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CONSTRUCTION INSURANCE

RISK ALLOCATION THROUGH INDEMNITY OBLIGATIONS IN CONSTRUCTION CONTRACTS

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I. INTRODUCTION

Indemnification, an idea originating under common law, allows the burden of loss to be shifted from one party to another. This concept commonly is incorporated into construction contracts to allow the party to be indemnified (the "indemnitee") to gain protection against certain risks of loss by allocating those risks to another party (the "indemnitor"). As a general rule, these provisions are to be interpreted like any other contractual provision — by recognizing the intent of the parties entering into the agreement. The enforceability of various indemnity agreements, however, frequently has been litigated because the parties' intent is not always clear.

Indemnity provisions are unenforceable if they are against public policy. Many jurisdictions have statutorily determined which types of clauses are void and unenforceable as against public policy. Such statutes frequently state that they do not affect insurance contracts; therefore, the risk of loss arising from liability on an indemnification obligation may be further allo-

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cated to insurance companies, spreading the risk throughout the construction industry. This article discusses recent trends in the enforcement of indemnity provisions and the allocation of risks therein insured.

II. COMMON LAW INDEMNIFICATION

The general rule of indemnity allows a person chargeable with the wrongful act of another, who pays damages to the injured party as a result, a right of indemnity from the person who committed the wrongful act.[1] "The underlying principle of indemnity rests on the notion that when one is compelled to pay money another ought to pay, the former may recover the sum so paid from the latter *if* the one making the payment is free from causal negligence."[2] Under common law, therefore, parties seeking indemnification have the burden of proving that they are not at fault.[3]

Absent a showing of freedom from personal fault, a party cannot be indemnified under common law since common-law indemnity is an equitable principle that shifts the entire burden of loss from one party to another.[4] A "just and equitable result" can be produced only when the liability for injury is placed on the person who actively causes the injury, as opposed to the person who is secondarily liable for her own negligence but did not actually cause the injury.[5]

III. CONTRACTUAL INDEMNITY AGREEMENTS

In the context of contracts, the concept of indemnity is used to secure a party from future loss or damages.[6] The contract obligates one person to reimburse the other for any loss, damage, or liability that the other incurs while acting at the indemnitor's

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1. *See* Peeples v. City of Detroit, 99 Mich. App. 285, 292, 297 N.W.2d 839, 841 (1980); Travelers Indemnity Co. v. Trowbridge, 41 Ohio St. 2d 11, 321 N.E.2d 787 (1975).
2. McLouth Steel Corp. v. A.E. Anderson Constr. Corp., 48 Mich. App. 424, 430, 210 N.W.2d 448, 451 (1973) (emphasis in original).
3. *See id.*
4. *See Peeples*, 99 Mich. App. at 292, 297 N.W. at 841; Ethyl Corp. v. Daniel Constr. Co., 725 S.W.2d 705, 708 (Tex. 1987).
5. *See* Travelers Indem. Co. v. Trowbridge, 41 Ohio St. 2d at 13-14, 321 N.E.2d at 790.
6. *See* Ordinary v. Connolly, 75 N.J. Eq. 521, 72 A. 363 (1909).

request or for his benefit.[7] While the indemnitor may not be primarily liable in a culpability sense, he is liable by contract if the parties have bargained for the terms of indemnity and there is no disparity in bargaining power or undue influence.[8] Furthermore, absence of fault need not be shown.[9]

In the construction industry, indemnity provisions frequently are used to transfer the risk of loss from the owner to the contractor or from the contractor to a subcontractor. Because the inherent risks in the construction industry are significant, the parties will find it especially important to bargain for the allocation of risks associated with personal and bodily injury and property damage, even if such losses occur absent fault on the part of either, or both, party(ies). Commonly, an employee on a job site or a third-party passerby is injured as the result of someone's negligence. A typical example is that of an employee injured by a falling brick or tool.[10] The following indemnity clause, also known as a "hold harmless" provision, illustrates the allocation of risk of loss between the indemnitee and the contractor:

> Contractor covenants and agrees that it shall indemnify and hold [Indemnitee], and all of its officers, agents and employes [sic], harmless from any claim, loss, damage, cost, charge or expense, whether to any person or property or both, arising directly or indirectly out of Contractor's, or any of its Subcontractor's, performance of the Contract, to which [Indemnitee], or any of its officers, agents or employes [sic] may be subject or put by reason of *any act, action, neglect or omission on the part of Contractor, any of its Subcontractors or [Indemnitee]*, or any of their respective officers, agents and employes [sic],

7. *See* Vandiver v. Pollak, 107 Ala. 547, 19 So. 180 (1895); Hall v. Equitable Sur. Co., 126 Ark. 535, 191 S.W. 32 (1917); Westville Land Co. v. Handle, 112 N.J.L. 447, 171 A. 520 (1934).

8. *See* Stern v. Larocca, 49 N.J. Super. 496, 508, 140 A.2d 403, 409 (Ct. App. Div. 1958) ("[T]here is no reason why the courts should not give [a normal, sensible and bargained-for business arrangement] the sanction they would accord any other business contract equally clearly expressed"); Halpern, *Indemnity Provisions in Construction Contracts*, 9 CONSTR. L. ADVISOR 1 (Sept. 1988).

9. *See* Peeples v. City of Detroit, 99 Mich. App. 285, 293, 297 N.W. 839, 842-43 (1980).

10. *See generally* W. DERK, INSURANCE FOR CONTRACTORS (5th rev. ed. 1981) (discussing identification and analysis of risk and alternatives available to address and minimize these risks).

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> except that neither Contractor nor any of its Subcontractors shall be liable under this section for damages arising out of injury or damage to persons or property directly caused by or resulting from the *sole negligence* of [Indemnitee], or any of its officers, agents or employes [sic] . . . .[11]

This provision indemnifies the indemnitee for his own negligence so long as the indemnitor is concurrently negligent. Under this clause, however, the indemnitee may not be indemnified for losses sustained as a result of his sole negligence. Generally, absent a state statute to the contrary, the parties may bargain for a "hold harmless" agreement that indemnifies the indemnitee for varying degrees of liability (including his own sole negligence, the concurrent negligence of the parties, sole negligence of the indemnitor, and strict liability).[12] If the parties' intent is clear,[13] these provisions will be upheld so long as the court finds no breach of duty to the public.[14]

The parties also may negotiate the types of losses, damages, and liabilities that may be indemnified.[15] These include not only bodily injury, death, and property damage but also breach of warranty, breach of contract, antitrust violations, patent, trademark or copyright infringements, willful misconduct, and crimi-

11. *See* Giguere v. Detroit Edison Co., 114 Mich. App. 452, 456-57, 319 N.W.2d 334, 336 (1982) (emphasis added). The Michigan Court of Appeals held this clause enforceable to the extent that the parties were concurrently negligent. The court found this to be a "clear expression of an intent to indemnify," *id.* at 458, 319 N.W.2d at 337; therefore, this particular provision must have met the "clear and unequivocal" test required in a majority of jurisdictions, including Michigan. *See infra* notes 22-27 and accompanying text.

12. *See Stern*, 49 N.J. Super. at 507, 140 A.2d 409 (parties' intent would be frustrated if the obligation to indemnify was qualified by the kind or degree of fault or negligence causing the loss, damage, or liability).

13. Many jurisdictions have determined what degree of clarity is necessary to enforce an indemnity provision that indemnifies for the indemnitee's own negligence. *See infra* notes 22-41 and accompanying text.

14. *See* Otis Elevator Co. v. Maryland Casualty Co., 95 Colo. 99, 33 P.2d 974 (1934). The majority of states have enacted legislation that provides the degree of liability which, when agreed to be indemnified for, makes the indemnification provision void and unenforceable as contrary to public policy. *See also infra* notes 18-21 and accompanying text.

15. *See, e.g.*, All-State Investigation & Sec. Agency, Inc. v. Turner Constr. Co., 301 A.2d 273, 275 (Del. 1972) (provision specifically including indemnification for claims based on patent, copyright, or trademark infringement and claims brought under the Workmen's Compensation Act); Ethyl Corp. v. Daniel Constr. Co., 725 S.W.2d 705, 707 (Tex. 1987) (general clause indemnifying for loss or damage to persons or property).

nal behavior. The indemnitor may be subject to damages determined by judgment, by terms of the contract, or by settlement of the parties.

IV. RECENT LIMITATIONS IN INDEMNITY OBLIGATIONS

The American Institute of Architects (AIA) and National Society of Engineers (NSPE) included an indemnity provision in their 1966 standard construction contract forms that held the architects and engineers harmless from liability caused by the general contractor or its agents.[16] In response, and as a result of general contractors' inability to successfully negotiate the elimination of such provisions from their contracts, general contractors lobbied state legislatures to change the provisions' legal effect.[17]

South Carolina, like the majority of states, has enacted a statute that limits the scope of enforceable indemnification provisions.[18] Many states, including South Carolina, limit enforceable indemnification to those situations in which the indemnitee is held harmless for the negligence of the indemnitor or the concurrent negligence of the parties, but do not allow indemnification for the sole negligence of the indemnitee.[19] Some states completely prohibit indemnification for negligence of any party.[20] Other states prohibit indemnification for negligence, whether sole or concurrent, of the indemnitee.[21] The effect of

16. *See* Halpern, *supra* note 8, at 4.

17. *See id.*

18. S.C. CODE ANN. § 32-2-10 (Law. Co-op. Supp. 1988).

19. *See, e.g.*, ALASKA STAT. § 45.45.900 (1986); ARIZ. REV. STAT. ANN. § 34-226 (Supp. 1988); CAL. CIV. CODE § 2782 (West 1989); HAW. REV. STAT. § 431.453 (1985); IDAHO CODE § 29-114 (1980); IND. CODE § 26-2-5-1 (Supp. 1988); MD. CTS. & JUD. PROC. CODE ANN. § 5-305 (1984); MICH. STAT. ANN. § 691.991 (West 1987); N.J. REV. STAT. § 2A:40A-1 (1987); OR. REV. STAT. § 30.140 (1988); S.C. CODE ANN. § 32-2-10 (Law. Co-op. Supp. 1988); S.D. CODIFIED LAWS ANN. § 56-3-18 (1988); TENN. CODE ANN. § 62-6-123 (1986); UTAH CODE ANN. § 13-8-1 (1986); VA. CODE ANN. § 11-4.1 (1985); WASH. REV. CODE § 4.24.115 (1988); W. VA. CODE § 55-8-14 (1981).

20. *See, e.g.*, DEL. CODE ANN. tit. 6, § 2704 (1975) (This statute applies only to negligence in the planning stages and not in construction. *See* All-State Investigation & Sec. Agency v. Turner Constr. Co., 301 A.2d 273 (Del. 1972)); FLA. STAT. § 725.06 (1988) (prohibiting indemnification agreements unless they contain a monetary limitation and the agreement is part of a bid, or consideration is given); ILL. REV. STAT. ch. 29, para. 61, § 1 (Supp. 1988); N.H. REV. STAT. ANN. § 338-A:1 (1984).

21. See MASS. GEN. L. ch. 149, § 29C (1976); MINN. STAT. ANN. § 337.02 (West 1988); NEB. REV. STAT. §§ 25-21,187 (1985); N.M. STAT. ANN. § 56-7-1 (Replacement Pamphlet

the latter is to allow indemnification, in cases of negligence, only for losses incurred as a result of the negligence of the indemnitor, thus codifying the original policy created under common law.

In most jurisdictions, whether limited by statute or not, "the law frowns upon contracts intended to exculpate a party from the consequences of his own negligence and though, with certain exceptions, they are enforceable, such agreements are subject to close judicial scrutiny."[22] This "rule of strict construction" has been implemented in many jurisdictions. At least twenty-four states have done so under some form of the "clear and unequivocal" test.[23] This test provide that in order to be enforceable, the parties' intent to impose an obligation upon the indemnitor to indemnify the indemnitee against his own negli-

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1986); N.C. GEN. STAT. § 22B-1 (Supp. 1987); OHIO REV. CODE ANN. § 2305.31 (Anderson 1981); R.I. GEN. LAWS § 6-34-1 (1985); TEX. CIV. PRAC. & REM. CODE ANN. § 130.002 (Vernon Supp. 1989) (prohibiting indemnification for negligence of an architect or engineer).

22. *See, e.g.*, Niagara Frontier Transp. Auth. v. Tri-Delta Constr. Corp., 107 A.D.2d 450, 451, 487 N.Y.S.2d 428, 430, (quoting Grose v. Sweet, 49 N.Y.2d 102, 106, 400 N.E.2d 306, 308, 424 N.Y.S. 365, 367 (1979)), *aff'd*, 65 N.Y.2d 1038, 484 N.E.2d 1047, 494 N.Y.S.2d 695 (1985). *See also* Sink & Edwards, Inc. v. Huber, Hunt & Nichols, Inc., 458 N.E.2d 291, 294 (Ind. Ct. App. 1984) (stating that provisions requiring indemnification for indemnitee's own negligence are not enforceable unless expressed in clear and unequivocal terms).

23. *See, e.g.*, Ocean Accident & Guar. Corp. v. Jansen, 203 F.2d 682 (8th Cir. 1953) (applying Nebraska law); United States Fidelity & Guar. Co. v. Mason & Dulion Co., 274 Ala. 202, 145 So. 2d 711 (1962); Pioneer Roofing Co. v. Mardian Constr. Co., 152 Ariz. 455, 733 P.2d 652 (1986); Pickens-Bond Constr. Co. v. North Little Rock Elec. Co., 249 Ark. 389, 459 S.W.2d 549, *appeal after remand*, 253 Ark. 172, 495 S.W.2d 197 (1972); Laudano v. General Motors Corp., 34 Conn. Supp. 684, 388 A.2d 842 (Super. Ct. 1977); Cumberbatch v. Board of Trustees, 382 A.2d 1383 (Del. Super. Ct. 1978); Cone Bros. Contracting Co. v. Ashland-Warren, Inc., 458 So. 2d 851 (Fla. Dist. Ct. App. 1984), *petition for review denied*, 464 So. 2d 554 (Fla. 1985); Eastern Air Lines, Inc. v. C.R.A. Transp. Co., 167 Ga. App. 16, 306 S.E.2d 27 (1983); Maxon Corp. v. Tyler Pipe Indus., Inc., 497 N.E.2d 570 (Ind. Ct. App. 1986); Wallace v. Slidell Memorial Hosp., 509 So. 2d 69 (La. Ct. App. 1987); Parliament Constr. Co. v. Beer Precast Concrete Ltd., 114 Mich. App. 607, 319 N.W.2d 374 (1982); Braegelmann v. Horizon Dev. Co., 371 N.W.2d 644 (Minn. Ct. App. 1982); Southwestern Bell Tel. Co. v. J.A. Tobin Constr. Co., 536 S.W.2d 881 (Mo. Ct. App. 1976); Port Auth. v. Honeywell Protective Servs., 222 N.J. Super. 11, 535 A.2d 974 (Ct. App. Div. 1987); Niagara Frontier Transp. Auth. v. Tri-Delta Constr. Corp., 107 A.D.2d 450, 487 N.Y.S.2d 428, *aff'd*, 65 N.Y.2d 1038, 484 N.E.2d 1047, 494 N.Y.S.2d 695 (1985); Kay v. Pennsylvania R.R., 156 Ohio St. 503, 103 N.E.2d 751 (1952); Broce Constr. Co. v. Traders & Gen. Ins. Co., 465 P.2d 475 (Okla. 1970); Barrus v. Wilkinson, 16 Utah 2d 204, 398 P.2d 207 (1965); Northwest Airlines v. Hughes Air Corp., 104 Wash. 2d 152, 702 P.2d 1192 (1985); Herchelroth v. Mahar, 36 Wis. 2d 140, 153 N.W.2d 6 (1967).

gence must be expressed in "clear and unequivocal" terms.[24]

The "clear and unequivocal" test is not applied uniformly, however. In some states, extrinsic evidence is allowed to prove the intent of the parties.[25] In others, intent may be shown by the language of the construction contract.[26] Occasionally, courts allow parties to offer terms of another document incorporated in the contract by reference.[27]

In *Ethyl Corp. v. Daniel Construction Co.*[28] the Texas Supreme Court abandoned the "clear and unequivocal" test and adopted the "express negligence" rule. The court held that "[t]he express negligence doctrine provides that parties seeking to indemnify the indemnitee from the consequences of its own negligence must express that intent in specific terms . . . within the four corners of the contract."[29] The critical element under this "express negligence" rule is that the intended obligation be stated "in so many words."[30] The court in *Ethyl Corp.* explained that the adoption of the express negligence rule was the result of a trend toward more strict construction of indemnity contracts and a reaction to contract writers' propensity to write vague provisions that fail to state the true intent of those provisions. "The intent of the scriveners is to indemnify the indemnitee for its negligence, yet be just ambiguous enough to conceal that intent from the indemnitor."[31]

While there may be some basis for the court's perception, the situation would not appear to be any more true in the area of indemnification than in any other area of contractual agreement. Moreover, the effect of the express negligence rule potentially may invalidate the risk allocation under documents having

24. *See, e.g.*, All-State Investigation & Sec. Agency v. Turner Constr. Co., 301 A.2d 273, 275 (Del. 1972); Stern v. Larocca, 49 N.J. Super. 496, 502, 140 A.2d 403, 406 (Ct. App. Div. 1958).

25. *See, e.g.*, Amendola v. United States, 74 F. Supp. 488 (S.D.N.Y. 1947) (applying New York, federal common, and admiralty law); Pacific Indem. Co. v. California Elec. Works, 29 Cal. App. 2d 260, 272, 84 P.2d 313, 320 (1938).

26. *See, e.g.*, Laudano v. General Motors Corp., 34 Conn. Supp. 684, 388 A.2d 842 (Super. Ct. 1977).

27. *See, e.g.*, United States Fidelity & Guar. Co. v. Mason & Dulion Co., 274 Ala. 202, 207-08, 145 So. 2d 711, 714-15 (1962).

28. 725 S.W.2d 705, 708 (Tex. 1987).

29. *Id.*

30. *Id.*

31. *Id.* at 707-08.

industry-wide use and acceptance. In fact, there has been only one Texas case in which the indemnity provision was upheld as meeting this stringent test.[32]

Notwithstanding the emphasis on the need for rules of strict construction,[33] some courts apparently are still willing to impose strict liability upon an indemnitor based upon broadly worded indemnification provisions.[34] In Louisiana, where contracts indemnifying one against the consequences of his own negligence are strictly construed, the supreme court in *Sovereign Insurance Co. v. Texas Pipe Line Co.*[35] determined that a provision that is doubtful or fails to address the issue of indemnification against strict liability may be further interpreted "in light of everything that, by law, custom, usages or equity is considered as incidental or necessary to its effectuation."[36] Such an interpretation is not allowed for indemnification provisions that are ambiguous with respect to their coverage of acts of negligence. It is unclear whether acts of negligence were contemplated by the parties since the obligor lacks the "ability to evaluate, predict, or con-

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32. *See* BFW Constr. Co. v. Garza, 748 S.W.2d 611 (Tex. 1988). The indemnity provision that met the requirements of express negligence is as follows:

> (a) Subcontractor shall fully protect, indemnify and defend Contractor and hold it harmless from and against any and all claims, demands, liens, damages, causes of action and liabilities of any and every nature whatsoever arising in any manner, directly or indirectly, out of or in connection with or in the course of or incidental to any of Subcontractor's work or operations hereunder or in connection herewith (regardless of cause or of any concurrent or contributing fault or negligence of Contractor) or any breach of or failure to comply with any of the provisions of this Subcontract or the Contract Document by Subcontractor.
>
> (b) Subcontractor shall fully protect, indemnify and defend Contractor and hold it harmless from and against any and all claims, demands, causes of action, damages and liabilities for injury to or death of Subcontractor or any one or more of subcontractor's employees or agents, or any subcontractor or supplier of subcontractor, or any employee or agent of any such subcontractor or supplier, arising in any manner, directly or indirectly, out of or in connection with or in the course of or incidental to any work or operation or operations of Subcontractor or Contractor or any other contractor or subcontractor or party, or otherwise in the course and scope of their employment, and regardless of cause or of any fault or negligence of Contractor.

Id. at 612.

33. *See supra* notes 22-41 and accompanying text.

34. *See, e.g.,* Patton v. T.O.F.C., Inc., 79 Ill. App. 3d 94, 398 N.E.2d 313 (1979); Sovereign Ins. Co. v. Texas Pipe Line Co., 488 So. 2d 982 (La. 1986); Berry v. V. Ponte & Sons, 166 N.J. Super. 513, 400 A.2d 114 (Ct. App. Div. 1979).

35. 488 So. 2d 982 (La. 1986).

36. *Id.* at 983.

trol the risk which may be created by the indemnitee's future conduct."[37] On the other hand, the indemnification against strict liability imposed for injury caused by inherently dangerous materials is more clearly bargained for.[38] The court reasoned that indemnity for liability arising from negligence provides a disincentive to careful and prudent conduct, while indemnity for strict liability would not.[39] The Indiana court of appeals in *Patton v. T.O.F.C., Inc.*,[40] however, upheld a contract allowing indemnification for strict liability, based upon a finding of "clear intent" of the parties to do so.[41]

Few jurisdictions thus far have faced the indemnity obligation issue; therefore, it is difficult to predict whether a trend will develop allowing indemnification provisions to be more liberally construed regarding strict liability for inherently dangerous products.

V. INSURANCE AND INDEMNITY

Many states have passed limiting legislation regarding indemnity provisions in construction contracts that indemnify for negligence.[42] Some of these states, however, have expressly provided that the statutory provision is not to affect the purchase of insurance.[43] Through the purchase of insurance, the indemnitor can insure the risk of loss from his indemnity obligation. As such, one might think that an indemnitor would not hesitate to enter into an indemnity agreement in order to obtain a construction contract. Nevertheless, this is not necessarily the result — not only because of the limitations placed upon the coverage allowed by the insurance industry, but also because the indemnitor needs to protect his claim experience record in order to re-

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37. *Id.* at 986.

38. *See id.*

39. *See id.*

40. 79 Ill. App. 3d 94, 398 N.E.2d 313 (1979).

41. *See id.* at 99, 398 N.E.2d at 317.

42. *See supra* notes 18-21 and accompanying text.

43. *See, e.g.*, ALASKA STAT. § 45.45.900 (1986); CAL. CIV. CODE § 2782 (West 1986); DEL. CODE ANN. tit. 6, § 2704 (1975); HAW. REV. STAT. § 431-453 (1985); MD. CTS. & JUD. PROC. CODE ANN. § 5-305 (1984); MINN. STAT. ANN. § 337.03 (West Supp. 1989); NEB. REV. STAT. § 25-21, 187 (1985); N.J. REV. STAT. § 2A:40A-1 (1987); OHIO REV. CODE ANN. § 2305.31 (Anderson 1981); OR. REV. STAT. § 30.140 (1988); VA. CODE ANN. § 11-4.1 (1985); W. VA. CODE § 55-8-14 (1981).

main insurable.[44] Indemnified losses will be charged against the experience record of the insured, regardless of whether he is directly liable or merely liable under the indemnity agreement. Because insurance is often a critical element in obtaining construction contracts, contractors and subcontractors need to protect their experience records so that insurance companies will continue coverage; therefore, these contractors and subcontractors may be reluctant to assume the liabilities of another, even if the risk of those losses may be insured.

Commercial General Liability (CGL)[45] policies provide coverage for "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies."[46] It does not, however, "apply to . . . '[b]odily 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 . . . [unless] assumed in a contract or agreement that is an 'insured contract;' or . . . [t]hat the insured would have in the absence of the contract or agreement."[47] An "insured contract" is defined by the CGL policy as:

> a. A lease of premises;
> b. A sidetrack agreement;
> c. An easement or license agreement in connection with vehicle or pedestrian private railroad crossings at grade;
> d. Any other easement agreement, except in connection with construction or demolition operations on or within 50 feet of railroad;
> e. An indemnification of a municipality as required by ordinance, except in connection with work for a municipality;
> f. An elevator maintenance agreement;
> g. That part of any other contract or agreement pertaining to your business under which you assume the tort liability of another to pay damages because of "bodily injury" or "property damage" to a third person or organization, if the contract or

44. *See generally* W. DERK, *supra* note 10, at 6-53 (discussing identification and analysis of risks as well as alternatives avoidable to address and minimize these risks).

45. These policies formerly were called "Comprehensive General Liability" policies.

46. *See, e.g.*, Wulfsberg & Colvig, *The 1986 Commercial General Liability Insurance Program*, in CONSTRUCTION CONTRACTS AND LITIGATION 1988, 308 P.L.I. 397, app. 435 (1988).

47. *Id.* at app. 436.

agreement is made prior to the "bodily injury" or "property damage." Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.[48]

Under the prior standard CGL policy, subsection "g" was not included and indemnity provisions only could be insured to the extent that the indemnitor-insured would incur liability in the absence of the indemnity provision, such as common law tort liability. While the indemnity provision held the indemnitor liable for losses incurred by the indemnitee, the insured indemnitor could not insure the risk of loss arising if the indemnity provision allowed the indemnitee to be held harmless for bodily injury or property damage incurred as a result of the indemnitee's own sole negligence.[49] Therefore, while clauses for indemnification obligations for negligence of the indemnitee are becoming more difficult to enforce due to state courts and legislatures, by adding subsection "g," the insurance industry has made such clauses easier to insure.

Formerly, to cover its indemnification obligations, the indemnitor needed to purchase contractual liability insurance,[50] which applies to liability assumed by the insured under contract. Now, to the extent that the insured wants additional coverage for indemnified risks not covered under subsection "g" — those risks that do *not* arise as a result of a party's tort liability — the insured still will need to consider contractual liability coverage. This coverage is available in two basic forms: standard contractual coverage and blanket contractual coverage. Standard contractual coverage may be written as a separate coverage or added to the standard CGL in the form of an endorsement.[51] Under the standard contractual coverage policy, the contracts under which liability has been assumed must be listed in the

48. *Id.* at 470. The policy, under its definition of "insured contract," expressly excludes contracts that (1) indemnify architects, engineers, and surveyors for injury or damage arising out of specific acts and (2) contracts under which the indemnitor-insured is an engineer, architect, or surveyor assuming liability for those specific injuries or damages, as well as others. *See id.* at 471.

49. *See Contractual Risk Transfer*, in CONSTRUCTION RISK MANAGEMENT X.F.1 (International Risk Management Institute, Inc. 1st reprint 1986).

50. *Id.*

51. *See id.* at X.F.2. This coverage provides for payment of "all sums which the insured, by reason of contractual liability assumed by him under a contract designated in the schedule for this insurance, shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies." *Id.*

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insurance schedule in order to be insured. Therefore, the indemnitor should carefully list such contracts because he will not be covered for liability assumed under a hold harmless agreement in a contract that is omitted from the insurance schedule.

The advantage of blanket contractual coverage is that no schedule of covered contracts is submitted. Instead, all contracts are covered, thus eliminating the risk of omitting a contract and losing its coverage. The disadvantage of blanket coverage is that, as an endorsement to the main CGL policy, it is subject to the same dollar limits as the CGL policy.[52] To compensate for this, the indemnitor may purchase "umbrella" coverage, which provides "excess limits for the same hazards insured under primary policies, subject to a high limit per occurrence and in the aggregate."[53]

Contractual liability coverage is subject to the same exclusions as the main CGL policy, as well as its own set of exclusions.[54] The first of these exclusions from contractual liability coverage disallows coverage if the indemnitor-insured is an architect, engineer, or surveyor and if the bodily injury or property damage arises out of its design or supervisory activities. These risks are covered by the architect's professional liability insurance, as opposed to the contractor's liability coverages.[55] The second exclusion provides that the insurance does not apply to liability of the indemnitee, if the indemnitee is an architect, engineer or surveyor, arising out of:

> a. the preparation or approval of or the fialure to prepare or approve maps, drawings, opinions, reports, surveys, change orders, design, or specifications; or
> b. the giving of or the failure to give directions or instructions by the indemnitee, his agent or employees, provided such giving or failure to give is the primary cause of the bodily injury or property damage . . . .[56]

This second exclusion, however, would *not* force the risk to be allocated to the indemnitee's industry, such as architecture, engineering, or surveying. The indemnitor under an enforceable in-

52. *See id.* at X.F.2-3.
53. W. DERK, *supra* note 10, at 76.
54. *See Contractual Risk Transfer*, *supra* note 49, at X.F.3.
55. *See id.*
56. *Id.*

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demnity provision would bear the risk of this uninsured loss.

VI. Conclusion

The recent trends in allocating risks in the construction industry have afforded contractors and subcontractors a great deal of protection. By statute, individual states are making it more difficult to uphold indemnity provisions for the negligence of the indemnitee, especially if the damage was incurred as the result of the indemnitee's sole negligence. This affords protection to contractors and subcontractors, who frequently are indemnitors with lesser bargaining power than the indemnitee. The courts also have recognized this disparity in bargaining power and will not enforce such indemnity provisions without a "clear and unequivocal" showing of the parties' intent to do so. Finally, if a party must agree to indemnify for another's negligence, those indemnified risks are likely to be insurable. Under the standard policies, the insurance industry will not insure indemnified risks assumed by architects, engineers, or surveyors, since those risks should be allocated to their respective industries through their own insurers. Provisions indemnifying architects, engineers, and surveyors, however, also are not insurable under many standard policies, so contractors who agree to these indemnity provisions for activities in the early stages of construction are not protected by insurance and must be careful in contracting to be sure certain risks are properly allcoated or bargained for in the contract.