the indemnification provision, that under the Maryland anti-indemnity statute, Md. Cts. & Jud. Proc. Code § 5-305, any agreement in a construction contract purporting to indemnify the promisee against liability for damages caused by the promisor’s sole negligence is void and unenforceable. The Court interpreted the indemnification provision of the contract and found that the indemnification clause was not sufficiently clear so as to be construed as requiring indemnification of the owner for its sole negligence. The Court, therefore, refused to apply the anti-indemnity statute to render the indemnity provision void. The Court, in interpreting the contract, found that the indemnity provision was not enforceable since it did not clearly and unequivocally state that the contractor was required to indemnify the owner for its own negligence.³³ It is interesting to note that although the court refused to apply the anti-indemnity statute to render the indemnity clause unenforceable under the anti-indemnity statute due to its ambiguity, it held that this same ambiguity prevented its enforcement under the common law test applied by the courts of Maryland in interpreting such clauses. This is a good example of the principle that in order to be enforceable, an indemnity clause must clearly express the intention of the parties that an Indemnitor expressly intends to indemnify the Indemnitee for the Indemnitee’s own negligence.³⁴

- **Insurance Provisions and Anti-Indemnity Statutes**

It is interesting to note that an insurance policy is in the purest sense a broad form indemnity agreement, under which the indemnitor - the liability insurance carrier- agrees to indemnify and hold harmless the indemnitee - the insured - for the indemnitee’s (insured’s) sole negligence. Yet, the same public policy rationale which has been fashioned by the Judiciary and which has been used by the legislators in enacting “anti-indemnitee” statutes, does not ring true for insurance policies. Obviously, such a rationale, if applied to the insurance contract, would defeat the purpose and intent of insurance coverage for liability claims. Most construction anti-indemnity statutes specifically provide that the statutes do not apply to insurance requirements in construction contracts.³⁵ Accordingly, although construction anti-indemnity statutes outlaw indemnification of the indemnitee for the indemnitee’s sole

negligence, they allow the indemnitee to require the indemnitor to obtain insurance, the effect of which could provide coverage to indemnitee for the indemnitee's sole negligence.

The effect of the exclusion of insurance contracts from the effect of the anti-indemnity statutes is to validate the allocation of risks by the parties by contractual provisions requiring liability insurance covering the indemnitee, even when the result may be to provide insurance coverage to another party for its own negligence. This rather incongruous effect underscores the importance to the indemnitee of naming the indemnitee as an additional insured on the indemnitor's commercial general liability policy (CGL) as a second means of obtaining indemnification in the event that an indemnification provision is unenforceable under a particular state's law. *Conversely, it underscores the important risk implications to the Insurer of naming other than the named insured as an additional named insured under an insurance agreement.*

The legal effect of naming a third party as a named insured is the same for most purposes as issuing a separate policy of insurance to the third party. It is, therefore, important for an insurer to carefully consider the legal effect of adding additional named insureds to insurance policies.

Contracting parties also obviate the right of subrogation by entering into a contract which adds another party as a named insured in a contract of insurance. Such a provision avoids subrogation in view of the well established law that an insurer is generally not allowed to pursue subrogation against its own insured.

- Indemnification Issues: A recent case study involving subcontractors

A recent case of import which should be considered in assessing the future course of action with respect to the indemnification and coverage issues raised in cases which involve Contractors and Subcontractors in construction claims and litigation is the case of **A.S. Johnson Co., et al. D.C. App. No 96-CV-69, decided May 1, 1997** by the D.C. Court of Appeals.

The **Johnson** case involved a factual scenario in which both A.S. Johnson and Atlantic Masonry were subcontractors of Sigal Construction Company when an Atlantic employee was injured on the job site. The employee collected worker's compensation from Atlantic and brought a negligence action against Johnson and Sigal, both of whom settled with the Plaintiff prior to the tort trial.

Johnson filed an action against Atlantic asking for indemnification or contribution as a third-party beneficiary of a subcontract between Atlantic and Sigal that required Atlantic to indemnify not only Sigal, the general contractor, but also "other contractors or subcontractors" of Sigal for amounts paid as a result of Atlantic's negligence. The trial court ruled that Johnson was not a third-party beneficiary of the Atlantic/Sigal subcontract's indemnity provision and dismissed the complaint.

The D.C. Court of Appeals reversed the ruling of the lower court and held that it was apparent from the plain language of the indemnification clause that it was **intended to benefit Johnson and other subcontractors**. The court further ruled that the clause required Atlantic to indemnify not only the owner of the property and Sigal itself, but also “other contractors and subcontractors.” The court went on to state that the additional language of the subcontract would be meaningless unless the court interpreted it as manifesting an intention to benefit Johnson and those in a similar situation who are required to pay damages as a result of the contracting parties, Atlantic’s, negligence. The court specifically noted that the duty to indemnify was expressed in terms that make the duty run directly to the indemnitees, inclusive of the other subcontractors.

The court noted that while Johnson was not specifically named as such in the Sigal-Atlantic contract, Johnson fell within a specifically named and designed class of “subcontractors” that clearly were to benefit from the indemnification agreement.

Atlantic then asserted that even if Johnson was determined to be a third-party beneficiary, the exclusivity of the workers’ compensation remedy prevented Johnson from suing Atlantic to recover damages which Johnson paid to one of Atlantic’s employees. The court noted that while it is true under Maryland law, the exclusivity of workers’ compensation extinguishes common law indemnification and contribution claims against a corporation whose injured employee would not have been permitted to sue the employer directly, the principle does not apply when there is an “**express contractual agreement**” to assume an obligation to indemnify.

The court determined that the critical distinction in Maryland law is not between a party to a contract or a third-party beneficiary of the contract, but between an **express indemnification clause** and an implied obligation of indemnity, holding that Atlantic expressly agreed by contract - albeit in a contract with Sigal, not with Johnson - to indemnify “subcontractors,” a class that included Johnson. The Court held that the indemnification provision of the contract, which was set forth in § 18 also contained § 18.2 which expressly provides for waiver of workers’ compensation exclusivity.

It is also relevant to note that the court stated that notwithstanding the possibility that cross indemnification provisions may exist in both the subcontracts, that such would still not preclude the action because the contractual language could not be more clear in requiring indemnification even if Johnson was negligent.³⁶

The court further recognized possible alternative results in interpreting the provisions of cross indemnification provision:

- 1)The indemnification claims might cancel each out and Johnson could not recover;
- 2)The competing indemnification claims might be reduced to a right of contribution for half of what Johnson paid out (Pro-rata result);
- 3)Johnson might recover on the basis of proportionate fault; or
- 4)The stronger indemnification clause might prevail entirely on a theory of “passive” versus “active” negligence.

The import of this case is that in a construction case, it is necessary to obtain a copy of all contracts and subcontracts to determine the contractual risk transfer provisions which may have been entered into by the parties which may grant certain indemnification rights to other subcontractors who are not a party to

the contract. It also is important to obtain the insurance policies of the general contractor and any subcontractor whose policies may be implicated in order to determine the coverages afforded under the respective policies and the levels of insurance provided therein.

- **Insurer's Right of Subrogation**

An insurer is entitled to subrogation under the principles of the common law, and the insurer's right of subrogation is not dependent upon any express term or provision of the insurance policy. The insurer's right of subrogation arises, under common law principles, when the insurer pays a claim on behalf of its insured. At the time of the payment of the claim, the insurer's right to subrogation arises by operation of the law and vests in the insurer all rights which the insured has against a third party for the loss. The insurer's right to subrogation is limited to such rights as the insurer had against the insured at the time of the payment of the claim. Accordingly, there is no right of subrogation where the insured has no cause of action against a defendant. Under the principles of subrogation, the subrogee (insurer) stands in the shoes of the insured (subrogor) and has no greater rights than the subrogor. For this reason, **when the insured has released the culpable party prior to the payment of the claim by the insurance carrier, the insurance company's rights of subrogation against the culpable party are destroyed.**³²

In addition to common law subrogation, subrogation rights exist by virtue of contractual provisions contained in contracts between two parties. **By means of contractual provisions, parties may also agree to waive or limit subrogation. The modification or alteration of the legal right to subrogation is a means or modality of contractual risk transfer that can have a significant effect on the obligations of an insurer under a policy of insurance.**

It is essential that the Insurer take into consideration the effect that a waiver of subrogation has on the risk which is being underwritten by the issuance of an insurance policy. In those instances when an insurer fails to take into account the effect of a subrogation waiver provision of a contract, or issues an endorsement which permits a waiver of subrogation without taking into consideration the effect that such provisions have on risk transfer, **the ultimate responsibility for a loss will often be unwittingly underwritten by the insurance carrier.**

The use of a subrogation waiver by contracting parties as a risk transfer device between the parties inter se usually has the effect of preventing subrogation by an insurer, under the well established law that an insurance carrier, as a subrogee, can succeed to no greater rights than its insured, the subrogor.

- **Insurance Policy Subrogation Provisions**

Notwithstanding the fact that an insurance company's right of subrogation arises automatically by the common law doctrine of equitable subrogation at the time that an insurance company pays or satisfies a covered claim, most insurance policies contain an express provision setting forth the insurer's right of subrogation. Such provisions do not expand the insurer's subrogation rights which exist in the absence of such provisions, but rather are **designed to clearly indicate that such rights do exist and to provide contractual provisions against an insured interfering with such rights as part of the consideration underpinning the agreement to pay covered claims on behalf of the insured.** Such provisions also

serve to notify the insureds of the existence of the subrogation rights of the insurer, as well as to require the insured to cooperate with the insurer in asserting against the third-party tort-feasor any claims that the insured may have against the third party and to place restrictions on the insured's ability to limit or waive the subrogation rights of the insurer.

The most commonly found type of subrogation provision which is contained within an insurance policy expressly states that the insured shall do nothing to prejudice or abrogate the insurer's rights to recover from third parties *after a loss has occurred*. Other provisions which are sometimes found in an insurance policy may prohibit the insured from waiving subrogation at any time or may explicitly allow the insured to waive subrogation.

- **Common Subrogation Provision**

The most common type of subrogation provision which is found in commercial lines property and casualty insurance policies forbids the insured from waiving the right to subrogate after a loss, but is silent with respect to a waiver executed prior to a loss.³⁸ It is common for commercial contracts to include provisions which include waivers of subrogation. Normally such business contracts are executed by the parties prior to the occurrence of any property or casualty losses associated with the business venture. It is important for both the insured and the insurer to be mindful of the difficulties that such subrogation waivers can cause, because such waivers are in conflict with the intent of the common subrogation clauses contained in the insurance policy and may adversely affect the insured's right to coverage under the policy.

The language contained in the common subrogation clause that the Insured "do nothing *after* a loss to prejudice the Insurer's subrogation rights," implies that actions of the insured which extinguish the Insurer's rights of subrogation *prior* to a loss will not void coverage under the policy. The cases which have considered the effects of a pre-loss waiver of subrogation rights have upheld the right of the Insured to waive subrogation rights and still recover for the loss under the policy of insurance. In such cases, the Courts have held that the Insured is entitled to recover when it incurred the very loss that was Insured against, and which the Insured had paid to insure, and that the Insurer, **by means of an appropriate policy provision, could have prohibited such a subrogation waiver agreement had it intended to do so.**

Accordingly, contracting parties generally can rely upon the enforceability of a waiver of subrogation clause contained in a commercial contract without adversely affecting the insurance coverage of the waiving party without requiring an endorsement in the applicable insurance policy in those instances when the insurance policy contains the typical provision prohibiting only post-loss subrogation waivers. Such pre-loss waiver provisions are generally held not to jeopardize coverage, even in those instances when the insurer is not notified of its existence prior to the loss.³⁹

Therefore, it is incumbent upon the insurance carrier to specifically prohibit pre-loss waivers by endorsement in the event the insurance carrier intends to enforce its subrogation rights upon the payment of a loss. In a construction case, such a clause could make a sizeable difference in the risk undertaken by the Insurance carrier in underwriting the particular insurance policy.

Insurance industry practices do not appear to recognize the fact that pre-loss subrogation waivers are valid and do not affect the coverage afforded under the insurance policy. Many underwriters assume that their insureds will advise them of any waiver of subrogation that they may enter. Additionally, workers' compensation carriers often issue endorsements to specify the waiver of subrogation in the insurance

policy and charge an additional premium for it. This practice also occurs in the issuance of Commercial General Liability insurance, as well as workers' compensation insurance policies.

Irrespective of the method used by the Insurance carrier to deal with the issue of the pre-loss waiver of subrogation, it is submitted that ***sound underwriting policy mandates that either the pre-loss waivers be specifically prohibited under the policy provisions by endorsement, or that they be specifically disclosed, acknowledged and agreed upon in an endorsement to the policy for which an additional premium is paid by the insured desiring to enter into pre-loss waivers of subrogation rights in a commercial contract.*** Otherwise, an insured could generally succeed in effecting enforceable waivers of subrogation at the ultimate cost of the insurer simply by including them in its business contracts and not advising the insurer of them.

- **Commercial General Liability Policy**

A common provision found in most CGL policies is a subrogation provision which operates to transfer rights of recovery to the insurance carrier upon payment of a loss.⁴⁰

CONTRACTUAL LIABILITY INSURANCE

It is common for one party to a business contract to transfer to the other contracting party all or a portion of the potential liability associated with the subject matter of the contract. The most common means by which this is accomplished is by the use of a hold harmless provision or an indemnification provision in the contract or agreement.

These provisions generally operate independently from an insurance policy to transfer the financial burden associated with a risk of loss to the other party of the contract. However, **the party to whom the legal liability is transferred may insure the assumed liability loss exposure by purchasing contractual liability coverage as a part of its automobile, general liability, and umbrella liability insurance policies.**

Commercial General Liability policies, auto liability policies, and umbrella liability policies universally include a form of contractual liability insurance as a part of their standard coverage, but there are significant restrictions placed on the coverages provided by these policies. Additionally, the standard CGL policies are often modified with non-standard limitations. Some professional liability policies also provide a degree of contractual liability coverage. Other forms of insurance, such as aircraft insurance, generally exclude nearly all contractual liability coverage(s). This topic focuses on the contractual liability coverages afforded under the CGL policy.

THE CGL POLICY'S CONTRACTUAL LIABILITY COVERAGE

The scope of the Contractual Liability Coverage afforded under a standard Commercial General Liability policy is dependent upon a number of the other provisions of the standard policy, namely:

- (1) The Coverage A. Insuring agreement;
- (2) The exclusion of liability arising out of contractual agreements;
- (3) The exceptions to this exclusion which form the basis for the contractual liability coverage;
- (4) The definition of "insured contract";

- (5) The supplementary payments provision (in the 1996 edition form); and
- (6) The policy exclusions that apply to contractual liability coverage.

It is important to understand the significance of each of these policy provisions to understand the scope of coverage provided in a CGL policy's contractual liability coverage.

- **The Insuring Agreement and the Exclusion**

The CGL policy's Coverage A is broad and includes coverage for bodily injury or property damage sustained by an insured as a consequence of an "occurrence," as defined in the policy. Certain coverage is excluded from the broad coverage afforded under Coverage A, namely liability arising out of contractual agreements which the assured might enter into. Exclusion b of the policy eliminates 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. This is because Insurers do not intend to cover all liability arising out of all contractual agreements the insured enters into -only certain specific types of coverage for such contractual obligations are intended to be covered.

However, the exclusion set forth in b. has two exceptions that leave coverage in place with respect to liability (1) assumed in an "*insured contract*" as defined in the policy; and (2) liability "*that the insured would have in the absence of the contract or agreement.*"

These exceptions provide the substance for contractual liability insurance coverage in a standard CGL policy. In other words, coverage for contractual liability insurance exists by virtue of the coverage granted in the insuring agreement, the exclusion for contractual liability and the exception to the exclusion of contractual liability.⁴¹

It is important to note that not only is contractual liability insurance provided to an insured who assumes the liability of another under provided that the injury or damage occurs subsequent to the issuance of the policy, but it is also provided for any liability that the insured would have in the absence of an agreement or contract.

In the event that the liability of an insured is not one that would have applied in the absence of a contract or agreement, it must be an "insured contract" as defined under the policy for coverage to apply.

- **Definition of "Insured Contract"**

The term "insured contract" is specifically defined in a CGL policy, and in view of the coverage afforded by this exception to the exclusion of contractual liability coverage, it is a definition which is important, as it defines the coverage afforded under the policy.⁴² The **first type** of "insured contract" for which contractual liability insurance is provided by definition is a **lease of real property**. It is common practice for a lease of premises to include a hold harmless clause requiring the lessee to hold the lessor harmless for liability arising from the leased premises or the lessee's operations on the leased premises. The CGL policy covers bodily injury or property damage liability assumed in a lease agreement for premises by virtue of the fact that **leases are specifically defined as "insured contracts" under the policy.**⁴³

The **second** specially defined type of "insured contract" is a *sidetrack agreement*, which is an agreement confined to the Railroad industry. An Insured which has spurs or sidetracks which connect to a railroad's main line is usually required, as a condition of the sidetrack agreement, to enter into a hold harmless agreement whereby it holds the railroad harmless from losses arising out of the use of the side

track. **These sidetrack agreements are specially defined as “insured contracts” under the standard ISO policy.**

The **third** type of an “insured contract” is an *easement or license agreement*, which are specifically defined as “insured contracts” unless they are in connection with construction or demolition operations on or within 50 feet of a railroad. An easement is an interest which one party has in the use or limited use of the land of another, such as the right of use to go over another person’s property. An easement is attached to real property and may be conveyed with the real property. An easement can be private or public, such as permitting people to walk across a parcel of land to get to the ocean or public beach. Easements may be for purposes of ingress and egress to another parcel of property. Easements may arise by operation of law or by prescription. A license is a revocable right to come onto another person’s property, and is consensual. A license may be revoked at any time. Under the definition of “Insured contract”, *these types of “agreements” provide contractual liability insurance.*

The **next** type of “contract” which qualify as “insured contracts” is an *obligation of indemnity which is required by a municipality*. It is not uncommon for municipalities to have ordinances requiring indemnification from a private citizen or organization who by virtue of their activities can cause bodily injury or property damage to members of the public. Examples of such are vendors, concessionaires who rent merchandise or vehicles and similar activities. These types of contractual relationships qualify as **“insured contracts”** for the purposes of providing contractual liability insurance under a CGL policy. However, if a contractor performs work for a municipality, an ordinance-imposed indemnification in connection with that work is not included in this particular portion of the definition of “insured contract.” Any such indemnification is included as an “insured contract” under Paragraph f. of the definition.

Also, an agreement to maintain and/or service an elevator is an “insured contract” by definition.

The general contractual assumption agreement other than as specified under paragraphs a. through e. are covered in **section f.** of the definitional section in the event that they meet the criteria set forth therein. **Under this section coverage is afforded for contractual assumptions of tort liability of others in purchase orders, rental and lease agreements for equipment, or other personal property, sales agreements, construction contracts, and other similar contracts. Only the indemnity portion of such contracts are “insured contracts” under the definition, and only when the tort liability of another is the subject of an indemnity or hold harmless agreement.**

Contractual Liability coverage only applies to *tort liability* and does not apply to the assumption of a first party loss, a warranty of performance, or an exculpatory agreement.⁴⁴ Similarly, no coverage is afforded under a CGL policy for an indemnity agreement whereby an insured agrees to be responsible for any and all damages that occur to the insured’s own product.⁴⁵

It is interesting to note that the restriction to the *“tort liability of another”* assumed in a contract has also been applied to preclude coverage for a claim based upon the insured’s breach of a contractual agreement to add another as an additional named insured to the insured’s liability policy. A number of courts have held that the contractual liability coverage in a standard CGL policy does not provide coverage for liability of the insured for breach of contract to provide insurance. **The commitment or promise on the part of an insured to secure or obtain insurance coverage for another is not insured. Contractual**

liability coverage does not apply to liability arising out of the breach of any type of contract, including the breach of a contract to provide insurance.

The part f. requirement in a CGL policy which provides contractual liability insurance that the indemnity agreement relate to the “tort liability of another” can preclude coverage for a claim against the insured by an indemnitee under a limited form of indemnity agreement. When an insured has signed an indemnity agreement by virtue of which the insured agrees to indemnify another party for the insured’s own negligence, contractual liability insurance coverage may not be available, because under a **limited form of indemnity**, the insured has not assumed the **tort liability of another** so as to trigger contractual liability coverage under a CGL policy. In such cases, the courts have held that since the indemnity agreement does not cover another’s own negligence, there can not be any assumption of liability of another to which contractual liability insurance can apply.

Additionally, to qualify as an “insured contract” an agreement must appertain to the business of the assured. A limited determination as to the scope of the insured’s business can result in limited contractual liability insurance coverage. For instance, in the construction industry a general contractor frequently requests subcontractors to provide services beyond the scope of the subcontract. In such cases, in the event that the activity can not be characterized as relating to the assured’s business, coverage may not be afforded under a CGL policy because it did not arise out of an “insured contract.”

CGL policies do not and are not intended to provide coverage for contractually assumed personal liability or advertising injury liability. This is reinforced by the specific inclusion of “**bodily injury**” and “**property damage**” in part f. of the insured contract definition. Additionally, **Coverage B of a CGL policy, which sets forth coverage for Personal Injury and Advertising Injury, contains a specific exclusion for liability assumed in a contract.**

Also, a contract to qualify as an insured contract must be entered into before the “bodily injury” or “property damage” occurs. However, it is specifically emphasized that there is no limitation on the type of liability to be covered under an “insured contract,” other than with respect to liability arising from operations on or within 50 feet of a railroad or liability arising out of architectural services/engineering services.⁴⁶ **Contractual liability applies to liability arising out of the indemnitee’s sole negligence, joint negligence or contributory negligence as 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 in the policy.**

- **Contracts and Agreements which are not an “Insured Contract”**

The “insured contract” definition also specifies two types of liability assumptions that are not insured contracts, namely: (1) **the indemnification of Railroads**, and (2) **architects/engineers professional liability**. In accordance with provision f. of the “insured contract” definition, an agreement to **indemnify a railroad** for bodily injury or property damage arising from construction or demolition operations on or near railroad property is not an “insured contract.” Such indemnification is commonly imposed upon street and road contractors, as well as other contractors working on or about railroad property. Such contracts are specifically excluded as insured contracts and accordingly no coverage is afforded for such assumptions of liability. In the event that a contractor is negligent in causing any such loss, and would be liable even in the absence of the contractual assumption, the contractor’s CGL policy will cover the loss. However, in the event that the contractor’s action is based on the indemnity obligation in the contract rather than simply asserting the contractor’s negligence, the CGL policy will not cover the loss.⁴⁷

The fact that the CGL policy will not cover an insured's contract which contemplates work to be performed in proximity to railroad property for an owner, creates a significant risk exposure for the CGL insured which undertakes such construction contracts and is required to indemnify either a railroad or a third party owner. A railroad would enjoy the protection afforded under an applicable protective liability policy in the event of a loss, but the owner would not be covered under the contract of indemnity with the contractor because the contract does not qualify as an "insured contract."

The other specifically excepted contractual assumption of liability which is set forth in provision f. involves *architects and engineers professional liability*. Part (2) deals with those cases where the insured assumes the design professional's liability for injury or damages arising out of the list of professional activities. The provision clearly indicates that there is no coverage provided for an insured's contractual assumption of the professional liability of an architect, engineer or surveyor.

When an architect, engineer or other professional purchases CGL coverage, the insurer generally attaches an endorsement to the policy which precludes coverage for liability arising out of the insured's professional activities. Insured contract exception (3) prevents the professional from attempting to circumvent the exclusionary endorsement and to transform the CGL policy into one that covers professional liability by assuming liability for the same in a contract with a client.

- **Defense of Indemnitees**

A great deal of confusion and controversy has existed with respect to the practice among general liability insurers to provide a defense for their insured's indemnitees in conjunction with the defense provided to their insured. Interpretation of the standard ISO policy provision, as well as variations of the standard contract varied greatly, with some Insurance carriers taking the position that coverage is not afforded for providing a defense or for defense costs and others taking the position that such coverage exists because of the insured's obligation to pay those damages.

In 1991, ISO addressed the problem directly and modified the CGL coverage to provide for coverage of an insured's indemnitee's defense costs as part of an "insured contract." The defense costs, which ISO asserted were not covered at all under the existing CGL policy language was to provide coverage by definition in the revised form as damages in the policies contractual liability coverage. In March of 1995 made a new filing that addressed this subject and resulted in a new January 1996 edition of the commercial general liability coverage form under which costs to defend indemnitees are specifically defined as damages, and are therefore eligible for coverage by exception to the CGL contractual liability exclusion. Such costs are applied against the policy limits are covered only if certain conditions are met, namely: (1) The defense costs consist of another party's "reasonable attorney fees" and "necessary litigation expenses"; (2) Liability for such costs have been assumed by the insured in an "insured contract"; and (3) The covered costs are for the defense of the other party in a civil or alternative dispute resolution proceeding where the damages covered by the CGL policy are alleged.

The 1996 CGL form goes further and sets forth a duty to defend the insured's indemnitee - rather than paying the indemnitee's legal expenses. When the additional conditions have been met, the costs of defending the suit against the indemnitee will be paid by the insurer as supplementary payments just as the insured's own defense costs are under an ISO policy without reducing the policy's limits of insurance.

In the 1996 edition of the CGL policy, the duty to defend arises only when the insured and the indemnitee are named in the same suit.⁴⁸ One good feature of the 1996 CGL policy's supplemental

payments provisions regarding the contractually assumed defense obligation is the creation of certain duties on the part of the indemnitee, such as the duty to notify its own insurer of the suit and cooperate with the indemnitor's insurer in connection with the coordination of coverage with the other insurer. This provision clearly expresses an intention of obtaining some sort of contribution towards the indemnitee's defense costs from the indemnitee's own insurance carrier.

- **Application of Policy Exclusions**

In view of the fact that contractual liability coverage is granted by the CGL policy's Coverage A insuring agreement, and is not separate coverage unto itself, all of the CGL policy's Coverage A exclusions apply to the contractual liability coverage, unless they are specifically stated not to apply in the language of the exclusion. **Only three (3) of the exclusions contain such exceptions, which result in coverage being provided for liability assumed under an insured contract that would not otherwise apply under the policy, namely:**

(1) The exclusion for bodily injury to an employee, or an injured employee's spouse, child, brother, or sister;⁴⁹

(2) The exclusion for bodily injury or property damage arising out of the ownership, maintenance, or use of an aircraft or watercraft;⁵⁰ and

(3) The exclusion for damage to property loaned to or in the care, custody or control of the insured, or on which the insured is working when such liability is assumed in a sidetrack agreement.⁵¹

The exception to the employers liability exclusion (e) is extremely important since, as a result of the exception to the CGL's employers liability exclusion, the CGL policy covers third party over-actions brought by a contractor which is sued by an employee of the insured who has assumed contractual liability from the contractor.

The aircraft, auto, or watercraft exclusion (g) precludes liability arising out of these types of conveyances. The exception to this exclusion applies only to aircraft and watercraft liability and is significant because aircraft and watercraft liability policies usually exclude the liability of others assumed in a contract (the business auto policy covers liability assumed under an insured contract). It is important to note that the insured will have no coverage for its own liability arising out of its watercraft or aircraft use, but does have liability assumed under an insured contract for such losses.

The care, custody, or control portion of the property damage exclusion (j) precludes coverage for damage to the property of others in the insured's possession. The exception to this exclusion for liability assumed in a side track agreement provides coverage for damage to a railroad's property when the insured is liable under the sidetrack agreement. It is important to note that the "sidetrack agreement" portion of the insured contract definition does not restrict coverage to the tort liability of another assumed in the agreement. The contractual liability coverage would respond to this type of liability.

- **Coverage A Exclusions That Apply to the Contractual Liability Coverage**

A number of the more important Coverage A exclusions apply to the contractual liability coverage, including the following:

- The liquor liability exclusions (c);
- The pollution exclusion (f);
- The damage to the insured's product exclusion (k);
- The damage to property exclusion (j); and
- The impaired property exclusion (m).

These exclusions can not be circumvented by assuming liability in an insured contract, and their applicability causes the insured's contractual liability coverage to be narrower than its indemnity obligation. Therefore, liability for the tort of another which has been assumed by the insured in an insured contract which arises out of an area which falls within the purview of one of the exclusions in the standard CGL policy which is not excepted for liability assumed in an insured contract exposes the assured indemnitor to uninsured liability.

Examples of liability that an insured could assume under a contract that would not be covered under the CGL policy as a result of these exclusions are as follows:

- Liability assumed by a contractor for the removal of contaminated soil from a storage yard;
- An insured's violation of a warranty, such as might occur if a product does not perform as warranted;
- The failure to meet the requirements of a sales agreement, such as might occur if a product is not delivered by the agreed deadline;
- An agreement of a tavern or restaurant to indemnify the owner or lessor of the premises for liability arising out of the sale of alcoholic beverages;
- Self-destruction of the insured's product; and
- Damage to a customer's property in the insured's possession for repair, maintenance, or modification.

- **Personal Injury and Advertising Liability Coverage**

Personal Injury and Advertising Injury coverage which is set forth in Coverage B of the CGL policy insures against liability arising from specified intentional torts such as libel, slander, copyright infringement, malicious prosecution, and false arrest. However, in contrast to Coverage A which provides bodily injury and property damage coverage, **Coverage B is subject to a contractual liability exclusion that contains no exceptions with respect to an "insured contract." The sole exception to the contractual liability exclusion in Coverage B is for liability the insured would have in the absence of the contract or agreement.**

The exclusion in Coverage B of contractually assumed injury liability is problematic in that the legal profession uses the term "personal injury" in a different manner than the meaning of the same term in an insurance contract. As used by the legal profession, the term "personal injury" means bodily injury, as

well as libel, slander, false arrest, etc. **Accordingly, “personal injury” is used in the broader legal meaning in most indemnity agreements, and indemnitors therefore assume a broader scope of liability than their insurance contract covers. This leaves a large spectrum of uninsured liability which is assumed in standard indemnification agreements which utilize the generally used legal term of personal injury.**

- **Contractual Liability Endorsements**

In view of the fact that indemnitors frequently assume greater liability than the insurance provided for Coverage A claims, a number of standard endorsements have been developed for this purpose, namely:

- “Amendment of Contractual Liability Exclusion for Personal Injury Limited to False Arrest, Detention or Imprisonment for Designated Contracts or Agreements” (CG 22 74);
- “Contractual Liability - Railroads” (CG 21 39); and
- “Contractual Liability Limitation” (CG 21 39).

While the above-noted endorsements are available their use does not completely eliminate gaps in coverage and are themselves problematic in application.

- **Summary**

The ISO Commercial General Liability policy automatically provides insureds with what has been described as “broad form blanket contractual liability coverage.” This means that generally, an insured’s CGL policy will cover the liability of another party to a third party because of bodily injury or property damage sustained by that third party if the insured agreed to assume that liability in a written or verbal contract executed prior to the occurrence of injury or property damage. Some of the principle areas where coverage gaps occur (as compared to the scope of liability transferred under an indemnity agreement) include defense costs, the “personal injury” perils, and the types of liability for which the policy provides no coverage due to the operation of the exclusions.

NON-STANDARD CGL CONTRACTUAL LIABILITY LIMITATIONS

As set forth in the preceding sections, the Standard Commercial General Liability (CGL) policies insure a wide variety of the named insured’s contractual assumptions of liability - principally the assumption of another party’s tort liability in a contract related to the named insured’s business.

In addition to the standard CGL coverage forms, the insurance industry uses a number of nonstandard contracts. Some insurers tailor coverage for a particular class of business in which the insurer is specializing and others restrict coverage being offered to risks that present for some reason a higher loss potential than average, such as in surplus lines coverage - coverage which is written under less stringent regulatory rules for insureds that would otherwise have a difficult time finding coverage in the standard insurance marketplace. Care must be taken in the nonstandard insurance marketplace, inclusive of surplus lines in order to make certain that the coverage provided matches what is required by contractual obligations to other contracting parties.

Of obvious import is the analysis of the extent of coverage provided for any contractual risk transfers under the contractual liability provisions of the policy and the extent to which the policy language is more restrictive than the standard CGL coverage.

Non-standard contractual liability provisions in a general liability policy may create problems for both the indemnitee and the indemnitor. For an indemnitor that must look to the surplus lines marketplace for its general liability coverage, it is essential that it examine the policy carefully to identify the areas where the contractual coverage may be significantly more restrictive than the standard ISO policy. In the event of such restrictive coverage, the indemnitor should seek to tailor its contractual assumption of liability to the coverages afforded under the policy.

Indemnitees must consider, when drafting contract insurance requirements and accepting proof of insurance from an indemnitor, that not all general liability coverage is equivalent. It can never be assumed that a requirement of “contractual liability coverage” in a contract will guarantee an indemnitor’s liability to respond to a standard hold harmless or indemnity agreement. General liability insurance requirements should always include the requirement that coverage afforded by equivalent to, or at least as broad as that of a standard ISO form CG 00 01.

- **Contractual Liability Coverage In Umbrella and Excess Policies**

Additional coverage to that provided by a standard primary policy, by means of an excess policy, which provides excess limits of insurance for the same exposures already insured under the primary or underlying policy, or by means of an umbrella policy, which offers not only excess limits, but also coverage above a retention or deductible for losses that are not covered by the underlying policy, vary significantly among insurers. Unlike the case of primary policies, there are no industry “standard” policy which permits generalization as to what an excess or umbrella policy covers, as there is significant coverage deviations in such policies.

- **The Umbrella Insuring Agreement**

Coverage of contractually assumed liability in umbrella policies is traditionally very broad. The coverage grant is in the insuring agreement, which refers specifically to the contractual liability exposure. One such example is as follows:

We will pay on behalf of the insured those sums in excess of the retained limit which the insured by reason of liability imposed by law, or assumed by the insured under contract prior to the occurrence, shall become legally obligated to pay as damages.

Under this type of insuring agreement, the insured would have coverage with respect to liability for any type of covered injury or damage assumed in a contract, subject to any applicable policy exclusions and definitions, just as it would with respect to liability for the same type of injury or damage if that liability were incurred directly rather than by contractual assumption. However, most umbrella policies limit this broad grant of coverage in a number of ways, inclusive of providing exclusions and limitations such as the following:

- A reference to “written or oral agreements” which would exclude coverage for Implied contracts;
- Restrictions of the coverage to contracts entered into in the course of the insured’s business operations;

- Specifications as to the insured persons who may assume contractual liability of the kind covered by the policy;
- Exclusion of certain categories of contracts, such as contracts with labor organizations; and
- Exclusion of contractual assumptions of certain types of covered liability such as property in the care, custody or control of the insured.

Unless the policy language provides otherwise, the coverage is not subject to any of the contractual liability exclusions such as the ones applicable under a CGL policy. Therefore, coverage is generally afforded for personal injury and advertising injury liability when it is contractually assumed.

Some umbrella carriers use the “insured contract” concept but cover liability for personal injury and advertising injury. The scope of the insuring agreement is dependent upon the policy language and the definitions set forth therein.

As is the case in a standard primary policy, contractual liability coverage in an umbrella policy is structured by the policy exclusions such as war, workers compensation and similar laws, aircraft-watercraft, and property damage (care, custody or control) exclusions.

- **The Excess Insurance Policy**

Additional coverage which is afforded by an excess policy of insurance generally provides excess limits of insurance for the same exposure already assumed under the primary or underlying policy. Such excess policies which frequently follow the form of coverages which are afforded in the underlying policies and which are known as “follow form” policies adopt the same coverage terms and provisions of the underlying policy and the coverage analysis of such policies are performed by an analysis of the coverages afforded by the underlying policy and any coverage for contractual liability is therefore dependent upon the coverage(s) afforded in the underlying policy.

In the case of an Excess policy which has separate coverage language from the underlying policy, the same considerations which involve an analysis of the coverage terms and provisions of a CGL policy applies, or in those instances when a significant deviation from the primary policy is present, the same coverage analysis applicable to an Umbrella policy.

ADDITIONAL INSURED STATUS

In addition to the use of indemnification and hold harmless agreements as a technique for contractual risk transfer, naming a party as an additional insured on a policy of insurance is also a means of effectuating the transfer of the financial consequences of risk. The basic underlying concept of this type of risk transfer is for an indemnitee to require the indemnitor to obtain insurance coverage for the loss on behalf of the indemnitee. In some instances a separate policy of insurance will be purchased by the indemnitee for such purpose. However, more commonly, the indemnitor will arrange for its own insurance coverage to be modified by endorsement to cover the indemnitee as well for the particular contractual relationship entered into by the parties.

In addition to the named insured and those parties or organizations who automatically qualify for insured status under an insurance policies basic provisions, additional entities may be added as insureds by means of endorsement. Under a property policy, the insured, to whom a loss will be paid if the property is damaged or destroyed, must have an insurable interest in the property. In such policies, an additional

named insured must, like the insured, have an insurable interest in the covered property. Under a liability policy, the insured, who is the person or entity on whose behalf damages arising out of legal liability are paid to a third-party claimant, any person or organization can be added to a policy as a named insured, provided the insurer agrees.

Additional insured status under the indemnitor's insurance policy is often used as a supplement to a hold harmless agreement by the indemnitee effecting a contractual risk transfer. This is done as additional financial security for the enforcement of a hold harmless agreement as well as to serve as a back up in the event that judicial interpretation of the hold harmless agreement invalidates the agreement, or in the event that the agreement proves unenforceable for any other reason. In such instances, when an indemnitee is unable to obtain indemnification from the indemnitor, the indemnitee can seek coverage under the indemnitor's insurance policy for the loss or risk.

Courts in most jurisdictions, inclusive of Maryland, have upheld an indemnitee's right to seek recovery directly as an additional insured, even when indemnification for the same elements of the loss is not allowed under a hold harmless or indemnification agreement. This has occurred most frequently when the hold harmless agreement is a broad form indemnification agreement which applies to the indemnitee's sole negligence and is adjudicated to be unenforceable under public policy rationale. In such cases the Courts have generally held that providing another party with insurance coverage is not the same as indemnifying that party and have upheld contractually required insurance coverage.⁵²

A similar ruling upholding the validity of additional insured protection despite an applicable anti-indemnity statute has been made in Maryland in the case of Heat & Power Corp. v. Air Products & Chemicals, Inc., 587 A.2d 1202 (Md 1990). This case stands for the legal proposition that although state law prohibits broad form hold harmless agreements, an indemnity/additional insured under the indemnitor's liability policy can be insured against its own fault.⁵³

- **Direct Right to a Defense**

One major consequence of adding an additional named insured to an insurance policy is to afford the additional named insured under an insurance policy the **same right to a defense under the indemnitor's policy that the indemnitor has**. This right comes with the contractual rights established in favor of the additional named insured under the terms and provisions of the insurance contract. **The legal consequence of adding the additional named insured to the contract of insurance is to in effect grant to the additional named insured the same right of defense and indemnity for which coverage is provided within the scope of the operation being insured.**

It is to be noted that under a CGL policy an indemnitee under a pre-loss indemnification agreement providing for a contractually assumed defense was entitled to a defense against covered claims under specific circumstances. This is covered under the contractually assumed liability clauses which afford coverage by exempting contractually assumed liability from the exceptions contained within the insurance policy. However, due to numerous problems of the interpretation of the underlying contract which contains the underlying indemnification contract, such as whether a defense is to be provided, as well as indemnification and the interpretation difficulties encountered with meaning of the scope and meaning of the indemnification provisions, much uncertainty exists over the extent and availability of coverage which often results in the disclaimer of the insurer to cover the costs of defense and or indemnification. **As an additional named insured under a policy of insurance, the indemnitee has the same rights to a defense and full indemnification for a covered loss that the indemnitor policy holder has.**

- **Subrogation**

Subrogation, which is the legal principle holding that a party that has paid a loss on another's behalf becomes entitled, on the basis of that payment, to a right of recovery against the party legally responsible for the loss, does not operate to give an insurer subrogation rights against its own insured. That is because an insurance contract is, in a very real sense, the purist form of an indemnification agreement which provides indemnification for the indemnitee's sole negligence and if subrogation were to exist in favor of an insurance company against its own insured, such a right of recovery would defeat the very purpose of a policy of liability or indemnity insurance. For these reasons, additional named insured status is a complete refuge from subrogation actions that might otherwise be brought against the additional named insured entity by the named insured's insurance company. **It is basic black letter law that an insurance company has no right of subrogation against its own insured, and the same principle applies to an additional named insured in a policy of insurance.**

- **Personal Injury Coverage**

Most hold harmless and indemnification provisions which are contained in contractual risk transfer agreements, make no distinction among the types of injury or damage covered by the agreement. This can pose a significant problem to an indemnitor in the instance of a claim of indemnification for a "personal injury" claim. When an indemnification claim is made for offenses which come under the CGL definition of "personal injury" - false arrest, malicious prosecution, wrongful eviction, libel, slander, invasion of privacy- there is only limited coverage afforded under the policy for assumed liabilities under the indemnitor's contractual liability coverage. **The CGL policy provides no personal or advertising injury coverage for contractually assumed liability, other than for such liability that the insured would have had even without the hold harmless agreement.** Limited contractual coverage can be endorsed onto a CGL policy with respect to one particular personal injury offense, namely false arrest. Beyond this limited optional coverage, an indemnitor's CGL's policy will not cover a personal injury claim against an indemnitee, **unless the indemnitee has been named an additional named insured under the policy.**

The effect of adding an additional named insured to a policy of liability insurance issued to an indemnitor policy owner is to also insure any acts which result in a personal injury claim which are performed by the indemnitee.

This same concept can be applied to an instance when the indemnitee, for any reason, is performing work that creates an uninsured loss exposure for the indemnitee, such as a form of professional liability not covered by the indemnitee's own CGL policy. It may also occur in the case of excluded coverages, such as environmental remediation or any other specialized risk which may not otherwise be covered under a policy of insurance issued to the indemnitee. In almost any situation or operation which does not come within the scope of insurance coverage provided to an indemnitee, such as when the indemnitee's specialized coverage does not extend to contractual liability or a specialized risk is being underwritten, **the indemnitee can be added to the indemnitor's policy as an additional named insured to protect its primarily vicarious liability in connection with the indemnitor's operations.**

In view of the nature of the undertaking and the financial risks which are being transferred, the underwriter must keep in mind the tremendous additional exposure which is being taken when adding an indemnitee to the indemnitor's liability policy as an additional named insured.

III. RISK ASSESSMENT & CLAIMS EVALUATION

COMPENSATORY DAMAGES FOR BODILY INJURY

In an action for damages in a personal injury case, the following elements of damage may be awarded :

- (i) The *personal injuries* sustained and their extent and duration;
- (ii) The *effect* such injuries have on the overall physical and mental health and well-being of the plaintiff;
- (iii) The *physical pain and mental anguish* suffered in the past and which with reasonable probability may be expected to be experienced in the future;
- (iv) The *disfigurement* and *humiliation* or *embarrassment* associated with such disfigurement;
- (v) The *medical and other expenses* reasonably and necessarily incurred in the past and which with reasonable probability may be expected in the future;
- (vi) The *loss of earnings* in the past and such earnings or *reduction in earning capacity* which with reasonable probability may be expected in the future.

In awarding damages a jury in Maryland must itemize its verdict or award to show the amount intended for:

- (1) The medical expenses incurred in the past;
- (2) The medical expenses reasonably probable to be incurred in the future;
- (3) The loss of earnings and/or earning capacity incurred in the past;
- (4) The loss of earnings and/or earning capacity reasonably probable to be expected in the future;
- (5) The “**Noneconomic Damages**” sustained in the past and reasonably probable to be sustained in the future. All damages which you may find for pain, suffering, inconvenience, physical impairment, disfigurement, loss of consortium, or other *nonpecuniary* injury are “**Noneconomic Damages**”; and
- (6) Other damages.

MARYLAND CAP ON NON-ECONOMIC DAMAGES

<u>DATES</u>	<u>PERSONAL INJURY</u>	<u>WRONGFUL DEATH</u>
07/01/86 - 09/30/94	\$350,000.00	N/A
10/01/94 - 09/30/95	\$500,000.00	\$750,000.00

10/01/95 - 09/30/96	\$515,000.00	\$772,500.00
10/01/96 - 09/30/97	\$530,000.00	\$795,000.00
10/01/97 - 09/30/98	\$545,000.00	\$817,500.00
10/01/98 - 09/30/99	\$560,000.00	\$840,000.00
10/01/99 - 09/30/00	\$575,000.00	\$862,500.00
10/01/00 - 09/30/01	\$590,000.00	\$885,000.00
10/01/01 - 09/30/02	\$605,000.00	\$907,500.00
10/01/02 - 09/30/03	\$620,000.00	\$930,000.00
10/01/03 - 09/30/04	\$635,000.00	\$952,500.00
10/01/04 - 09/30/05	\$650,000.00	\$975,000.00

Note: Non-economic damages shall increase by \$15,000.00 on October 1 of each year beginning on October 1, 1995. The increased amount shall apply to causes of action arising between October 1 of that year and September 30 of the following year. This shall apply in a personal injury action to each direct victim of tortious conduct and all persons who claim injury by or through that victim. In a wrongful death case in which there are two or more claimants, an award for non-economic damages may not exceed 150% of the cap on personal injury recovery for non-economic damages.

SUSCEPTIBILITY TO INJURY

The effect that an injury might have upon a particular person depends upon the susceptibility to injury of the plaintiff. In other words, the fact that the injury would have been less serious if inflicted upon another person should not affect the amount of damages to which the plaintiff may be entitled.

PRESENT VALUE QUALIFICATION—PERSONAL INJURY

In deciding upon the damages to be awarded for any future economic loss, a jury must consider how long the plaintiff is likely to live notwithstanding the injury, and the present cash value, if any, of the loss.

Present cash value means that sum of money needed now, which, when added to what that sum may reasonably be expected to earn in the future by prudent investment, will equal the amount of the plaintiff's loss.

In other words, the total anticipated future loss must be reduced to an amount, which, if prudently invested at a particular rate of interest over the applicable number of years, will return an amount equal to the total anticipated future loss.

PUNITIVE DAMAGES

If you find for the plaintiff and award damages to compensate for the actual injuries/losses suffered, a jury may, but is not required to, award an additional amount as punitive damages. In determining the amount of such an award, a jury should use its sound judgment and discretion to arrive at an amount which it believes will punish the defendant and deter the defendant and others from similar conduct. There should

be a reasonable connection between the award and the defendant's ability to pay. The award should not be designed to bankrupt or financially destroy the defendant.

(i) Intentional torts except fraud (implied malice): Punitive damages may be awarded if defendant's conduct was outrageous, and in light of the risks and dangers which were known or should have been known, defendant's conduct indicated a disregard for the rights and safety of others, or showed a conscious indifference to the consequences.

(ii) Fraud Cases: Punitive damages may be awarded if the jury finds a breach of fiduciary duty, gross fraud, or other extraordinary or exceptional circumstances from which ill will or evil motive may be inferred. A finding of mere fraud alone is insufficient to award punitive damages.

(iii) Unintentional Torts (actual malice): Defendant's conduct was outrageous and performed with evil motive, intent to injure, ill will or fraud and without legal justification or excuse.

(iv) Products Liability: If the jury believes defendant actually knew of the defect and by marketing/selling/manufacturing the product acted in conscious disregard of a foreseeable harm caused by the product.

DAMAGES—SPOUSE OF DECEASED

In determining the damages which will reasonably and adequately compensate the spouse of the deceased as a result of the death, a jury considers both economic and non-economic losses.

The economic losses to be considered include the financial support, as well as the replacement value of the services that the deceased furnished or probably could have been expected to furnish. The jury may consider the deceased's earnings and future earning capacity for the probable time both had been expected to live to determine the amount that the surviving spouse could reasonably have expected to receive.

The non-economic losses to be considered are the mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, marital care, attention, advice or counsel the surviving spouse has experienced or probably will experience in the future.

DAMAGES—PARENT OF DECEASED CHILD

In determining the damages which will reasonably and adequately compensate each parent as a result of the death of their child, a jury considers both economic and non-economic losses.

The economic losses to be considered are any financial benefits a parent probably would have been expected to receive from the deceased until the child reached age 18.

The non-economic losses to be considered are the mental anguish, emotional pain and suffering, and the loss of society, companionship, comfort, protection, care, attention, advice, counsel or guidance, a parent has experienced or probably will experience in the future.

The non-economic losses are not limited to the period of time when the child would have been a minor.

DAMAGES—MINOR CHILD OF DECEASED PARENT

In determining the damages which will reasonably and adequately compensate each surviving child of a deceased parent as a result of the death of a parent you shall consider both economic and non-economic losses.

The economic losses to be considered include the financial support, as well as the replacement value of the services that the deceased furnished or probably would have been expected to furnish until the child reached age 18.

The non-economic losses to be considered are the mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, parental care, attention, advice, counsel, training, guidance or education which the child has experienced or probably will experience in the future.

The non-economic losses are not limited to the period of time when the surviving child is a minor.

DAMAGES—ACTION BY ESTATE

In determining the damages to be awarded to the estate of the deceased as a result of the death, a jury considers both economic and non-economic losses.

The economic losses to be considered include the fair and reasonable medical expenses which were incurred by the deceased, and the loss of earnings from the time of injury to the time of death. Funeral expenses up to \$2,000 are also recoverable.

The non-economic losses to be considered are any conscious pain, suffering or mental anguish that the deceased experienced as a result of the injury until death (and any punitive damages for which the defendant is found to be responsible).

PRESENT VALUE QUALIFICATION-WRONGFUL DEATH

a. Spouse

In deciding upon the amount of economic damages for the plaintiff [spouse of deceased], the following elements may be considered:

(1) how long the plaintiff [spouse of deceased] would have been likely to have received financial benefits from the deceased;

(2) how long the deceased was likely to have lived; and

(3) how long the plaintiff [spouse of deceased] is likely to live.

The damages for such economic loss shall be for the period of their joint life expectancy.

b. Children

In deciding upon the amount of economic damage for the child[ren] of the deceased parent, the jury considers the financial benefits[the][each] child[ren] would have been likely to have received from the deceased. The damages for such economic loss shall be for the period of time until the child[ren] would reach the age of eighteen years.

In figuring the amount of the economic damages, the jury must not multiply the number of years by the financial benefits. Instead, you must determine the present cash value of such future financial benefits.

“Present cash value” means that sum of money needed now, which, when prudently invested over the applicable number of years, will equal the amount of financial benefits lost because of the death of the deceased.

MORTALITY TABLE—LIFE EXPECTANCY

According to life expectancy tables, the life expectancy of a person of that person is relevant and may be considered.

The life expectancy figure(s) set forth in the life expectancy table is to assist the jury in determining the probable life expectancy of the plaintiff as it bears on future losses and damages. It is not conclusive proof of the life expectancy, and the jury is not bound by it. It is only an estimate based on average experience.

CLAIM EVALUATION

The evaluation of every claim includes a good faith analysis of three (3) basic factors: (1) Liability Issues; (2) Damage Issues (3) Insurance Coverage/Collectability of Damages.

- Risk Factors Presented by the Claim

The proper evaluation of a claim includes a consideration of all risk factors associated with the claim. The evaluation always includes an analysis of the following factors:

1. Liability exposure

- Is there a possibility of establishing non liability as a matter of law?
- Is a jury question presented on liability
- Is the case a case of liability

2.Damage Assessment/Evaluation

- special damages which can be proven
- economic damages
- non economic damages
- punitive damages
- other damages
- the intangibles

1.The Plaintiff

2.The jurisdiction in which suit is filed

3.The Plaintiff’s attorney

- 4.The demographic consideration
- 5.The jury pool composition
- 6.The Defendant
- 7.The evidence
- 8.The witnesses
- 9.The documentary evidence
- 10.Review and Analysis of the Case in its entirety
- 3.Coverage(s) afforded under the insurance policy/collectability

After all investigation and discovery has been completed and the case has been reviewed in its entirety, it can be evaluated for settlement. This is the best time in which to evaluate the settlement. A thorough investigation of the facts and law is essential to the proper evaluation of a claim.

- **Jury Verdict Range(s)**

One of the factors which is always a part of every claim evaluation is the anticipated jury range which is presented based upon all of the relevant facts. A survey of the jury ranges in a wide variety of cases has been compiled in a separate publication which accompanies this publication.

MEMORANDUM

to: All Staff Members

from: Jeffrey R. Schmieler

subject: TORT CASE: DEFENSE (Office Policy & Procedure)

date:September 17, 2002

I. THE LAW:

1. Review the file to determine how the injury occurred, and if there appears to be a possibility of establishing non-liability of the Defendant as a matter of law.

2. If after a review of the authorities, a pre-trial motion does not seem advisable, turn to the facts as a defense and concentrate your efforts on a tireless and thorough investigation and preparation of all the available evidence.

3. Be sure that in reviewing the available authorities you note the mutual duties and obligations imposed on the Plaintiff and Defendant by the law of the jurisdiction where the injury occurred.

II. THE FACTS:

-

1. Review the investigation that has been completed prior to the receipt of the file and ascertain whether:
 - a. All witnesses have been contacted and statements obtained.
 - b. Police investigation reports have been obtained and investigating police officer interviewed.
 - c. Diagrams and/or photographs of the accident locale have been obtained.
 - d. All medical reports on the injury to the Plaintiff have been obtained.
 - e. A thorough check has been made to determine the past medical and legal (claims) history of the Plaintiff.
2. Specially drafted Interrogatories should be filed in order to obtain pertinent information.
3. An extensive Notice to Produce should be filed obtaining pertinent information and documents.
4. If any of the above information has not been furnished, arrange to have it completed before taking Depositions.
5. Ordinarily, it is advisable at this point for defense counsel to visit the scene of the accident to familiarize himself with it, as well as to arrange for the preservation of any evidence which could be removed or destroyed before trial.

6. It may also be advisable at this point to interview the Defendant, or it's representative, if it's a corporation, and any other witnesses who are peculiarly available to the Defendant or whose testimony you consider vital to the defense.
7. After filing all necessary pleadings, arrange to take the Deposition of the Plaintiff, inquiring thoroughly into his medical and claims background, his marital history, his employment history and the like, as well as into the facts of the occurrence itself and the injuries and complaints of pain and disability which he may have.
8. Consideration should then be given to taking the Deposition of other witnesses. Such depositions usually should be taken if you have reason to believe that a witness may die or leave the jurisdiction prior to trial, or that his testimony is vital to the defense.
9. Make a thorough investigation of the medical evidence which could be presented at the trial as follows:
 - a. Obtain all up to date medical reports on the Plaintiff's injuries;
 - b. If permanent injury is claimed, arrange to have the Plaintiff

examined by a doctor of your own selection;

c. If your doctor feels it helpful or essential, arrange to have all prior medical reports and x-rays made available to him in considering his opinion on disability;

d. After reviewing your doctor's report and evaluation, have a conference with him wherein he can educate you on all medical aspects of the case.

10. After reviewing the various medical reports and the testimony of the Plaintiff in his Deposition, consider whether the Plaintiff's claims of disability are exaggerated or non-existent, and, if so, consider the possibility of a specialized investigation, such as:

a. A check of the Plaintiff's neighborhood and working acquaintances to determine whether they are familiar with the nature of his complaints.

b. Possibly an undercover investigation of the Plaintiff and his actions including photographs or motion pictures of any unusual or strenuous actions in which he may engage.

c. Investigation through his employment to verify special claims, such as lost wages, or if the Plaintiff is self-employed, securing an appropriate authority to review his income tax records.

11. Consider the use of demonstrative evidence, such as the advantages or disadvantages of used commercial photographs, plats, charts or models.

12. Review the facts that your investigation has developed to determine if there is any area for the testimony of an expert witness. Examples of such testimony would be the speed and stopping distances of automobiles, sufficiency of lighting at an accident scene, the slipperiness of floors, waxes and the like, and structural soundness, product design and quality.

III. CASE EVALUATION, SETTLEMENT AND TRIAL:

1. Prepare summaries of depositions, answers to Interrogatories, medical statements, itemized listing of special damages and file trial summary.

2. File Request for Admissions of Fact and Genuineness of Documents if warranted by case.

3. After all investigation and discovery has been completed, review the case in its entirety and evaluate for possibility of settlement. This is the best time in which to evaluate settlement, since for the first time you have before you all of the evidence which will be available to the jury, and it can be viewed dispassionately without the rigors and pressures of pre-trial or trial. In line with settlement, it should be kept in mind that a thorough investigation of the facts and law is as essential to advantageous settlement as it is to a proper presentation of the case at trial.

CASE STUDIES AND ACTUAL CASE EXEMPLARS

A Review of Jury Verdicts in Maryland, The District of Columbia and the Commonwealth of Virginia in the following areas of the law reveal a wide range of verdicts depending upon the facts and circumstances of each case, as well as the demographics of the jury composition in the various jurisdictions and counties in which the verdicts were rendered.

The vagaries of the jury verdicts are such that the risk exposure in any given case is ultimately dependent upon multiple factors, but the potential jury ranges must be carefully considered in each case in which a jury verdict is likely to occur, i.e. in those cases which present an issue of liability which ultimately will be decided by a jury.

A discussion of the jury verdict ranges in each jurisdiction as reflected by a wide compendium of cases tied before a jury follows. Due to the voluminous verdicts analyzed, it is not possible to attach the verdicts as a part of this publication.

WORKS CITED

I. Contractual Risk Transfer

Strategies for Contract Indemnity and Insurance Provisions ©

Published by International Risk Management Institute, Inc.

This publication was the principle source for the materials presented and was quoted extensively throughout, and in some instances verbatim. The above-noted publication is recommended as an authoritative source in the field of contractual risk transfer and was extensively relied upon for the presentation of the content hereof.

II. Malecki on Insurance Vol. 6, Number 4

This publication was relied upon for the final chapter on Limited Liability Companies, principally in connection with the Liability Exposures of Members and Managers and Insurance Coverage and the Indemnity Obligation.

III. Case Authority as Cited throughout.

JEFFREY R. SCHMIELER

LAW OFFICES OF

SAUNDERS & SCHMIELER, P.C.

^[1]See Aetna v. Cochran, 337 Md. 98, 651 A.2d 859 (1995); See Reames v. State Farm Fire and Casualty Insurance, 111 Md. App. 546, 683 A. 2d. 179, cert. denied, 344 Md. 329, 686 A.2d. 635 (1996); Steyer v. Westvaco Corp., 450 F. Supp. 384 (D. Md. 1978); American Casualty Company v. Denmark Foods, Inc., 224 F.2d 461, 464 (4th Cir. 1955).

^[2]See Aetna v. Cochran, 337 Md. 98, 651 A.2d 859 (1995). It is also the most likely current law of the District of Columbia which has not, as of this date, determined the issue. Virginia, however, is still a “four corners” state.

^[3]See Brohawn v. Transamerica Ins. Co., 276 Md. 396, 347 A.2d 842, 850 (1975).

^[4]See St. Paul Fire & Marine Ins. Co. v. Pryseski, 292 Md. 187, 438 A.2d 282 (1981).

^[5]337 Md. 98, 651 A.2d 859 (1995).

^[6]See Cochran, 337 Md. 103, 651 A.2d at 864 (quoting Bausch & Lomb v. Utica Mutual, 625 A.2d 1021, 1024 n. 1 (Md. 1993)).

^[7]See Cochran, 337 Md. at 104, 651 A.2d at 865.

^[8]*Id.* at 337 Md. 105, 651 A.2d at 866.

^[9]See Cochran, 337 Md. at 105, 651 A.2d at 866. With regard to the insured’s duty, the Maryland Court of Appeals has relied upon Cochran in two other cases, American Motorists Ins. Co. v. Artra Group, Inc., 659 A.2d 1295 (1995), and Chantel Associates v. Mount Vernon Fire Insurance Company, 656 A.2d 779 (Md. 1995), in support of the proposition that the insured must raise the extrinsic evidence to the attention of the insurer. In Chantel, the Court addressed coverage issues arising out of a claim involving lead paint poisoning. The court held that Cochran clarified the potentiality rule and that “an **insured** may establish a potentiality of coverage under an insurance policy through the use of extrinsic evidence so long as the **insured** demonstrates that there is a reasonable potential that the issue triggering coverage will be generated at trial.” *Id.* at 784 (emphasis added).

^[10]See Cochran, 651 A.2d at 866; Brohawn, 347 A.2d at 850.

^[11]See *id.*

^[12]See Freedman & Sons v. Hartford Fire Ins. Co., 396 A.2d 195 (D.C. 1978).

^[13]Calvin E. Reames v. State Farm Fire and Casualty Insurance, 111 Md. App. 546, 683 A.2d 179, cert. denied, 344 Md. 329, 686 A.2d 635 (1996); Steyer v. Westvaco Corp., 450 F. Supp. 384 (D. Md. 1978); American Casualty Company v. Denmark Foods, Inc., 224 F.2d 461, 464 (4th Cir. 1955). This principle of law was also applied in Sheets v. Brethren Mutual Ins.Co., 342 Md. 634, 679 A.2d. 540 (1996), in that the Sheets court could not make a determination as to whether Brethren Mutual had a duty to indemnify because it did not know the liability theory which formed the basis of the settlement, i.e., the ultimate liability of the assured.

^[14]Lititz Mutual Insurance Company v. Bell, 352 Md. 782, 724 A.2d 102 (1999).

^[15]*Id.*

^[16]*Id.*

^[17]Sheets v. Brethren Mutual Ins. Co., 342 Md 634, 652, 679 A.2d 540, 548 (1996).

¹⁸Id. (Citation omitted).

¹⁹Id. The court cited Pettit v. Erie Insurance Exchange, 349 Md. 777, 786, 709 A.2d 1287, 1292 (1988), stating “the acts of sexual molestation in Pettit were acts of battery, and the rationale of the decision is framed in the law of battery.”

²⁰See Reames, 111 Md. App. at 546, 683 A. 2d. at 179; Steyer, 450 F. Supp. at 384 (D. Md. 1978); Denmark Foods, 224 F.2d. 461 at 464.

²¹See Lititz Mutual Insurance Company v. John Bell, Sr. et al., No 98-55, September term, 1998 (decided February 16, 1999).

²²See Thompson; Weedo; Indiana Ins. Co. v. Louis L. DeZutti and Joanna T. DeZutti, 408 N.E.2d 1275, 1279 (Ind. 1980).

²³Weedo v. Stone-E-Brick, Inc., 81 N.J. 233, 405 A.2d 788 (1979).

²⁴In Woodfin, 678 A.2d at 133, the Court quoted Weedo, 405 A.2d at 796, stating that a CGL policy “does not cover an accident of faulty workmanship, but rather faulty workmanship which causes an accident,” and further stated, “This principle is wholly consistent with Maryland law.”

²⁵Id. at 796.

²⁶An exemplar of a broad form indemnity and hold harmless provision is set forth as Attachment Number 1.

²⁷Although the transfer of risk is completely independent of insurance coverage, due to the presence of the contractual liability provisions of most insurance policies, insurance coverage is , in many instances , covered under the terms and provisions of a liability policy issued to an indemnitor and the ultimate risk hazard assumed by the insurance carrier providing coverage to the indemnitor is directly affected by the existence of such a contractual risk transfer.

²⁸Many contracts containing indemnity or hold harmless provisions require indemnitor to purchase liability insurance in sufficient limits to assure that the indemnitor has the financial resources requisite to cover the risk hazards contemplated by the agreement.

²⁹Exemplars of the three forms of Indemnity and Hold Harmless agreements are attached as Attachment Number 2,3, & 4 respectively.

³⁰An example of A Broad Form of Indemnity and Hold Harmless agreement is attached as Attachment Number 2.

³¹An exemplar of an Intermediate Form Indemnity and Hold Harmless agreement is set forth as Attachment Number 3.

³²In the State of Maryland, contracts will not be construed to indemnify a person against his own negligence unless an intention to do so is expressed in those very words or in other unequivocal terms. Heat & Power Corp. v. Air Products & Chemicals, Inc., 320 Md. 584, 578 A.2d 1202 (1990); In Va. the construction is less rigid, and the Va. Courts hold that an Indemnity Clause should be “read as a whole.” Richardson-Wayland Electrical Corp. v. Virginia Electric & Power Co., 247 SE.2d 565 (Va 1978).

³³The indemnity clause under consideration by the Md. Court of Appeals required the contractor to indemnify the owner for any liability “resulting from or arising out of or in connection with the performance of this contract by contractor.”

³⁴The Commonwealth of Virginia also has an “anti-indemnity” statute which applies to all construction contracts with no specific mention of design contracts or design professionals which prohibits an indemnity agreement from providing for indemnification for the indemnitee’s sole negligence. Under the Va. Statute indemnification is valid for the concurrent negligence of the indemnitor and indemnitee or for the sole negligence of the indemnitor. Va. Code Ann. § 11-4-1. The District of Columbia has no “anti-indemnity” statute.

³⁵The Maryland statute, supra, provides in pertinent part “.... **This section does not affect the validity of any insurance contract, workers’ compensation, or any other agreement issued by an insurer.**”

³⁶Moses-Ecco Co. v. Roscoe-Ajax Corp., 115 U.S. App. D.C. 366, 370, 320 F.2d 685 (1963).

³⁷Although the release of the culpable party by the insured extinguishes the right of subrogation of the insurance company, the insurance company will generally have rights against its insured for a breach of the insurance policy, providing the policy so provides.

³⁸An example of such a common subrogation clause which is from the 1973 edition of comprehensive general liability policy (ISO) and is present in the current versions of the standard Insurance Services Office, Inc (ISO) commercial general liability, ISO business auto and NCCI workers compensation policies is set forth as Attachment Number 5.

³⁹In the event that fraud or double dealing by the Insured is involved or in the event that the Insured may be held to have violated the implied covenant of good faith dealing owed by an insured to the insurer, then the rule is otherwise, and the insurance coverage otherwise afforded under the policy may be voided.

⁴⁰A copy of a standard subrogation provision used in ISO polices is set forth in Attachment Number 8.

⁴¹An exemplar of the CGL coverage grant and exclusion is set forth in Attachment Number 9.

⁴²A copy of the definition set forth in the standard ISO policy is set forth in Attachment Number 10.

⁴³Leases to property other than premises are not included in the definition of “insured contract” under the first definition of the same under the CGL policy. Leases of property other than “premises” would be included under part f. of the policy and would have to meet the criteria set forth therein to qualify as an “insured contract”.

⁴⁴However, a bodily injury claim caused by a breach of warranty has been held to be covered in a CGL policy under the theory that the cause of action is basically identical to a bodily injury caused by a traditional tort.

⁴⁵These types of losses are considered business risks which are not covered nor intended to be covered under a CGL policy.

⁴⁶This expansive coverage was called the “broad form contractual liability coverage” prior to the 1986 CGL policy revisions. Prior to 1986, it was necessary to add contractual liability coverage by endorsement to a CGL policy.

⁴⁷In view of the gaps in coverage afforded to a contractor and the liability exposure which exists, even over and above a Railroad Protective Liability Policy, endorsements exist which delete this coverage limitation.

⁴⁸This requirement would effectively eliminate the payment of the costs of defense involving an indemnitee when the indemnitor is the Plaintiff’s employee due to the exclusivity of the worker’s compensation recovery.

⁴⁹CGL Policy's standard exclusion c.

⁵⁰CGL Policy's standard exclusion g. (4)

⁵¹CGL Policy's standard exclusion j.

⁵²In such instances the courts have drawn distinctions between a contractual promise to obtain insurance for another party against that party's negligence (not prohibited), and a contractual promise to indemnify the other party for that same negligence (prohibited by anti-indemnity statutes and sole negligent indemnity prohibitions). It is submitted that any such distinction is pure nonsense.

⁵³Although there is no reported case in the District of Columbia, it is axiomatic that such indemnity /additional insured under the indemnitor's policy can be insured against their own fault, because in the District of Columbia a clearly expressed intention to indemnify another for sole negligence is itself upheld.

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